

Determining the Parties – True Choice of Seat of the Arbitration and Lex Arbitri

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Abstract

International arbitration is a well-established mechanism for the settlement of cross-border commercial disputes. In both domestic and international arbitration, the disputing parties wish to avoid national court adjudication either for reasons of ensuring a neutral and specialist international tribunal (international cases) or a forum which is more efficient or a subject-matter expert (domestic cases). Normally the Juridical seat/ seat of arbitration, carries along with it the choice of that country's arbitration/crucial law. Even though the concept of seat of arbitration and its importance is well known a very peculiar situation arose in this case because venue of arbitration was specified in the arbitration agreement and seat of arbitration was not specified by the parties. Finally Supreme Court of India relying on Judgments of various foreign Courts and Indian Courts settled the issue between the parties and also the law for International arbitration disputes in India.

Keywords: International Commercial Arbitration, Lex Fori, Lex Arbitri, Seat of Arbitration, Venue of Arbitration, dispute, Party autonomy

Arbitration is a dispute resolution mechanism, in which with the help of third party and without the involvement of the court dispute can be resolved. Under arbitration the parties mutually decide and appoint a person so that in future if some dispute arises between the parties then the arbitrator may help them to settle the dispute. Increasing international trade and investment in globalizing world, is accompanied by growth in cross-border commercial disputes. Given the need for an efficient dispute resolution mechanism, International Commercial Arbitration has emerged as the most preferred choice for resolving mechanism cross border commercial disputes and preserving business relationships. With an influx of foreign investments, overseas commercial transactions, and open ended economic policies acting as a catalyst, international commercial disputes involving India are steadily rising. This has drawn tremendous focus from the international community on India's international arbitration regime. To provide speedy dispute resolution, law relating to arbitration has amended from time to time. Due to certain controversial decisions by the Indian judiciary in the last decade, particularly in cases involving a foreign party; the international community has kept a close watch on the development of arbitration laws in India. The Indian judiciary has often been criticized for its interference in international arbitrations and extra territorial application of domestic laws in foreign seated arbitrations. The speedy efficiency of arbitration as seen in two legislative enactments, 1st is the arbitration and conciliation act, 2015 and the 2nd is incorporation of section 89 in civil procedure code.

The question involved in this research paper is that can the parties voluntarily provide that an arbitration seated in a country should be subject to the supervisory jurisdiction of the courts of foreign country's procedural law?

If the law of arbitration is found within the national laws of each state, then which national laws provide the Lex arbitri in any particular case?

LAW GOVERNING THE ARBITRATION (LEX ARBITRI) AND ROLE OF THE SEAT OF ARBITRAL TRIBUNAL:

Before the Commencement of an Arbitration:

The first thing of arbitration is that to resolve the dispute through a third party. So before the commencement of the arbitration, the most important factor to be considered is that to draft the Arbitration agreement. Arbitration agreement can be formed in three ways i.e. arbitration clause, separate Arbitration agreement and submission agreement. By drafting the arbitration agreement the party enjoys the freedom to construct the dispute resolution system of their choice.

The parties' freedom to agree on an arbitration regime of their choice and to prescribe the procedure to be followed is subject to few limitations. The validity of arbitration agreement must be depends upon the law which governs it. This will usually but not necessarily be the law governing the substantive contract, in which the arbitration clause is implanted. On the other hand the arbitral procedure itself should comply with the mandatory rules of Arbitration which is called as Lex Arbitri. The Lex Arbitri is often the law of the place of the seat of the arbitration, but not always. It can be possible when the parties by their mutual consent decided to choose the rules and regulation between seat of arbitration and Lex Arbitri which shall be applied in their arbitral procedure.

Let us first keep in mind that there are three laws that are potentially applicable to an arbitration agreement:

- 1) The law of the arbitration agreement (governing law) also known as curial law or procedural law or lex fori;
- 2) The proper law of the contract (substantive law);
- 3) The law of the seat of arbitration (Lex Arbitri)

The concept of Lex Arbitri:

The concept of Lex Arbitri is not limited to provisions which are formally included in an arbitration norms concerning arbitral dispute. Without entering into an idealistic debate, we consider as the arbitral procedure based on the legal system derives its validity from the law applicable to arbitration agreement.

Lex Arbitri constitutes the primary foundation for the effectiveness of an arbitration agreement. It must be distinguished from the law governing the procedure, because it might not necessarily deals with all its aspects like the substantive law and procedural law. If merged then it might establish a conflict-of-law rule or even restrain the arbitral tribunal in dealing with certain questions which hare necessary to resolve dispute between the parties.

The concept of Lex Fori:

The law of the jurisdiction where the proceedings is to be held in which relief is pursued, governs all procedural matters as illustrious from substantive rights is called as Lex Fori. The concept of Lex Fori is limited to the

extent, which cannot include in an arbitration norms concerning arbitral dispute. We consider Lex Fori as only the venue of arbitration which does not include the procedural provisions like – C.P.C and Cr.P.C, how the arbitration proceeding is to be done.

Role of Seat:

The Seat of Arbitration determines by the parties through their arbitration agreement that whether to put 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 fails to determine specifically chosen the law governing the conduct and procedure of Arbitration, the applicable law of the Arbitration will be determined by the law of the place of the Seat of Arbitration i.e. Arbitral Tribunal. The regulation of conduct of Arbitration like appointment of arbitrator, interim measures and challenge to an award would have to be done by the courts of the country in which the Seat of Arbitration is located.

The courts in India first considered the applicability of Part I of the Arbitration and Conciliation Act as it shall take place outside India in *Bhatia International V. Bulk Trading*.¹

The Supreme Court of India held that Part I would apply to all arbitrations and to all proceedings of arbitration relating domestic or international commercial arbitration, as for domestic arbitration, the law should be applicable of India if such arbitration is held in India and For international commercial arbitration, it was held that Part I would still apply unless the parties by agreement, had excluded all or any of the provisions of the Arbitration and Conciliation Act, included therein. It was further held that Part I would apply to such an arbitral award. As a result, the courts in India would have jurisdiction under both Section 9 and Section 34 of the act. Hence, an Indian court could entertain a challenge to the validity of such an arbitral award.

In September 2012 in *Bharat Aluminum Company (BALCO) V. Kaiser Aluminum Technical Services Inc*² the Supreme Court reversed its judgment of earlier controversial ruling in *Bhatia International* concerning applicability of Part I to arbitrations that are held outside India.

The Supreme Court stated that Part I applies to only those arbitrations that are held within India. The essential test for determining ‘whether Part I is applicable to any proceeding’ is by firstly seeing whether the seat of arbitration is in India. Accordingly, it was held that Indian courts will have no jurisdiction to make Part I of the act applicable to an arbitral award made outside India. The Supreme Court rejected the argument that the courts of the country that is the seat of arbitration and those of the country whose law is chosen by the parties will have concurrent jurisdiction over any court proceedings in relation to such arbitral process. It was held that the courts of only the country in which the seat of arbitration is located have jurisdiction to entertain any matter relating to the arbitration. Only in the absence of a choice of seat of arbitration will the country whose law is chosen by the parties have jurisdiction to entertain arbitration proceedings.

As per the proposed amendment to the Arbitration and Conciliation Act, 1996, the Law Commission report has recommended that Part – 1 of the act will remain available to the parties in case of foreign seated arbitration, such as Section 9 – (Interim relief), Section 27 – (Court assistance and Section 37(1)(a) – (Appealable Orders).

¹ (2002) 1 Arb LR 675 : AIR 2002 SC 1432

² (2012) 9 SCC 552

Seat of Arbitration v. Venue of Arbitration:

Both the seat and venue stands for their own value at their respective places but the seat determines the law governing to the arbitration procedure and the venue is the place where the arbitration proceeding is to take place. Seat of arbitration is of more important than Venue of arbitration because it is not necessary to hold the proceedings to that venue only but it is necessary to follow the rules of seat of arbitration which are decided at the time of making arbitration agreement. Seat of arbitration and Venue of arbitration may be different. The seat of arbitration remains unaffected and independent if the venue of arbitration is at some different place.

In the case of *Enercon (India) Ltd and Ors V. Enercon Gmbh And Anr*³ there were a dispute arose before the Hon'ble Supreme Court of India for non-delivery of supplies under an Intellectual Property License Agreement ("IPLA") which contained an arbitration clause. The relevant aspects of the arbitration clause in dispute were:

The governing law of the IPLA was Indian law and London was decided as the venue of the arbitration; and the provisions of the Indian Arbitration and Conciliation Act, 1996 were to apply.

The proceedings initiated both in India and in England in sequence seeking declarations on the validity of the arbitration clause and asking for anti-suit injunctions. The Hon'ble High Court of Bombay observed that though London was not the Seat of Arbitration, the English Courts would have concurrent jurisdiction. Since, venue of arbitration was London. But when the matter went before the Hon'ble Supreme Court it was 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".⁴

As it was further held in the case *Imax Corporation V. M/S E-City Entertainment (I) Pvt. Ltd*⁵ decided on 10th March 2017 that

If the parties intentionally and expressly decided the proceeding to be held outside India then Part-1 shall not be applicable to that arbitration agreement.

This case confirmed the implication between Lex Fori and Lex Arbitri keeping that the parties intended specifically exclude themselves from Part-1 of the arbitration and Conciliation Act, 1996,

Further, the relation between Lex Arbitri & Lex Fori stated as:

"Parties may well choose a particular place of arbitration specifically because its Lex Arbitri is one which they find striking. However, once a place of arbitration has been chosen, it brings with its own law. If that law contains provisions that are mandatory to apply in the proceeding of arbitration, then those provisions must be obeyed. It is not a matter of choice any more than the notional motorist is free to choose which local laws to obey and which to ignore."

³ SLP (C) No. 10924 of 2013

⁴ <http://www.legallyindia.com/views/entry/seat-of-arbitration>

⁵ CIVIL APPEAL No. 3885 OF 2017 (Arising out of SLP (C) No. 34009 of 2013)

Conclusion:

The distinction between Lex Arbitri and rules governing the arbitral procedure is particularly important from the point of view of the parties' autonomy. While the parties can in principle freely choose the rules which apply to the arbitral procedure. The importance of seat of arbitration can reduce the interference of court in many matters of the arbitral procedure.

After the 2015 amendment act, the issue regarding the seat and venue of arbitration has been cleared. Now in the spirit of international commercial arbitration the matters regarding interim relief (section 9), setting aside the arbitral award (section) and appeal to the arbitral decision (section) which comes under part – 1 of arbitration and conciliation act which was prior applied to only domestic arbitration, now shall be applicable to international commercial arbitration too.

As held in the case of Imax the supreme court of India had excluded the parties which intentionally choose the Seat of Arbitration outside India from the application of Part-1 of Arbitration and Conciliation Act.

