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**A Tale of Two Seats: The Indian Supreme  
Court on the Seat/Venue Distinction**

**Aman Deep Borthakur**

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# A Tale of Two Seats: The Indian Supreme Court on the Seat/Venue Distinction

**Aman Deep Borthakur\***

*Identifying the law governing the arbitration requires one to examine the relevant agreement and determine the seat. Courts and tribunals have often faced difficulty in designating the arbitral seat when the arbitration clause is silent on the same. Often, either a place or venue may be mentioned along with the laws applicable to the substantive dispute. Since 2018, the Indian Supreme Court has delivered two landmark decisions that have tried to resolve this issue. This piece reviews these decisions and determines whether the approach taken by the Court in these two instances is adequate for the task. Closer scrutiny of these decisions can shed some light on the interpretation of arbitration clauses and highlight the role of the seat on the arbitral process.*

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*Identifier la loi régissant l'arbitrage requiert que l'on examine l'entente pertinente et en détermine le siège. Les cours et tribunaux ont souvent eu des difficultés à désigner le siège de l'arbitrage lorsque la clause compromissoire est muette sur celui-ci. Souvent, un lieu ou un endroit peut être mentionné avec les lois applicables au litige de fond. Depuis 2018, la Cour suprême indienne a rendu deux décisions historiques qui ont tenté d'adresser cette question. Cet article passe en revue ces décisions et détermine si l'approche adoptée par la Cour dans ces deux cas est adéquate. Un examen plus approfondi de ces décisions peut faire la lumière sur l'interprétation des clauses d'arbitrage et mettre en évidence le rôle du siège dans le processus arbitral*

## Introduction

The arbitral seat is crucial for grounding an arbitration in a particular legal system. It governs myriad aspects of the proceedings ranging from the constitution of the tribunal to the enforcement of an award. Despite its significant impact on the arbitral process, arbitration clauses often fail to designate the seat of arbitration.<sup>1</sup> In several cases, either a place or venue of arbitration may be mentioned. In such scenarios, it becomes the task of either the tribunal or failing that, the court when seeking to exercise supervisory jurisdiction, to determine the seat. In doing so, the court may also have to consider other factors such as the place where the arbitration agreement was signed, the parties' implied intentions and the place of performance. Thus, determining the seat becomes a complex exercise in balancing several different criteria. In January 2020 Supreme Court decision of *BGS SGS Soma JV v. NHPC Ltd.*, a 3-judge bench considered several ways to make this determination.<sup>2</sup> These include placing greater emphasis on the venue for designating a seat or the place where the award was signed.

There is a lack of Indian academic literature on this particular issue. The objective of this paper is to review the Supreme Court's recent response to this issue and suggest a different approach for the same. In doing so, I shall also explore the role of the seat and how the Supreme Court has viewed the jurisdiction of courts at the seat in two recent decisions.

The paper is divided into three parts. The first analyses the role of the arbitral seat in juxtaposition to the venue and place. The second part reviews the interpretation of ambiguous arbitration clauses in recent Supreme Court decisions. The third and final part attempts to critique the methodology of these decisions and suggest more reasonable criteria to identify the seat.

## I. Revisiting the Role of the Arbitral Seat

International arbitration is often projected as a solution to the numerous issues that a foreign party may face while litigating in a state court.<sup>3</sup> The reason this is so is because of its transnational nature which brings with it an expectation of certainty and fairness.<sup>4</sup> However, no form of dispute resolution can remain truly independent of the state apparatus. Every

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1 David Hesse, "The Sea of Arbitration is important. It's That Simple." (10 June 2019), online (blog): *Kluwer Arbitration Blog* <<http://arbitrationblog.kluwerarbitration.com/2018/06/10/seat-arbitration-important-simple/>>.

2 See generally *BGS SGS Soma JV v NHPC* (2019), 9307 Supreme Court of India at para 3 (India) [*BGS*].

3 Hans Smit, "The Future of International Commercial Arbitration: A Single Transnational Institution" (1986) 25 *Colum J Transnat'l L* 9 at 9.

4 *Ibid.*

arbitration is grounded in a particular legal system.<sup>5</sup> This system is called the *seat* of arbitration.

There are three different laws at play in any given proceeding: the law governing the contract, the law governing the arbitration agreement and the curial law governing the conduct of the proceedings.<sup>6</sup> Unless there is an agreement to the contrary, the curial law would be taken to be the law at the seat. This is because that would be the law which has the closest connection to the arbitration proceedings.<sup>7</sup>

The purpose of the seat is to serve as the juridical home of the arbitration. This means that the choice of seat also determines the *lex arbitri* or law governing the arbitration.<sup>8</sup> Another implication of seating an arbitration in a particular jurisdiction is that courts located there will have supervisory jurisdiction over the arbitration proceeding.<sup>9</sup> Thus, several important functions pertaining to applications to the court to appoint arbitrators, appealing challenges to arbitrator appointments, interim measures, collection of evidence, and challenges to the validity and enforcement of awards shall be performed by the courts at the seat.<sup>10</sup> In fact, if an arbitral award is set aside at the seat, it may lose its enforceability in other New York Convention jurisdictions.<sup>11</sup>

Thus, the designation of a seat is of great significance to the arbitral process. The venue, on the other hand, is merely the geographical location where the arbitration hearings may be carried out.<sup>12</sup> Therefore, for a London-seated arbitration, it makes no difference if the actual arbitration hearings are conducted at another venue, say, Mumbai, because the seat continues to be London. The venue also has no significance for the law governing the arbitration.

Lastly, the term ‘place’ of arbitration is often understood to refer to the seat itself.<sup>13</sup> The English Arbitration Act 1996 and most institutional rules use the term ‘seat’. However, in the UNCITRAL Model Law on International Commercial Arbitration, 1985, and the Indian statute which is based off

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5 Alastair Henderson, “Lex Arbitri, Procedural Law and the Seat of Arbitration” (2014) 26 *Sing Ac LJ* 886 at 895.

6 *Union of India v. Hardy Exploration and Production (India) Inc* (2018), 4628 Supreme Court of India at para 7 (India) [*Union*].

7 *Ibid.*

8 Henderson, *supra* note 5 at 890.

9 Aníbal Sabater, “When Arbitration Begins Without a Seat” (2010) 27(5) *J Intl Arb* 443 at 443.

10 *Ibid.*

11 *Malicorp Ltd v Government of the Arab Republic of Egypt* (2015), 2015 WL 685376 at para 15.

12 Alexander J. Bělohávek, “Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth” (2013) 31(2) *ASA Bulletin* 262 at 262.

13 Henderson, *supra* note 5 at 891–892.

of it, the term 'place' and not 'seat' is employed.<sup>14</sup> It can refer to either the juridical seat or the venue depending on the context in which it is employed in the legislation. The Law Commission, headed by Justice A.P. Shah, in its 246<sup>th</sup> Report had recommended that the word 'place' be replaced by 'seat' and 'venue' where appropriate to keep it in line with international usage of the terms.<sup>15</sup> Unfortunately, the amended legislation did not incorporate that change.<sup>16</sup> As a result, courts are still divided on how to deal with clauses which do not identify a seat, and/or refer instead to a place or venue.

The distinction between the seat and venue is maintained even in institutional arbitration rules. Article 18 of the ICC Arbitration Rules makes reference to the place (seat) of arbitration that will be decided by the court unless fixed by the parties. However, clauses 2 and 3 refer to any location at which the Tribunal may conduct hearings, meetings or deliberations. Rule 21 of the SIAC Rules is similarly worded with the use of the word 'seat' instead of 'place'. The location that is referred to for the purpose of conducting meetings, hearings or deliberations is the venue. The LCIA Rules in Rule 16.2 stipulates London as the default seat, in case the parties fail to agree or the tribunal decides that another seat is more suitable. The LCIA Rules are also explicit in stating that no matter the geographical place chosen, the arbitration will be treated as having been conducted at the seat and any order or award as having been made at the seat as well.<sup>17</sup>

The problem arises when an arbitration clause does not name a specific seat, but instead makes reference to a venue. This imposes an obligation on the Tribunal, and failing that, the court to determine the seat of arbitration.<sup>18</sup>

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14 See *UNCITRAL Model Law on International Commercial Arbitration*, 1985, arts 1(3), 20.

15 Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996*, Report 246 (2014) ("seat of the arbitration" means the juridical seat of the arbitration" NOTE: This definition of "seat of arbitration" is incorporated so as to make it clear that "seat of arbitration" is different from the venue of arbitration. Section 20 has also been appropriately modified.] (vi) In sub-section (2), add the word "only" after the words "shall apply" and delete the word "place" and insert the word "seat" in its place" [NOTE: This amendment ensures that an Indian Court can only exercise jurisdiction under Part I where the seat of the arbitration is in India. To this extent, it over-rides *Bhatia International v. Bulk Trading S.A. and Anr.*, (2002) 4 SCC 105, and re-enforces the "seat centricity" principle in *Balco* at 39).

16 See *Indus Mobile Distribution Pvt Ltd v Datawind Innovations Pvt Ltd*, [2017] 5370 Supreme Court of India 1 [*Indus*] (the Supreme Court, stated the following: "The amended Act, does not, however, contain the aforesaid amendments, presumably because the *BALCO* judgment in no uncertain terms has referred to "place" as "juridical seat" for the purpose of Section 2(2) of the Act. It further made it clear that Section 20(1) and 20 (2) where the word "place" is used, refers to "juridical seat", whereas in Section 20 (3), the word "place" is equivalent to "venue". This being the settled law, it was found unnecessary to expressly incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act at para 19).

17 LCIA Arbitration Rules, (2014) Art 16.3.

18 See *UNCITRAL Model Law on International Commercial Arbitration*, *supra* note 1.

## II. Reviewing the Indian Supreme Court's Decisions

Two recent decisions of the Supreme Court have reopened the issue of interpreting ambiguous arbitration clauses to determine the seat.

### *Union of India (Ministry of Oil and Gas) v. Hardy Exploration and Production (India)*

This case arose out of a setting aside application under Section 34 (which contains detailed grounds for challenging awards) in relation to an arbitration between the Indian government and an oil exploration company.<sup>19</sup> The maintainability of the application was contested on the ground that Indian courts did not have jurisdiction to entertain it since it was a foreign award delivered in Kuala Lumpur.<sup>20</sup>

First, the court examined case law to understand how other decisions have tried to identify the seat of arbitration. To begin with, it relied on the *Harmony Innovation Shipping v. Gupta Coal (India) Ltd.* decision.<sup>21</sup> In that case, it was only stated in the arbitration clause that English law would govern the contract. However, the clause stipulated no law governing the arbitration agreement. The court relied on different factors in said contract such as the reference to the London Maritime Arbitration Association and to English law to hold that the place of arbitration was London.<sup>22</sup> Thus, the court attempted to ascertain the presumed intention of the parties by assessing the clause in a holistic manner.<sup>23</sup> It stated that while making this determination, one must take note of the commercial purpose of the contract and then determine which place has a closer connection in light of that objective.<sup>24</sup>

The court in *Union of India v. Hardy Exploration* then finally went on to examine the arbitration clause to see if it excluded the jurisdiction of Indian courts as per the 'implied exclusion' principle in the *Bhatia International* judgment.<sup>25</sup> This principle emerges from the ruling in *Bhatia International* that Indian courts would have jurisdiction over an arbitration unless the parties explicitly or implicitly excluded their jurisdiction.<sup>26</sup>

Two important points can be distilled from the relevant contractual clauses in the present case. First, the contract stipulated that it would be governed by Indian law. Second, the venue of arbitration would be Kuala

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19 See generally *Arbitration and Conciliation Act, 1996*, Act No 26, s 34 (which sets out grounds under which an arbitral award can be challenged).

20 *Union*, *supra* note 6 at para 1d.

21 (India) Ltd, & Anr (2015), 610 Supreme Court of India.

22 *Ibid* at para 46.

23 *Ibid*.

24 *Ibid* at para 44.

25 *Union*, *supra* note 6 at para 8.

26 *Bhatia International v Bulk Trading SA*, [2002] 6527 Supreme Court of India 1 at para 26 [*Bhatia*].

Lumpur.<sup>27</sup> Thus, it makes reference to a law governing the contract, and a venue, but not a seat.

It was argued that since the arbitration had been conducted at Kuala Lumpur and the award signed there, it amounted to the juridical seat of arbitration. Additionally, Kuala Lumpur could have been chosen as the seat for its neutrality. The court however felt that merely because sittings happened at a particular location did not make it the seat. It set a high threshold for the word ‘determine’ used in Article 20(1) of the UNCITRAL Model Law (or its corollary, Section 20(2) of the Arbitration and Conciliation Act, 1996). According to the court, determining a seat required a “positive act” to be done. In other words, there was no categorical intention that Kuala Lumpur be the seat in addition to being the venue. It endorsed the idea that a venue could become the seat if something more added to that conclusion.<sup>28</sup> However, in this particular case, due to the absence of any additional considerations, it held that Indian courts would have jurisdiction over setting aside proceedings.

*BGS SGS Soma JV v. NHPC Ltd.*

The petitioner in this case was awarded a project to construct dams on river Subansri for a hydro-power project.<sup>29</sup> The parties to the contract were both Indian. Thus, it was a domestic arbitration. The arbitration clause in question had two key features. First, it stated that the dispute would be settled in accordance with Indian law. Second, the proceedings would be held at either New Delhi or Faridabad, both being Indian cities.<sup>30</sup> On 18 March 2011, notice was served on the respondent on account of alleged delays and costs suffered by the appellant. After a number of hearings, the Tribunal delivered its award in Delhi granting compensation to the appellant. Due to some errors, the amount was changed later.<sup>31</sup> Aggrieved by the award and the subsequent correction, the respondent filed a Section 34 application before a District Court in Faridabad. The appellant filed an application for the plaint to be presented before the correct judge in New Delhi or Dimapur, Assam, which was the project site.<sup>32</sup> In 2017, after the Commercial Courts Act 2015 came into force, the application was transferred to the Gurugram Commercial Court.<sup>33</sup>

The jurisdiction of the court to hear the Section 34 application was challenged on the ground that New Delhi was not just the venue but also

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<sup>27</sup> *Union*, *supra* note 6 at para 1d.

<sup>28</sup> *Ibid* at para 35.

<sup>29</sup> See *BGS SGS Soma JV v NHPC*, [2019] 9307 Supreme Court of India 1 at para 3 [*BGS*].

<sup>30</sup> *Ibid* at para 3.

<sup>31</sup> *Ibid* at para 4.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid* at para 5.



the seat of arbitration. It was contended by the respondent that since the hearings took place in Delhi, the award should be considered as having been made in Delhi.<sup>34</sup> Therefore, the application should have been made to a District Court in New Delhi.<sup>35</sup>

The previously discussed decision of *Union of India v. Hardy Exploration* was also assailed for being contrary to the binding 5-judge bench decision in *BALCO* which supports the notion that the choice of seat would determine which court would have jurisdiction.<sup>36</sup> In *BALCO*, the court first dealt with the role of the seat in an arbitration. It noted that there exists a territorial link between the place (seat) of arbitration and the law governing the proceedings.<sup>37</sup> Section 2(1)(e) of the Indian Arbitration and Conciliation Act defines the 'court' having jurisdiction over the arbitration with reference to the court which would have had original jurisdiction if the proceeding had been a suit.<sup>38</sup> The court in *BALCO* recognised party autonomy and stated that the courts at the seat will have exclusive jurisdiction and (presumably) not the courts at the place where the cause of action (of the hypothetical suit) arose.<sup>39</sup> The judgement is consistent in adhering to that position except for an *obiter dictum* in paragraph 96. The paragraph alone states that both the courts at the seat and the courts at the place where the cause of action arose would concurrently have jurisdiction.<sup>40</sup>

Thus, Paragraph 96 of *BALCO v. Kaiser Aluminium* was dissected for being contrary to other paragraphs in that judgment which treated the choice of seat as an exclusive jurisdiction clause and not as a license for several courts to have jurisdiction.<sup>41</sup> Additionally, the notice seeking arbitration was sent to the Assam office. The thrust of all these arguments was to show that since Delhi was the place or seat of arbitration, the Section 34 application should have been brought before a District Court in New Delhi.<sup>42</sup>

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34 *Ibid* at para 6.

35 *Ibid* (the Commercial Courts Act 2015 has granted jurisdiction to the Commercial Courts and the High Courts of Judicature of the states. In *BGS SGS Soma JV v. NHPC Ltd.*, the issue of designation of a seat between New Delhi and Faridabad (in the neighbouring state of Haryana) determines appellate jurisdiction in favour of different courts in Delhi and Haryana. If Delhi was held to be the seat, jurisdiction would lie with the Delhi High Court, and if Faridabad were to be chosen, it would lie with the Commercial Courts in the State of Haryana.)

36 *Ibid* at para 96; See *BALCO v Kaiser Aluminum*, [2012] 9307 Supreme Court of India 1 [*BALCO*] (the *BALCO v Kaiser Aluminium* decision of the Supreme Court is a seminal one in Indian arbitration law for having clarified the law on a number of issues, particularly, that foreign awards would be treated differently under Indian law, thereby limiting Indian court intervention.)

37 *BALCO* at para 74.

38 *Arbitration and Conciliation Act*, 1996, Act No 26, s 2(1)(e).

39 See *BALCO*, *supra* note 36(b) at para 95–97.

40 *Ibid* at para 96.

41 *Ibid*.

42 See *BGS*, *supra* note 29 at para 9.

The respondent countered these points by stating that the arbitration clause provided only a choice of venue between Delhi and Faridabad. Therefore, merely because hearings were held in Delhi would not make it the seat. In fact, since the agreements in the present case were signed in Faridabad and notice was sent to the Faridabad office of the Respondent, the Commercial Court did have jurisdiction.<sup>43</sup> Additionally, it was argued that courts of both New Delhi and Faridabad would have concurrent jurisdiction in light of the fact that Delhi was a neutral forum and Faridabad was the forum where the cause of action is said to have arisen.<sup>44</sup> This was stated in accordance with its understanding of *BALCO*.<sup>45</sup>

First, the Delhi High Court ruled that Faridabad was the seat since that was where the arbitration agreement had been executed and the notice of arbitration received.<sup>46</sup> Hence, it held that the entire cause of action arose in Faridabad which granted it jurisdiction.

On appeal, the Supreme Court took a different approach. The court began its analysis by looking at the Arbitration and Conciliation Act to analyse the role of the seat within the legislation. For instance, under Section 31(4) which deals with the form and contents of the award, the award must mention the place of arbitration and it will be deemed to have been made at that place. It then recognised that the courts at the seat would be responsible for exercising supervisory jurisdiction while the venue could be any convenient place chosen for hearings.<sup>47</sup>

To support the territoriality principle, the England and Wales High Court judgment of *Shashoua v. Sharma* was cited where the court held that only a court at the seat could grant an anti-suit injunction.<sup>48</sup> It also laid down the rule that the venue would be the seat if the arbitration had been conducted in accordance with supranational rules and there were no contrary indicators; a rule now known as the '*Shashoua*' principle.<sup>49</sup> Therefore, London was determined to be the seat since the arbitration was conducted in accordance with the ICC Rules. There was nothing to suggest that it was only the venue, taking into consideration its position as a popular seat for international arbitrations. In another ICC arbitration, the choice of London as venue was held to be a choice of seat as well, which would grant it exclusive jurisdiction.<sup>50</sup> Another England and Wales High Court judgment,

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43 *Ibid* at para 10.

44 *Ibid*.

45 *BALCO*, supra note 36(b).

46 *Ibid* at para 97.

47 *Ibid* at para 35

48 See *Shashoua v Sharma*, [2009] 957 England and Wales High Court (Comm.) at para 54 [*Shashoua*]

49 *Ibid* at para 34

50 See *Brahmani v River Pellets v Kamachi Industries*, [2019] Supreme Court of India 3658 (AIR) [*Brahmani*] (the Indian Supreme Court went a step further and held the choice of a venue to be equivalent to an exclusive jurisdiction clause. In this case, the arbitration

*C v. D* supports the principle that the choice of seat is a choice of forum for seeking remedies with regard to a particular arbitration proceeding.<sup>51</sup> All these judgments demonstrate that there is a territorial link in play here between the seat and the law governing the proceedings.

The court also considered the 2017 Supreme Court decision in *Indus Mobile Distribution Pvt. Ltd v. Datawind Innovations Pvt. Ltd.*<sup>52</sup> The arbitration clause, *inter alia*, stated that the arbitration proceedings shall be “conducted at Mumbai”. It further gave courts in Mumbai exclusive jurisdiction over all disputes in relation to the agreement.<sup>53</sup> However, since the cause of action had arisen in Delhi, it was claimed that the Delhi High Court would have jurisdiction over interim applications.<sup>54</sup> The Supreme Court relied on the exclusive jurisdiction clause and concluded that Mumbai had been chosen as a seat for its neutrality. Therefore, courts in Mumbai would be vested with jurisdiction even if no part of the cause of action arose there.<sup>55</sup> It recognised the principle of party autonomy by giving precedence to the choice of seat over jurisdiction under the Code of Civil Procedure 1908.

As regards the contradiction in *BALCO*, Paragraph 96 of the judgment, according to the judges in *BGS SGS Soma JV*, expands the scope of ‘court’ as defined under the Act to include both courts at the seat and the courts having jurisdiction due to the cause of action having arisen there.<sup>56</sup> Nevertheless, the judges recommended a holistic reading of the judgment that supports the idea that choice of seat is akin to an exclusive jurisdiction clause. If the concept of concurrent jurisdiction were followed, a party could approach any court besides a court at the agreed upon seat. This would defeat the reasonable expectations of the other party and also possibly cause great inconvenience.<sup>57</sup> Granting exclusive jurisdiction to courts at the seat is thus viewed by this court as the best way to enhance party autonomy.<sup>58</sup>

Having dealt with the issue of the role of the seat, the court went on to determine the seat itself. The court ultimately ruled that when a venue has been designated and not a seat, the correct conclusion, in the absence of any contradictory factors, is that the venue is also the seat of arbitration.<sup>59</sup>

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agreement specified Bhubaneswar (in the state of Orissa) as the venue but was silent on the seat. The court upheld party autonomy and stated that the application under Section 11(6) should have been to the Orissa High Court instead. It therefore, allowed an appeal against an order by the Madras High Court since it was not the jurisdictional court.).

51 See *C v D*, [2007] England Wales High Court (Comm.) 1541 at para 16.

52 *Indus*, *supra* note 16.

53 *Ibid* at para 2.

54 *Ibid* at para 8

55 *Ibid* at para 20.

56 *Arbitration and Conciliation Act*, 1996, Act No 26, s 2(1)(e); *BALCO*, *supra* note 36 (b) at para 96.

57 See *BGS*, *supra* note 29 at para 71.

58 *Ibid* at para 51.

59 *Ibid* at para 99.

The court relied on the 2012 decision of the England and Wales High Court in *Enercon GmbH v. Enercon (India)* where the agreement stipulated a venue (London) but not a seat.<sup>60</sup> In the arbitration clause, it was also stated that the provisions of the Indian Arbitration and Conciliation Act, 1996 would apply. In that case, it was held that there must be a clear intention to choose a different seat if the contrary is sought to be proven.<sup>61</sup> In *Enercon*, the court justified designating London as the seat on three grounds. The first was that London was a neutral seat for an Indian and a German party. The second was the use of the words ‘arbitration proceedings’ which meant that the entire arbitration would be anchored there and not just some hearings. The third was the fact that the place of arbitration had been changed from Mumbai in other contracts between the same parties to London in the contract in dispute. Interestingly, however, when the same case reached India, the Indian court held India to be the seat since the law of the arbitration agreement, substantive law of the contract and the curial law all were of India.<sup>62</sup> Thus, India had the closest and most intimate connection to the proceedings, as opposed to London which was only a venue.<sup>63</sup>

In another case, *Shagang South Asian Trading Co. v. Daewoo Logistical Division*,<sup>64</sup> the words “arbitration to be held in Hong Kong” were interpreted to mean Hong Kong would be the seat of arbitration. In an Indian case where the laws applicable were of S. Korea as well as the place where arbitration would be held, the former was held to be the seat.<sup>65</sup> Upon analysing all the above judgments, the court in *BGS SGS Soma JV v. NHPC* held the venue to be the seat. The court laid down the rule that when a clause states that the ‘arbitration proceedings’ are to be held at a certain venue, the reference should be considered, in fact, to be to the seat. This is because in such a case, the choice of venue does not just refer to hearings being conducted at a particular place but the arbitral proceedings as a whole which includes the making of the award.<sup>66</sup> This is differentiated from a choice of venue just for the purpose of say, taking witness statements or evidence.<sup>67</sup> Even the use of the word “held” in “....held in Hong Kong...” signifies an anchoring of the arbitration in that jurisdiction.<sup>68</sup> In the next section, I shall explain why such an interpretation is problematic.

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60 See *Enercon GmbH Wobben Properties v Enercon (India)*, [2012] European Wales High Court (Comm.) 519 at para 2 [*Enercon*].

61 *Ibid* at para 58.

62 See *Enercon (India) v Enercon GmbH*, [2014] 5 Supreme Court of India 1 at para 116 [*Enercon 2014*].

63 *Ibid* at para 114.

64 See *Shagang South Asian Trading Co v Daewoo*, [2015] England Wales High Court (Comm.) 194 at para 56 [*Shagang*].

65 See *Doczo v Doosan Infracore Co*, [2011] Supreme Court of India 176 at para 13 [*Doczo*].

66 See *BGS*, *supra* note 29 at para 66.

67 *Ibid*.

68 *Ibid* at para 69.

Lastly, the court also ruled that *Union of India v. Hardy Exploration* was not good law since it failed to apply the *Shashoua* principle that was relied on by the larger 5-judge bench in *BALCO v. Kaiser Aluminium*.<sup>69</sup> As per the *Shashoua* principle, the court should have ruled that Kuala Lumpur was also the seat because firstly, it was the venue, and secondly, the arbitration was to be conducted in accordance with supranational rules (UNCITRAL) and thirdly, there were no contradictory indicators.

The Supreme Court considered the fact that the arbitration clause does not mention whether the venue is for the purpose of some hearings or taking witness statements. Therefore, applying the *Shashoua* principle, either New Delhi or Faridabad could be the venue/seat. However, the court disagreed with the Delhi High Court by stating that since all proceedings had happened in Delhi and the awards had been signed there, the parties had exclusively chosen Delhi to be the seat of arbitration.<sup>70</sup>

### III. Critiquing the Court's Approaches

These decisions have taken divergent positions on the issue of determining the seat when the arbitration clause is drafted ambiguously. Both of them suffer from several lacunae. A common concern in the context of international commercial arbitrations with parties from multiple jurisdictions is that different state courts may assume jurisdiction and hand contradictory rulings as regards the same set of proceedings. This is evident in the *Enercon GmbH v. Enercon (India)* decisions where both Indian and English courts held their forum states to be the seat of arbitration.<sup>71</sup>

In my view, the court in *Union of India v. Hardy Exploration* suffered from a similar kind of 'forum' bias. While its analysis of the fact that the choice of venue is not tantamount to a choice of seat is uncontested, it did not provide any reasoning as to why New Delhi should be the seat of arbitration.<sup>72</sup> It could have stated, for instance, that India would be the seat because the subject matter of the underlying contract was situated in India. However, it failed to offer any justification for its reasoning. Merely because Kuala Lumpur was the venue does not mean that it could not also be the seat. A choice of venue should *per se* be considered a choice of seat in the absence of contrary factors. If the clause is silent on the seat, the choice of venue is independently a fair indication of the parties' intent. In that sense, the subsequent judgment of *BGS SGS Soma JV v. NHPC* was right in stating that it did not appreciate the *Shashoua* principle and hence was not good

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69 *Ibid* at para 96.

70 *Ibid* at para 101.

71 See *Enercon 2014*, *supra* note 62 at para 116; See *Enercon*, *supra* note 60 at para 59.

72 *Union*, *supra* note 6 at para 35.

law anymore.<sup>73</sup>

On the other hand, the latter decision suffers from some fundamental issues too. While it is fair to state that, in the absence of factors to the contrary, the venue would be the seat, the analysis of contrary indicia has to take place on a holistic basis. The lower court, in this case, the Delhi High Court, considered several factors such as the place of signing of the arbitration agreement and the place where the request for reference was received as relevant to determine that Faridabad and not Delhi was the seat.<sup>74</sup> The Supreme Court merely relied on the fact that Delhi was where the arbitration proceedings had been conducted and the award made.

Thus, for any arbitration where the proceeding has begun or the award delivered, the court's position places too much emphasis on the choice of venue within the larger matrix of factors to be considered while determining the seat. In most cases, all proceedings may be conducted at the venue and the award will be delivered there as well. That by itself should not mean that the venue assumes the place of 'seat' by virtue of Section 31(4) of the Indian Arbitration and Conciliation Act, 1996. If that line of reasoning is followed, in cases where the award is challenged, the choice of venue would always take precedence over any other contrary factors that may be relevant merely because the award was signed there. In ruling the venue as the seat since the award was made there, the court gave little consideration to the third component of the *Shashoua* principle, namely the existence of contrary indicia weighing against the designation of the venue as the seat.

The court should have considered a wider bundle of factors and then determined which jurisdiction has the closest connection to the arbitration proceeding in question. A number of factors in addition to the venue could be considered in this regard, such as the place of business of both parties, the place where the agreement was signed, the place of performance of the underlying contract, and the choice of law applicable to the contract or the arbitration agreement. By considering all of these factors in their entirety, a court should determine the seat of arbitration.

In the March 2020 Supreme Court decision in *Mankastu Impex v. Airvisual Ltd.*, the court had the opportunity to apply the abovementioned cases to determining the seat.<sup>75</sup> The case concerned an application to appoint an arbitrator in a dispute between an Indian and Hong-Kong based company.<sup>76</sup> The Memorandum of Understanding ('MoU') between the parties provided that it would be governed by the laws of India and that courts at

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<sup>73</sup> *BGS*, *supra* note 29 at para 96.

<sup>74</sup> *Ibid* at para 97.

<sup>75</sup> See *Mankastu Impex v Airvisual Ltd*, [2018] Supreme Court of India, Arbitration Petition No. 32/2018 [*Mankastu*].

<sup>76</sup> *Ibid* at para 2.

New Delhi would have jurisdiction.<sup>77</sup> It was thus argued by the petitioner that New Delhi was the place of arbitration and the courts there would have jurisdiction.<sup>78</sup> However, the very next clause of the MoU also clearly stated that the place of arbitration would be Hong Kong and “*..disputes arising out of the MoU shall be referred to and finally resolved and administered in Hong Kong*”.<sup>79</sup> The respondent placed reliance on *BGS SGS Soma JV v. NHPC* to argue that Hong Kong is the seat, and not just the venue, for the entire ‘*arbitration proceedings*’.<sup>80</sup>

The court did not clarify whether the position in *Hardy* or *BGS SGS Soma JV* was, according to it, the correct position of law. However, it followed a line of reasoning that is closer to *Hardy Exploration*. It held that the place specified in relation to administering the proceedings would be the seat of arbitration.<sup>81</sup> The previous clause in the MoU was insufficient to displace that assumption. The choice of Hong Kong as the venue would not by itself lead to the conclusion that it is the seat as well.<sup>82</sup> However, since Hong Kong had been named as the place where proceedings would be resolved and administered, it could be held to be the seat.<sup>83</sup> It appears that the court, unlike the *BGS SGS Soma JV* bench, has not taken the designation of a venue as *prima facie* designation of a seat. It has instead sought positive affirmation from the language of the clause that the parties intended that the arbitration be administered at that particular place. In taking a position closer to *Hardy Exploration*, the court has made the Indian position on the issue even more ambiguous.

## Conclusion

The choice of seat is an important decision for any arbitral process. It determines the law governing the conduct of the arbitration proceedings, and with it, issues such as the composition of the tribunal and court assistance in the taking of evidence. It also provides the legal framework for the challenge or enforcement of any arbitral award.<sup>84</sup> As the cases cited in the previous section demonstrate, there can be a significant loss of time and money if proceedings are brought before the wrong court. Therefore, it is advised that parties clearly specify the seat in the agreement itself.

However, arbitration clauses regularly use language such as the ‘place where arbitration will be held’ or designate a venue but not a seat which results in confusion as to which jurisdiction the arbitration is seated in.

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<sup>77</sup> *Ibid* at para 9.

<sup>78</sup> *Ibid*.

<sup>79</sup> *Ibid* at para 10.

<sup>80</sup> *Ibid* at para 11.

<sup>81</sup> *Ibid* at para 26.

<sup>82</sup> *Ibid* at para 21.

<sup>83</sup> *Ibid* at para 26.

<sup>84</sup> Sabater, *supra* note 9 at 443.

As a consequence, courts and tribunals have to attempt the tricky task of determining the seat of the arbitration.

Two judgments of the Supreme Court have attempted to shed light on this issue. The *Union of India v. Hardy Exploration* decision succeeded in differentiating the seat from the venue, but provided little guidance on how to determine the seat.<sup>85</sup> The *BGS SGS Soma JV v. NHPC* judgment was more elaborative in that regard.<sup>86</sup> It established that the venue was a key factor to consider while determining the seat. It held that the designation of a venue for 'arbitration proceedings' would be a reference to the seat for the proceedings as a whole and not for a convenient venue.<sup>87</sup> However, it placed too much emphasis on the choice of venue for the determination of seat due to the signing of the award at the venue. While the venue is important, it is entirely possible that different factors could give a much stronger indication of where the seat is located. To that end, it is recommended that the court consider the arbitration agreement and the underlying contract in their entirety to determine the seat of arbitration.

Despite this ruling, uncertainty remains. Both the *BGS-SGS Soma JV* and *Hardy Exploration* judgments have been delivered by three-judge benches.<sup>88</sup> *Mankastu Impex* refused to delve into the correctness of the decisions before it, and in any case, is a two-judge bench decision.<sup>89</sup> While the judges in *BGS SGS Soma JV* rightly held *Hardy Exploration* to be per incuriam, it is not clear which of the two is now applicable, an ambiguity relied on by the petitioner in *Mankastu Impex* as well.<sup>90</sup> It remains to be seen whether the Supreme Court constitutes a larger bench to settle the issue.

Furthermore, *BGS-SGS Soma JV* is a domestic arbitration.<sup>91</sup> The issue of designating a seat between New Delhi and Faridabad (both Indian cities) is primarily one only with administrative and logistical significance since the same law applies in either case. However, since Commercial Courts/ Commercial Divisions of High Courts having jurisdiction differ from state to state, it can have a bearing on more complex disputes. Nevertheless, it is unclear what precedential value is held by the decision as regards the choice of seat in international commercial arbitration which involves a host of different policy considerations. For instance, the neutrality of the seat assumes far more importance in international arbitrations. It is hoped that future judgments will shed light on this aspect of the issue.

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85 *Union*, *supra* note 6 at para 36.

86 See generally, *BGS*, *supra* note 29.

87 *Ibid* at para 84.

88 See generally *Union*, *supra* note 6; *BGS*, *supra* note 29.

89 See *Mankastu*, *supra* note 75 at para 13.

90 See generally *Union*, *supra* note 6; *Mankastu*, *supra* note 75 at para 13.

91 *BGS*, *supra* note 29.



