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SEAT OF ARBITRATION

By Adv. Vivek Aggarwal

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Seat of Arbitration- By Adv. Vivek Aggarwal

International Commercial Arbitration has become a growing phenomenon and has in recent times gained currency amongst corporate and big commercial agglomerates. International Commercial Arbitration is an alternative way of dispute resolution and is a promising way resolving dispute for more reasons than one. Such as:-

1. Arbitration proceeding is typically a much more speedy when compared to normal litigation. On the other hand, when it comes to litigation, there is no time limit and it varies widely across state to state, district courts to high courts, case to case, pendency of cases in the court, subject matter of dispute.
2. The Litigation is spread over years and opting for Litigation can expose you to years of expenses in resolving dispute without really coming to a conclusion. Arbitration on the other hand puts a limit on both time and cost. Giving the option to parties regarding appointment of arbitrator further makes it opens for the parties to decide on the cost and time factor.
3. The outcome of Arbitral Proceedings have more often than not, proved to be much more satisfactory to both the parties as compared to litigation. Reason being that the arbitral proceedings are much more private and consensual, moreover there is a touch of negotiation and consent of parties involved in the whole process.

4. The surge in people opting for arbitration is a clear signal for the same and point to the success rate of Arbitration as a method of dispute resolution. Today more and more people are opting for Arbitration and past few years have seen encouraging trends for commercial arbitration. This amply bears testimony to the success of Arbitration.

However, this gem of a conflict resolution process comes with its own set of issues. One such controversy emerged around the issue of choosing and/ or deciding the Seat of International Commercial Arbitration.

In this article we will explore the various facets of the concept of the Seat of Arbitration such as the implications of choosing the Seat of Arbitration, how can parties choose the Seat of Arbitration, which laws will govern the procedure of International Commercial Arbitration.

Why is it important?

First of all, we need to know why the Seat of Arbitration is important by knowing all the implications that come along on choosing the Seat of the Arbitration in an International Commercial Arbitration.

In the course of International Commercial Arbitration the main question comes down the most basic of the queries which is ‘what will be the law governing the International Commercial Arbitration’?

The Seat of Arbitration and the Governing Law

To determine the law governing the substance of dispute, the procedure of the arbitration and even questions such as the validity of the arbitration clause and the arbitration agreement, it is essential to determine the Seat of the Arbitration. For the Seat of the Arbitration determines which local law will be applicable to the procedural aspect of the Arbitration.

The procedural of the Arbitration includes all essential aspects such as validity and scope of the arbitration agreement, the manner of choosing the arbitrator and/ or the tribunal for arbitration, the scope and power vested in the arbitrator. Therefore, even the law governing the execution of the arbitral award and the law governing the recourse against the arbitral award is determined by the law applicable to the process of arbitration. These questions are tricky and yet the most essential when it comes to International Commercial Arbitration. The settled position today is that the place where the seat of arbitration is the place whose law governs the whole process of Arbitration.

Seat of the Arbitration Venue of the Arbitration

It is pertinent to note here that the Seat of Arbitration is different from the Venue of the Arbitration and as such venue of the arbitration can be different from the Seat of the Arbitration.

The development of the law in India

The scheme of the statute for Arbitration follows the general theme of division between Indian Arbitration i.e. the domestic arbitration and the International Commercial Arbitration conceptualized in Part-1 and Part-2 of the Act respectively. The two Parts separately cover all the law governing the end-to-end procedure for the Arbitration.

Part-2 of the Act specifically enumerates the meaning, extent and the scope of the International Commercial Arbitration.

The term "International Commercial Arbitration" has a definite connotation. **Section 2(1)(f)** defines International Commercial Arbitration as arbitration relating to disputes arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in India, where atleast one of the parties is a foreign national, a body corporate, association or body of individuals. The idea is that the central management or control of such foreign corporate, association, etc must be in foreign hands. If an International Commercial Arbitration is held outside of India, then the parties would be subject to Part-2 of the Act.

At the initial stages of the development of the Arbitration Law in India, it was perceived by many as having problems such as long-time taken to conclude the proceedings, interference of courts, application of domestic law in the International

Commercial Arbitration and therefore counterproductive to the very purpose of the introduction of the Arbitration in the resolution of legal dispute landscape.

However, with Amendments to the Act and various landmark judgments the Arbitration law has been progressively made more seat-centric, which essentially connotes that the seat of the arbitration will determine the governing law of the procedure of international commercial arbitration.

The Act in its original form, and as erroneously interpreted by the apex court in ***Bhatia International v. Bulk Trading*** allowed for the applicability of Part-1 provisions to even the foreign seated arbitration proceedings on the assumption that, unless the parties expressly or implied agreed to the contrary, the Indian courts had jurisdiction with respect to foreign-seated arbitration. This judgment suffered from many infirmities when applied in the practical scenario and led to frustration of the arbitral award by extra-territorial application of the Act which would inevitably lead to the arbitral award ending up in litigation in Indian Courts.

This position of law was corrected in the historic judgment in ***Bharat Aluminium Co v. Kaiser Aluminium Technical Services*** ('BALCO') in which the apex court unequivocally overruled its earlier position in *Bhatia International v. Bulk Trading.* It was finally held the seat of the arbitration is the 'centre of gravity' of the arbitration and therefore a choice of a foreign-seated arbitration by the parties

would essentially mean that the parties also agreed to the application of the domestic law of that foreign country.

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.

This position of law, now settled, has been crystallized in the Act also by way of the Amendments to the Act. The Amendment to the Act further clarified that **Sections 9, 27 and 37** of the PART-1 are exceptions to the principle stated in BALCO case and these sections will apply unless a contrary intention appears on part of parties in the arbitration agreement.

Therefore, the BALCO judgment and the Amendments have clarified and crystallized the issues and developments around the Seat of Arbitration and the law applicable. However, the question about the governing law in case when two Indian Parties choose for a foreign seated arbitration still needs some clarification. The courts have given contradictory judgements when it comes to applicability of governing law in case of Indian parties choosing for a foreign seated arbitration. Therefore, there is still no settled position of law in this case and the courts need to shed light on this issue.

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