INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed JournalMulti Disciplinary
Peer Reviewed Edition :

www.ijlra.com

 ISSN: 2582-6433

DISCLAIMER

ISSN: 2582-6433

EDITORIAL TEAM

EDITORS

Megha Middha

Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board

ISSN: 2582-6433

Dr. Namita Jain

Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India.India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020).Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi.Formerly Assistant professor of Law,Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration.10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.

Avinash Kumar

Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship.He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi.Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi.He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ISSN: 2582-6433

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANLAYSIS ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

www.ijlra.com
Volume 2 Issue 7 | Aug 2023
ISSN: 2582-6433

MANKASTU IMPEX PRIVATE LIMITED V. AIR VISUAL LIMITED, (2020) 5 SCC 399

AUTHORED BY - DR. LEENA MOUDGIL*

I. INTRODUCTION

The main source of international arbitration law remains the intention of the parties.[1] In order to avoid legal disputes, the commercial activity is to be preceded by a contract fixing the obligations of the parties.[2] With the rapid growth of the International Commercial Trade relations, parties increased rights to determine their own disputes and freely determine the nature of their relationship and contractual duties were recognized.[3] These are the law governing the arbitration agreement and the performance of that agreement; the law governing the existence and proceedings of the arbitral tribunal; the law or the relevant legal rules, governing the substantive issues in dispute- generally described as the 'applicable law', the 'governing law', the 'proper law of contract' or 'the substantive law'; other applicable rules and non-binding guidelines and recommendations and the law governing the recognition and enforcement of the arbitral award.[4] The procedure in International Commercial Arbitration is complex as it involves more than one system of law or of legal rules. Determining the "seat" of arbitration is extremely important as it determines the procedural law applicable to the arbitration, the law of arbitration agreement and proper law of substantive contract.[5]

II. FACTS OF THE CASE

In the present case, the petition is filed for the appointment of an arbitrator bythe Chief Justice of India under Section 9 and Section 11 (6), Arbitration and Conciliation Act, 1996 (hereinafter

* Associate Professor,Vivekananda School of Legal Studies,Vivekananda Institute of Professional Studies, GGSIPU, Delhi.

[1]Mauro Rubino-Sammartano, *International Arbitration: Law and Practice*56 (Kluwer Law International, Delhi, 1st Indian edn., 2007).

[2] Sabyasachi Chatterjee, "Law applicable to International Commercial Arbitration", 109- 116 *JSLC* 4 (2004).

[3] Dickson Oruaze Moses, Chrispas Nyombi and Tom Mortimer, "The Practicalities of Delocalisation in International Commercial Arbitration", *International Business Law Journal* 2017 .

[4] Nigel Blackaby and Constatine Partasides(et.al), Redfern and Hunter on *International Arbitration* 165 (Oxford University Press, 2009).

[5]P.C. Markanda, *Law relating to Arbitration and Conciliation* 385 (Wadhwa and Company Nagpur, 5thedn, 2003).

ISSN: 2582-6433

referred to as 1996 Act)[6] and whether the parties have chosen "Hong Kong" as the seat of arbitration.

The petitioner's Company is incorporated in India and respondent's Company is incorporated under the laws of Hong Kong. In September 2016, the two companies entered intoMoU under which the respondent agreed to sell to the petitioner the complete line of the respondent's air quality monitors products for onward sale. In 2017, the petitioner received an e-mail from one IQAir AG that the respondent is a part of IQAir AG. The petitioner sent reply invoking the terms of MoU. Later, petitioner issued a notice invoking the arbitration clause provided in Clause 17 the MoU and filed a petition under section 9 before Delhi High Court for interim measures so as to allow him to be the authorized distributor for the sale of all products in terms of the MoU and to injunct the respondent and IQAir AG from terminating the MoU and from entering into any contract with third parties for products which are the subject matter of the MoU.

On 15.12.2017, the respondent via letter responded to the notice that it has not assumed any contractual and legal obligations and terms of the MoU were not enforceable against IQ Air AG. Also, Clause 17 of the MoU provides for arbitration administered and seated in Hong Kong. The parties did not agree to ad hoc arbitration. On this background, the petitioner filed a petition under Section 11 (6), 1996 Act for the appointment of a sole arbitrator. In this case, Section 9 for Interim measures, Section 11 (6), 1996 Act for the appointment and Clause 17 of MOU are in question. Clause 17 of the MoU provides Governing Law and Dispute Resolution.

17.1 This MoU is governed by the laws of India, without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction.

17.2 Any dispute, controversy, difference or claim arising out of or relating to this MoU, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered in Hong Kong.

[6]The case is decided by Full Bench Judges namely Justice R. Bhanumathi, Justice A.S. Bopanna, and JusticeHrishikesh Roy. Justice R. Bhanumathi authored the judgment.

ISSN: 2582-6433

The place of arbitration shall be Hong Kong.

The issue was regarding the seat of arbitration when parties have mentioned the place of arbitration and not the seat. Can it be said that place and seat of arbitration are same? The Court has tried to settle the controversy.

In 2012, the Constitutional Bench in *BharatAluminium Co*. v. *Kaiser Aluminium Technical Services Inc.*[7] (herein after referred as, *Balco case*) held that Section 2(2) provides that Part I of the 1996 Act shall apply to all arbitrations which take place within India. 1996 Act would have no application to international commercial arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same is sought to be enforced in India in accordance with the provisions contained in Part II of the 1996 Act.

In *Enercon (India) Ltd.* v. *Enercon GMBH*[8], the Supreme Court held that "the location of the Seat will determine the courts that will have exclusive jurisdiction to oversee the arbitration proceedings. It was further held that the seat normally carries with it the choice of that country's arbitration/curial law".

As per the facts, MoU is governed by the laws of India and the courts at New Delhi have the jurisdiction. In 2018, *UOI* v. *Hardy Exploration and Production (India) INC* [9] where the Court held that a "venue" can become a "seat" only if– (i) no other condition is postulated; (ii) if a condition precedent is attached to the term "place", the said condition/indicia has to be satisfied first for "venue" to be equivalent to "seat". The counsel on behalf of the respondent submitted that clause 17.2 provides that the place of arbitration is Hong Kong and thus, for the appointment of arbitrator the Indian Courts don't have the jurisdiction. Later, in 2019 in *BGS Soma JV* v. *NHPC Ltd.*[10] case where the Court held that "venue" is really the "seat of arbitration proceedings". The ambiguity in judicial pronouncement and not having decision from larger bench leaves us to analyse and interpret.

[7] (2012) 9 SCC 552.
[8](2014) 5 SCC 1.
[9] (2018) 7 SCC 374.
[10] 2019 (17) SCALE 369.

ISSN: 2582-6433

III. SEAT VS. PLACE

The seat of arbitration is animportant aspect of any arbitration proceedings. The significance of the seat of arbitration is that it determines the applicable law when deciding the arbitration proceedings and arbitration procedure as well as judicial review over the arbitration award. The situs is not just about where an institution is based or where the hearings will be held. But it is all about which court would have the supervisory power over the arbitration proceedings. The Court held "seat of arbitration" and "venue of arbitration" cannot be used interchangeably. Also, the "place of arbitration" cannot be the basis to determine the intention of the parties that they have intended that place as the "seat" of arbitration. The parties' intention as to the "seat" should be determined from other clauses in the agreement and the conduct of the parties.

Also, it is well-settled that the "seat of arbitration" and "venue of arbitration" cannot be used interchangeably. Mere expression "place of arbitration" cannot be the basis to determine that parties have intended that place as the "seat" of arbitration. The intention of the parties as to the "seat" should be determined from other clauses in the agreement and the conduct of the parties. Clause 17.2 is clear that the reference to Hong Kong as a "place of arbitration" is not a simple reference as the "venue" for the arbitral proceedings; but a reference to Hong Kong is for final resolution by arbitration administered in Hong Kong. The agreement between the parties that the dispute "shall be referred to and finally resolved by arbitration administered in Hong Kong" clearly suggests that the parties have agreed that the arbitration be seated at Hong Kong and that laws of Hong Kong shall govern the arbitration proceedings as well as have the power of judicial review over the arbitration award.

Clause 17.2 of the MoUprovides that "arbitration administered in Hong Kong" is an indicium that the seat of arbitration is at Hong Kong. Once the parties have chosen "Hong Kong" as the place of arbitration to be administered in Hong Kong, laws of Hong Kong would govern the arbitration. The Indian courts have no jurisdiction for the appointment of the arbitrator. As discussed in Redfern and Hunter on International Arbitration that contains the following explication of the issue[11]:

"*To say that the parties have "chosen" that particular law to govern the arbitration is rather like saying that an English woman who takes her car to France has "chosen" French traffic law,*

[11]Alan Redfern & Martin Hunter et.al., *Law and Practice on International Commercial Arbitration* 87 (Sweet& Maxwell, 4thedn., 2006).

ISSN: 2582-6433

which will oblige her to drive on the right-hand side of the road, to give priority to vehicles approaching from the right, and generally to obey traffic laws to which she may not be accustomed. But it would be an odd use of language to say this notional motorist had opted for "French traffic law". What she has done is to choose to go to France. The applicability of French law then follows automatically. It is not a matter of choice.Nevertheless, once a place of arbitration has been chosen, it brings with it its own law. If that law contains provisions that are mandatory so far as arbitration is concerned, those provisions must be obeyed. It is not a matter of choice any more than the notional motorist is free to choose which local traffic laws to obey and which to disregard."

The words in Clause 17.1 do not suggest that the seat of arbitration is in New Delhi. The words "without regard to its conflict of laws provisions and courts at New Delhi shall have the jurisdiction" do not take away or dilute the intention of the parties in Clause 17.2 that the arbitration be administered in Hong Kong. Since the arbitration is seated in Hong Kong, the petition filed by the petitioner under Section 11 (6) of the Act is not maintainable and the petition is liable to be dismissed.

The reference to Section 2 (2)is necessary which provides that Part-I shall apply where the place of arbitration is in India. If the "International Commercial Arbitration" is seated in India, then Part-I of the Act shall apply. Later, in 2015 Amendment, a proviso is added to Sec. 2 (2) which provided that subject to an agreement to the contrary, the provisions of sections 9, 27 (1) (a) and 37(3) shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act.

IV. INTERPRETATION

The concept of supervisory jurisdiction to bring out clarity in the law. In *Mankastu*case, 2020 the Court observed similar to Balco case that in case of seat of arbitration outside India, the Indian Courts cannot exercise supervisory jurisdiction over the award or pass interim orders. But partiesshould incorporate Clause 17.3 so that a party may seek interim relief for which Delhi Courts would have jurisdiction. So, supervisory jurisdiction principle was not applied.

In Comparative international arbitration, it is stated: "the choice of the place or seat of arbitration is one of the key issues in drafting an arbitration agreement. First, it may influence which law

ISSN: 2582-6433

governs arbitration. Second, it has a bearing on the issue which can exercise supervisory or supportive powers in relation to arbitration. Third, the place of arbitration determines the nationality of the award which is relevant for the ultimate enforcement of the award.[12]

In *Mankastu*case, the court has not gone into the correctness of the BGS Soma case. The clause 17.1 of MoU is governed by the laws of India, without regard to its conflicts of law provisions, and courts at New Delhi shall have the jurisdiction. Clause 17.2 of the MoU provides that the place of arbitration shall be Hong Kong. This clause clarifies that the place will be Hong Kong. Also, in the MoU uses the word 'administered' implies that the parties have agreed that the arbitration between the parties would be seated in Hong Kong. The intention of the parties is not looked at from the point of concepts earlier developed.

'Administer' means to be responsible for managing a company, organization or institution.[13] The word administer is a verb that implies to carry out administration and further administration means organization and running of business.[14] According to Black's Law Dictionary the word 'administration' means management or performance of executive duties of a government, institution or business.[15] These definitions elaborate on the interpretation of the word administer and administration. This means that organization of arbitration will be in Hong Kong. The organization of arbitration implies that law applicability will be of Hong Kong only.

V. CONCLUSION AND SUGGESTIONS

The applicability of laws regarding seat and place has been interpreted several times. In *Balco case*, 2012 the difference between place and seat is elaborated. The author agrees with the decision as place is considered as physical location of arbitration and seat is considered as the centre of gravity that will govern the law applicable. In Mankastu case, the 'place of arbitration' is considered as 'seat of arbitration'. The Court considered that it can be so as the word administered is mentioned in Clause 17. The author opines that the word 'administered' is interpreted correctly. Administer implies managing only. It provides about not only physical location but also law governing arbitration. Sec. 11(6), 1996 Act provides about appointment of

[12] Julian DN Lew QC, Loukas A. Mistellis and Stefan M. Karol (Kluwer Law International) (referred from P.C. Markanda,Law relating to Arbitration and Conciliation, (Lexis Nexis, 2019, 9th edn) (Reprint).
[13]https://www.macmillandictionary.com/dictionary/british/administer
[14] Pearsall, *The Concise Oxford Dictionary* 17 (Oxford University Press, 1999).
[15] Bryan A. Garner, *Black's Law Dictionary* 44 (West Group, St. Paul, Minn., 1999)

ISSN: 2582-6433

arbitrator in domestic arbitration and arbitration seated in India. The provision has no application when proceedings are outside India.

- The concepts of supervisory jurisdiction and closest connection test have to be interpreted minutely to decide their application in future cases.
- There is an utmost need to resolve the point on 'place' and 'seat' of arbitration by a larger bench or legislature.
- Indian courts should not swing between different principles. The uncertainty regarding jurisdiction and application of provisions should be settled.