Concept of Seat in '*Indian Arbitration*'[1]: Enhancing Party Autonomy or Increasing Uncertainty?

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A significant recent development in the Indian arbitration regime is the introduction of the concept of 'seat' in India seated arbitration. While the Indian arbitration regime endorsed this concept for international commercial arbitration seated outside India in 1996, it had a limited application for domestic arbitration and India seated international commercial arbitration. In India, for arbitration matters, internal allocation of jurisdiction was to be governed by the rules of the Civil Procedure Code, 1908. These rules did not allow parties the freedom to choose an unconnected forum to govern arbitration proceedings. The Supreme Court of India has recently introduced a change in the above rules. Under this changed rule, party autonomy in choosing their seat for arbitration has allowed the contracting parties to confer exclusive jurisdiction on an unconnected forum in the country although appearing to be a progressive move, this recent development initiated by the Supreme Court, this article argues, is a cause of concern for the Indian arbitration regime. Instead of making the arbitration process more efficient, it introduces a new avenue of litigation and innumerable possibilities of increased court intervention in arbitration proceedings. This recent development needs reconsideration since the concept of the seat can have a very limited value for Indian arbitration. Choice of the seat does not entail the choice of a legal system given the fact that the Arbitration and Conciliation Act, 1996 is a central legislation, which is applicable uniformly to all the states in the country. It offers only one benefit- the possibility to choose the physical location of the courts where arbitration proceedings can be brought.

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[1] This article uses the term *Indian arbitration* as a specific term to include both domestic arbitration as well as India seated international commercial arbitration. The changes introduced by the Supreme Court which are subject matter of discussion in this article have an effect on both kinds of above-mentioned arbitration.

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Life of Arbitration laws in India, it can be said, has been a roller coaster ride. The arbitration regime received a major shot of modernisation and internationalisation in 1996 when India decided to become a Model Law Jurisdiction and reformed its arbitration law on the lines of UNCITRAL Model Law 1985.[3] The Arbitration and Conciliation Act, 1996 [the 1996 Act] incorporated party autonomy as a cardinal principle of the *Indian arbitration* regime, with the expectation that legislature and judiciary will be dedicated to the cause of enhancing it. While the judiciary has made significant contributions in the growth of this law, its role, one can say, has been like a mixed bag. Some decisions have been in accordance with the international best practices. However, there are others which despite appearing progressive have turned out to be counter-productive, having contributed to increasing uncertainty than reducing it. One such recent development in the *Indian arbitration* regime, which seems counterproductive to the growth of the *Indian arbitration* regime is the introduction of the concept of seat - a concept of international arbitration - in domestic as well as Indian seated international commercial arbitration (hereinafter *Indian arbitration*) by the Supreme Court.[4] This has entailed a change in a settled legal position. Till intervention of the Apex Court, the parties did not have autonomy to confer jurisdiction on courts merely on the basis of choice.[5] According to the 1996 Act, allocation of jurisdiction within India was to be governed by the rules of jurisdiction prescribed in the Code of Civil Procedure, 1908 (CPC).[6] An important consequence of application of the CPC was that the parties could not confer jurisdiction on an unconnected forum to exercise supervisory jurisdiction over the arbitration proceedings. The parties could choose one court amongst the courts which could be considered the courts of appropriate jurisdiction in accordance with the rules of CPC. The Supreme Court introduced a change in the above position as it found it proper that the parties should be allowed autonomy to confer supervisory jurisdiction on any court within India. This move of the Apex Court has twofold implications- firstly, it amounts to introducing concept of seat in domestic arbitration; secondly, for international commercial

[3] Before promulgation of the 1996 Act, arbitration in India was governed by three different statutes namely the Arbitration Act, 1940; Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. The Act of 1937 and 1961 were to give effect to the Geneva Convention and the New York Convention respectively, whereas the 1940 was to deal predominantly with domestic arbitration. The idea of India seated international commercial arbitration and having a legal framework to govern and facilitate such arbitrations became possible through the 1996 Act.

[4] According to the *Indian arbitration* laws, there are three categories of arbitration, international commercial arbitration seated outside India, domestic arbitration and India seated International commercial arbitration.

[5] Section 2(1)(e) of the 1996 Act gives a definition of the term Court. *Infra s. 1.2.* The Code of Civil Procedure, 1908, sec 15-20.

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arbitration, if India has been chosen as a seat of arbitration, the parties would be required to choose a specific seat within India to govern arbitration proceedings., extending party autonomy to let parties confer supervisory jurisdiction on any court within India, irrespective of internal rules of jurisdiction prescribed in the Code of Civil Procedure, 1908.[7] Though appearing to be a pro-party autonomy and a pro-arbitration move, this addition, this article argues, has become a cause of concern for the Indian legal system, especially for the idea of making India as a preferred seat for arbitration.

Concept of seat undoubtedly is an important concept of international arbitration.[8] It is a commonly accepted fact in the world of arbitration that the location of the arbitral seat can have profound legal and practical consequences for the parties to an international arbitration, and can materially alter the course and outcome of the arbitral process.[9] Although a well-entrenched concept in the world of International arbitration, its introduction in *Indian arbitration* needs more significant consideration than it has been given by the courts so far. It is important to anal yes, whether this addition makes *Indian arbitration* more attractive for contracting parties?

This article traces the journey of this new transplant in the *Indian arbitration* regime. This article argues that even if one supports the idea of giving more autonomy to the parties to choose a specific state within India as the seat of arbitration, any beneficial deployment of this concept of seat in *Indian arbitration* calls for further clarity from the judiciary and, later perhaps, also from the legislature. It further contends that idea of seat as an exclusive jurisdiction clause undercuts the objective of reducing court intervention and bringing certainty and efficiency in the dispute resolution process in India. The first section looks into legal position for allocation of jurisdiction within India as envisaged under the 1996 Act and CPC before intervention by the Supreme Court. The second section draws attention towards the series of Supreme Court cases, which imparted a new interpretation to section 2(1) (e) of the 1996 Act, and thereby, changed the rules for allocation of jurisdiction within India. The third section raises doubts about the relevance of importing a concept of international arbitration in *Indian arbitration* which has an effect of disturbing a settled

[7] Ibid.

[8] Gary Born, "Selection of Arbitral Seat in International Arbitration," in Gary B. Born , in *International Commercial Arbitration*, 2nd edition, Kluwer Law International 2014, pp. 2051- 2119; Blackaby Nigel, "Constantine Partasides," et al., Chapter 3. Applicable Laws', in *Redfern and Hunter on International Arbitration* (Sixth Edition), 6th edition (Kluwer Law International; Oxford University Press 2015) pp. 155 - 228

[9] Born, "Selection of Arbitral Seat," 2051.

legal position. The fourth section shows how a new interpretation to the sections 2(1) (e) and 42 of the 1996 Act is turning to be a source of confusion and uncertainty in the *Indian arbitration* regime. It draws attention towards a range of unanswered questions generated by the Supreme Court which are leading parties to engage in frequent and long jurisdictional battles. The article concludes with the argument that the possibility of choosing seat of arbitration within India may have enhanced party autonomy but it has come with a heavy cost of new avenue of litigation- something which undercuts the purpose of achieving efficiency in dispute resolution.

Indian Legal System's Approach towards Party Autonomy in Arbitration

Concept of Seat in International Arbitration and its Endorsement in Indian Legal System

The concept of seat is an old and well-entrenched concept in international arbitration. It is well known that choice of seat in international arbitration is not about choosing a physical location (a venue) for conduct of arbitration proceedings. It means, instead choice of a juridical seat or legal domicile of arbitration which in turn implies choice of a legal system[10]- the courts and the arbitration law-of a particular country.[11] The possibility to choose a seat is considered to be of great value for contracting parties in international arbitration. It serves two important purposes: first, to resolve conflicts of laws and jurisdiction and second to allow parties to choose a legal system that is perceived by them as most beneficial and neutral for the smooth conduct of the arbitration.[12] Choice of seat carries great importance since the national arbitration legislation (and judicial decisions) of the arbitral seat will almost always govern a wide range of issues concerning both the "internal" procedural conduct of the arbitral proceedings and the "external" relationship between the arbitration and national courts.[13] Indian legal system came to embrace this concept in 1996 when India modeled its arbitration law in conformity with the UNCITRAL Model Law 1985, which in

[10] Also referred as legal domicile of the parties.

[11] Federal state in U.S.

[12] Loukas Mistelis, 'Seat of Arbitration and *Indian arbitration* Law' Indian Journal of Arbitration Law4, no. 2 (February 2016): 1

[13] Born, *Op. Cit.* Born puts it succinctly as he explains that the choice of lex arbitri is important as a wide range of "internal" and "external" procedural issues relating to the arbitration will virtually always be governed by the law of the arbitral seat, including the annulment of awards, the selection, qualifications and removal of the arbitrators, the arbitrators' power to order provisional measures or disclosure, the allocation of competence to resolve jurisdictional disputes, the conduct of counsel or other party representatives in the arbitration, mandatory procedural requirements applicable in the arbitral proceedings, the form and publication of the arbitral award, and similar matters. (At pp. 2056-57.)

turn meant accepting the principle of territoriality. While the 1996 Act was a way to endorse concept of seat in a more holistic way, it was accepted, though with some limitations, way back in 1958, as India signed the New York Convention on Recognition and Enforcement of Foreign Awards. In remodeling its law according to the Model Law, India upheld the concept of party autonomy both for *Indian arbitration as well as for foreign seated* arbitration.

Accepting it for foreign seated arbitration meant accepting the principle that Indian courts will cede supervisory jurisdiction to courts of the country which has been chosen as a seat of arbitration by the parties. However, Indian legislature was restrictive in allowing autonomy to the parties when the issue was allocating jurisdiction within India. In case of international commercial arbitration for anyone choosing India as a seat of arbitration, allocation of jurisdiction within India was to be governed by the rules of jurisdiction prescribed in the Code of Civil Procedure, 1908. In other words, the 1996 Act did not introduce any change in the principle that mere choice of the parties could not be the basis for conferring jurisdiction on the Indian courts. As the next sub-section explains, the 1996 Act, did not extend party autonomy in letting parties choose a completely unconnected forum as seat of arbitration. Although India adopted party autonomy as a cardinal principle for refashioning laws relating to both domestic as well as international arbitration, the autonomy of the parties, as the next section shows, was somewhat restricted in India seated international arbitration and also in domestic arbitration till the Supreme Court judgement in *Bharat Aluminium Company v Kaiser Aluminium Technical Services Inc.,*[14] [BALCO] in 2012. In other words, Within India, supervisory jurisdiction could be exercised only by one of those courts which were connected with the dispute in some way. The next section looks into the reasons for this restriction and how it operated through the 1996 Act.

Restricted Party Autonomy in Indian Arbitration

The concept of seat being a central concept for international arbitration, Indian legislature did not consider it relevant for *Indian arbitration*. Section 20 of the 1996 Act, applicable as it was to *Indian arbitration*, did mention that parties can choose a place of arbitration. However, read with sections 2(1) (e), and 42, the choice granted in section 20 of the 1996 Act did not extend to the possibility of choosing any given Indian forum as supervisory court, if it is unconnected to the dispute.[15] Parties

[14] 9SCC552 (SC) (2012).

[15] In fact, for the purposes of jurisdiction within India, the 1996 Act continues with the provisions of the 1940 Act. Section 2(1)(e) and section 42 are largely similar to Section 2(c) and Section 31(4) of the 1940 Act, with minor modifications.

could choose a forum to exercise supervisory jurisdiction over arbitration proceedings, but that choice had to be limited to those courts which were connected with the dispute. The cardinal principle that parties cannot confer jurisdiction by choice where none exists remained intact.[16] Therefore, in matters relating to contracts only those courts could entertain arbitration petitions which were connected with the dispute in any way, that is, where the cause of action in the dispute may have arisen or parties may have been residing.[17] Embodying the above principle the section 2(1)(e) of the 1996 Act, which defines 'Court' for the purpose of instituting arbitration-related proceedings, read as follows:

> (i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit…;
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> (ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;

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[16] The said principle is not stated in Civil Procedure Code, 1908 in as many words, however the courts in India, especially the Apex Court has consistently affirmed this principle on numerous occasions. Hakam Singh v M/S Gammon India Ltd, 1 SCC 286 (SC)1971); Modi Entertainment Network v W.S.G. Cricket Pte Ltd, 4 SCC 341 (SC, 2003); Maharashtra Chess Association v Union of India, SCC Onine SC 932 (2019)

[17] Section 20 of the Civil Procedure Code, 1908 states,

> Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction
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> (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
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> (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally works for gain, as aforesaid, acquiesce in such institution; or
>
> (c)The cause of action, wholly or in part, arises.

Section 2(1)(e) provided that the jurisdiction of courts within the country will be governed by the CPC, as it held that arbitration petitions will be entertained by those courts which would have entertained a suit had the matter come up for litigation. Since CPC offers the possibility for multiple forums the 1996 Act also provided for a mechanism to resolve conflicts of jurisdiction within India through section 42. The section states,

> Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

In other words, according to the 1996 Act, even in international commercial arbitration party autonomy did not extend to conferring jurisdiction on a court which was a neutral/unconnected forum. According to section 2(1) (e) supervisory jurisdiction could be exercised only by one of those courts, which could assume jurisdiction as per the rules in the CPC.[18] And that one court could be chosen in two ways: (i) by both the parties through a forum selection clause[19] in the contract which either explicitly confers exclusive jurisdiction on one of the natural forums for arbitration proceedings or for all court proceedings, including arbitration proceedings or (ii) by the claimant after the dispute has arisen by filing the first arbitration petition according to section 42. Mere mention of a place in arbitration clause where arbitration proceedings would be held, could be taken as a choice of forum by the parties if that place was the one which had jurisdiction as per CPC, but that forum was not to be taken as an exclusive jurisdiction clause, leaving it open for the claimant to choose a forum from other natural forums as and when the dispute arose.

While the basic principle that jurisdiction cannot be conferred merely by choice of the parties continues to be an integral part of Indian law, the Apex Court felt the need of creating an exception to the above principle for the purposes of arbitration proceedings. The initial steps in this direction were taken in 2012 in *Bharat Aluminium Company v Kaiser Aluminium Technical Services inc.,*[20]

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[18] The Code of Civil Procedure, 1908, ss. 15-20.

[19] The Supreme Court has upheld validity of jurisdiction clauses in series of cases such as- M/S Gammon India Ltd., 1SCC 286 Swastik Gases (P) ltd. v Indian Oil Corporation Ltd., 9SCC32 (2013); B.E. Simeose v Chattisgarh Investment Pvt. Ltd.,12 SCC 225 (SC) 2015).

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[20] *(2012) 9SCC552 (SC)*

[BALCO], wherein the Constitution bench opined that *Indian arbitration* regime needs a broader approach to party autonomy. The contracting parties, the judges were of the view, should have the freedom to choose a court within India too, which can entertain and decide arbitration petitions even if it is completely unconnected with the matter.

Supreme Court's Initial Attempt to Remove Restriction on Party Autonomy

BALCO, as is well known, is a landmark case for the *Indian arbitration* regime, particularly for putting India back on a pro-arbitration path.[21] One of the most important tasks of the Court in this case was to restore the concept of seat and principle of territoriality in foreign seated arbitration. The mandate was to reiterate that an arbitration clause with express choice of seat in a foreign country is to be treated as an exclusive jurisdiction clause, which excludes the jurisdiction of Indian courts to exercise supervisory jurisdiction. The Constitution bench of the Supreme Court duly fulfilled the above mandate in BALCO, as it overruled the judgment in Bhatia International and engaged in a detailed discussion on the importance and relevance of seat in international arbitration.

While reinforcing the importance of the concept of seat for international arbitration, the judges took note of the fact that the *Indian arbitration* regime does not endorse concept of a more particular seat, i.e. Calcutta, Mumbai or Delhi, for instance, in respect of *Indian arbitration.* In other words, the bench observed that in *Indian arbitration*, parties cannot confer exclusive jurisdiction on a court which was unconnected with the dispute. Driven by a pro-arbitration approach, the Court found it necessary to remove this restriction from *Indian arbitration*. The bench found it important that the

[21]While *Indian arbitration* law was reformed in 1996 in accordance with the Model law, the principle of territoriality came to be disturbed in 2002 by a Supreme Court judgement in Bhatia International v Bulk Trading, 4 SCC105 (2002). This judgement held that Part I of the 1996 Act would apply also to foreign-seated arbitration unless excluded expressly or impliedly by the contracting parties. This led to an implication that mere choice of a foreign seat was not sufficient to exclude jurisdiction of Indian courts. Since this judgement shook the territoriality principle which was at the root of UNCITRAL Model Law and the 1996 Act, it created lot of uncertainty and debate in *Indian arbitration* regime, especially in relation to foreign seated arbitration and earned an image of 'arbitration hostile' country for India. One of the main task of the Constitution bench in BALCO was to reconsider the concept of 'implied exclusion' introduced by Bhatia International. J. Martin Hunter and Ranmit Banerjee, Bhatia, "BALCO and Beyond: One Step Forward, Two Steps Back?", *National Law School of India Review*, 24, No.2 (2013):1-9; Also see Rohan Tigadi, "Indian Arbitration: The Ghost of Implied Exclusion and Other Related Issues", in Michael Pryles and Philip Chan (eds), *Asian International Arbitration Journal*, (Singapore International Arbitration Centre (in cooperation with Kluwer Law International); 12, no. 2 (2016):181 – 193; S.K. Dholakia, Bhatia International v Bulk Trading S.A. – A Critical Review, 5SCC-J 22 (2003).

contracting parties should have the possibility to choose a neutral forum within India to exercise supervisory jurisdiction over arbitration proceedings. However, while opening up the possibility of a neutral seat, the bench was perhaps conscious of the fact that as per the CPC mere choice of the parties was not sufficient to confer jurisdiction on courts in India. It also paid attention to the fact that section 2(1) (e) offers jurisdiction to more than one court for entertaining arbitration proceedings. The Court, therefore, in the process of introducing concept of seat in *Indian arbitration* opted to give a new interpretation to section 2(1) (e) of the 1996 Act which could allow to read the possibility of a neutral forum for supervising arbitration proceedings within it. It decided to read the terms, "subject matter of suit" and "subject matter of arbitration" as two distinct terms, giving jurisdiction to two different sets of courts. The Court stated,

> We are of the opinion, the term "subject matter of the arbitration" cannot be confused with "subject matter of the suit". The term "subject matter" in Section 2(1) (e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process…..
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> ….In our view, the legislature has intentionally given jurisdiction to two courts, i.e. the court, which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process.[22]

[22] BALCO, Para 96, The Court further illustrated its above stance as it stated,

> On many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. ***This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi.*** (emphasis added)

It further buttressed its stance by emphasising that it was necessary to have a harmonious reading of section 2(1) (e) with section 20 of the 1996 Act. The bench was of the view that

> A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any "place" or "seat" within India, be it Delhi, Mumbai etc. In the absence of the parties' agreement thereto, Section 20 (2) authorizes the tribunal to determine the place/seat of such arbitration. [23]

With a rather different interpretation to section 2(1) (e) the Constitution bench introduced what looks like a customised concept of seat. It appeared customised in the sense that for the purpose of *Indian arbitration,* it accepted only one limb of the concept of seat- that is choice of a neutral forum, and it refrained from introducing the second limb- the seat as an exclusive jurisdiction clause. However, the judgement did not make it clear that what it was introducing was a concept of seat, which was customised for India. In subsequent paras, the Court went on to explain the implication and meaning of choice of seat for international arbitration and emphasised that choice of place in international arbitration means choice of juridical seat or choice of a legal system to govern arbitration proceedings to the exclusion of all other forums.[24] However, for *Indian arbitration*, seat, the judgement seemed to suggest, was not be seen as an exclusive jurisdiction clause. It took another judgement of the Supreme Court, almost five years later[25], which reinforced that the Constitution bench in BALCO had introduced the concept of seat with both its limbs- giving parties the possibility to choose a neutral seat which was to be treated as an exclusive jurisdiction clause.

Supreme Court's Effort to Give Full Effect to the Concept of Seat in Indian arbitration

While BALCO took initial steps in introducing concept of seat in 2012, it took sometime before this contribution of BALCO received real attention and impetus. The most significant attempt in this direction came in 2017 through the Supreme Court judgement in *Indus Mobile*. Willing to give full effect to the concept of seat within India, a Division Bench of the Supreme Court did not read BALCO as suggesting a customised or different concept of seat than what has been prevalent in international arbitration. Indus Mobile was a case concerning a contract that contained an arbitration clause which carried choice of Mumbai to conduct arbitration proceedings[26] and also an exclusive

[23] Ibid, Para.97.

[24] Ibid, Para.98.

[25]Indus Mobile Distribution Private Ltd. v Data wind Innovations Private Ltd, 7SCC 678 (SC) (2017) (Indus Mobile)

[26] The arbitration clause in Indus Mobile read as,

jurisdiction clause that conferred exclusive jurisdiction on the courts of Mumbai. Two petitions, one under section 9 and other under section 11 of the 1996 Act were filed before the Delhi High Court by one of the parties on the basis that cause of action had arisen at Delhi. While the Delhi High Court assumed jurisdiction on the basis of section 2(1) (e) of the 1996 Act, Supreme Court disagreed with it and held that choice of Mumbai as a place of arbitration amounts to choice of seat, which in turn would mean the exclusion of jurisdiction of all Courts except Mumbai. The Supreme Court did not find it problematic that the courts in Mumbai did not have jurisdiction under section 2(1)(e), as it was completely unconnected to the dispute and the parties. Taking the reasoning of BALCO further, the Court held to the effect that choice of place in the arbitration clause has to be taken as choice of a juridical seat by the parties even in a domestic contract. In other words, it was held that once it is concluded that parties have chosen a seat of arbitration, the chosen forum, even if it is completely unconnected with the dispute and the parties, will have exclusive jurisdiction to entertain all arbitration proceedings to the exclusion of all the forums where the cause of action may have arisen.

With this judgement, the division bench in *Indus Mobile*, therefore, took a major step forward in the direction of firmly establishing concept of seat as it has been prevalent in international arbitration with both its limbs- choice of neutral forum and chosen forum as exclusive one to the exclusion of all other forums. However, incidentally in doing so, the Supreme Court did not take cognizance of the fact that although para 96 of the BALCO makes it possible for the parties to confer jurisdiction on a court which is unconnected with the subject matter of the suit, the judges in the same para had also expressed a view that the legislature has intentionally given jurisdiction to two courts, i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. It also did not come up for discussion before the court that the Amendment Act 2015 was silent when it came to introduce any changes in section 2 (1)(e) and section 42, which could have had the effect of introducing the concept of seat in *Indian arbitration*.

If dispute cannot be amicable resolved… such dispute shall be settled by Arbitration. ……*Such arbitration shall be conducted at Mumbai*. (para 2)

It also went unnoticed that introduction of the concept of seat in *Indian arbitration*, would have an effect of making redundant two provisions of the 1996 Act- section 2(1)(e) and section 42. However, the above elements were not to go unnoticed in subsequent litigation. Indus Mobile, unfortunately, yielded itself to an unwanted consequence of varied interpretations and strongly divided opinions from the High Courts.

Indus Mobile and its Aftermath: Finding Seat within Seat and A State of Increasing Confusion

While *Indus Mobile* was an attempt to clarify the law relating to concept of seat in *Indian arbitration*, it came to be received by the High Courts or even different judges in the same High Court in two very different ways. Judgements from some High Courts fully accepted the dictum of *Indus Mobile*. These courts endorsed that BALCO had introduced the concept of seat with in *Indian arbitration* with both its limbs- neutrality and exclusivity of the chosen forum. They accepted the view that once it can be concluded that parties have made a choice of the seat in arbitration clause, the courts of that place are to have exclusive jurisdiction for deciding all arbitration petitions of the parties.[27] On the other hand, there were some others who did accept the idea that BALCO has given contracting parties freedom to confer supervisory jurisdiction on a neutral court, but did not read BALCO or *Indus mobile* to be suggesting that the choice of parties would be akin to an exclusive jurisdiction clause, which would denude the other natural forums of their jurisdiction.[28] This group was of the view that a Supreme Court judgement in Indus Mobile could not be interpreted as going beyond the mandate of concurrent jurisdictions laid out clearly in the section 2(1)(e) and also adhered to by the Constitution bench in BALCO, and thereby making two provisions of the 1996 Act redundant. The latter set of courts, therefore, assumed the task of finding ways to reconcile division bench judgement in *Indus Mobile* with the language of sections 2(1)(e) and 42 of the 1996 Act and the Constitution bench judgement in BALCO. In this reconciliation process, the greatest reluctance was in accepting choice of the neutral seat as an exclusive jurisdiction clause.

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[27] Dipendra Kumar v Strategic Outsourcing Services Pvt. Ltd., Arb. P. 312/2017 (Delhi HC, 2017); Osa Vendita v Bausch and Lomb India Pvt. Ltd., SCC Online 12721 (Delhi HC, 2018); Ramandeep Singh Taneja v Crown Realtech Pvt. Ltd., SCC Online Del 11966 (Delhi HC, 2017); Rites Ltd. v Govt. (NCT of Delhi), SCC Online Del 8227 (Delhi HC, 2018); General Instruments Consortium v Lanco Infratect Ltd., SCC Online Del 7697 (Delhi HC, 2017); Devyani International Ltd. v. Siddhi Vinayak Builders and Developers Ltd., O.M.P.(I)(comm.), SCC Online Del 11156 (Delhi HC, 2017)

[28] A pioneer judgement to represent this school of thought was Calcutta High Court judgement in Hinduja Leyland Finance v Debdas Routh, 1 CHN 561 (Calcutta HC, 2018); following course was Delhi High Court judgement in Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd., SCC Online Del 9338 (Delhi HC, 2018); Khazana Projects and Industries Pvt. Ltd. v. Indian Oil Corporation Ltd., SCC Online Cal 2203 (Calcutta HC, 2019). However, before Indus Mobile Bombay High Court had taken the same view in Konkola Copper Mines v. Stewarts and Llyods of India Limited, ()4 Arb LR 19 (Bom HC, 2013)..

In the process of reconciliation, some courts held that choice of seat can be considered as an exclusive jurisdiction clause only when the contract has both- the arbitration clause and an exclusive jurisdiction clauseand the choice of forum in both the clauses coincide.[29] It was held that in case parties expressed different choices in arbitration clause and jurisdiction clause, the choice of place in an arbitration clause cannot be seen as conferring exclusive jurisdiction on the courts of chosen place to the exclusion of the courts where the cause of action in the subject matter of the dispute has arisen. However, opinions differed even with respect to those contracts where arbitration clause and jurisdiction clause indicated different choices. In such situations, for the purpose of deciding on jurisdiction, some High Courts gave preference to the choice expressed in the arbitration clause, whereas some others gave preference to the choice in the jurisdiction clause ignoring the arbitration clause.[30]

As the above debate on the relationship between *Indus Mobile* and BALCO continued and defeated the objective of limited court intervention, the Supreme Court intervened again, this time much sooner, with another effort to clarify the position and to put a halt on this debate.

Second Effort by the Supreme Court to give Full Effect to the Concept of Seat in Indian arbitration

One of the most recent efforts of the Supreme Court in clearing the doubts on the issue of whether seat means an exclusive jurisdiction clause is its judgement in BGS SGS Soma JV v. NHPC Ltd.

[29] Debdas Routh, 1 CHN 561); Devas Multimedia Pvt. Ltd., SCC Online Del 9338

[30] For example, Bombay High Court dealt with such a situation in Aniket SA Investments LLC v Janapriya Engineers Syndicates Pvt. Ltd., SCC Online Bom 3187 (Bomb HC, 2019). The case here was relating to a contract wherein the arbitration clause stated that "seat of arbitration proceedings shall be Mumbai," and the jurisdiction clause which stated, "subject to the provisions of Article 20.4, the courts of Hyderabad shall have exclusive jurisdiction to try and entertain and disputes arising out of this Agreement." In a single bench decision the Bombay High Court gave preference to jurisdiction clause over arbitration clause and declined to accept jurisdiction. In a similar situation, the Delhi High Court Virgo Softech Ltd. v National Institute of Electronics and Information Technology, SCC Online Del 12722 (Del HC, 2018) preferred to give preference to exclusive jurisdiction clause considering choice of place in arbitration clause as choice of venue. In sharp contrast to this is another judgement of the single bench of the Delhi High Court in Ramandeep Singh Taneja v Crown Realtech Pvt. Ltd., SCC Online Del 11966 (Del HC, 2017) where arbitration clause provided for "venue of arbitration proceedings shall be at Faridabad" and this was accompanied with an exclusive jurisdiction clause, which conferred jurisdiction for all disputes "on courts of Delhi only". The Delhi High Court preferred to read choice of venue as choice of seat and gave preference to arbitration clause in declining jurisdiction for Delhi Court. Incidentally, in a recent judgement dated January 29, 2021, a division bench of the Bombay High Court reversed above-mentioned judgement of the single bench in the Janapriya Engineers Syndicates Pvt. Ltd., SCC Online Bom 3187, giving preference to the arbitration clause.

(BGS Soma).[31] Taking note of the fact that the constitution bench judgement in BALCO has been subjected to multiple and varied interpretations, the three judges' bench laid down categorically that the concept of seat is to be read with its both limbs- neutrality and exclusivity of the chosen forum. While the Division Bench in Indus Mobile had ignored that the Supreme Court in BALCO had tried to remain within the legislative framework of 2(1) (e) and had made mention of concurrent jurisdictions, the Bench in BGS Soma categorically addressed the issues relating to both the sections- 2(1) (e) and 42. The bench took note of the fact that mention of concurrent jurisdiction in para 96 of BALCO is in contradiction to the idea of seat as an exclusive jurisdiction clause.[32] Reinterpreting BALCO, the Apex Court in BGS Soma stated that the judgement in BALCO needs to be given a comprehensive reading and that such a reading leads to the conclusion that the Constitution bench wanted to suggest concept of seat as an exclusive jurisdiction clause.[33]

In BGS Soma the bench also took up the task of clarifying the stance of the Supreme Court in Indus Mobile. The judges herein emphasized that after BALCO, the issue of seat in *Indian arbitration* was taken up for the first time in Indus Mobile, which was an attempt to reconcile section 2(1)(e) and section 20. The Court then took note of the amendment in section 2(1)(e) in the 2015 Amendment Act, which had somewhat diluted the requirement of the cause of action within the territorial jurisdiction as a basis for assuming jurisdiction.[34] This Amendment had given authority to the High Courts, which otherwise do not have ordinary original jurisdiction to deal with matters relating to International Commercial Arbitration, which prior to the Amendment could have been dealt by the District Courts within whose jurisdiction the cause of the action may have arisen.[35]

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[31] SCC Online SC 1585 (SC) (2019)
[32] BGS Soma, Para 41.

[33] Ibid. Para 40, The judgement states,

> A reading of paragraphs 75, 76, 96, 110, 116, 123 and 194 of BALCO would show that where parties have selected the seat of arbitration in their agreement, such selection would then amount to an exclusive jurisdiction clause, as the parties have now indicated that the Courts at the "seat" would alone have jurisdiction to entertain challenges against the arbitral award which have been made at the seat. The example given in paragraph 96 buttresses this proposition, and is supported by the previous and subsequent paragraphs pointed out hereinabove. The BALCO judgment (supra), when read as a whole, applies the concept of "seat" as laid down by the English judgments (and which is in Section 20 of the Arbitration Act, 1996), by harmoniously construing Section 20 with Section 2(1)(e), so as to broaden the definition of "court", and bring within its ken courts of the "seat" of the arbitration.

[34] Ibid, Para. 51.

[35] Prior to the 2015 Amendment, definition of the Court was same for domestic arbitration as well as Indian seated International Commercial Arbitration. However, after the 2015 Amendment definition of Court in section 2(1)(e) is different for the different kind of arbitration. For International Commercial Arbitration matters jurisdiction now lies with the High Courts, those which have original

The Court struck down the idea of concurrent jurisdictions considering it against party autonomy and also as an idea that may cause undue harassment to the parties.[36] The Court took note of the "discordant notes"[37] from some High Courts, especially Delhi and Bombay High Courts, and their reluctance to accept that BALCO and Indus Mobile had introduced concept of seat as an exclusive jurisdiction clause. Specifically referring to the Delhi High Court judgment in the Antrix Corporation[38], and the restricted meaning it gave to the Indus Mobile the Court categorically held that these judgements were wrongly decided. It stated,

> ***BALCO does not "unmistakably" hold that two Courts have concurrent jurisdiction, i.e., the seat Court and the Court within whose jurisdiction the cause of action arises.*** What are missed by these High Court judgments are the subsequent paragraphs in BALCO (supra), which clearly and unmistakably state that the choosing of a "seat" amounts to the choosing of the exclusive jurisdiction of the Courts at which the "seat" is located.[39] ***(emphasis added)***

The Supreme Court also held that the view taken by the Delhi High Court with respect to section 42 was incorrect and that choice of seat as choice of a forum with exclusive jurisdiction did not make section 42 redundant.

BGS Soma can be considered an important step in the direction of clarifying doubts in relation to concept of seat in *Indian arbitration*. It clearly asserts that BALCO is to be interpreted as having introduced the concept of seat with both its limbs- choice of neutral forum and seat as an exclusive jurisdiction clause. The term court in section 2(1) (e) is to be read as to include two sets of courts- those where the cause of action has arisen and those which have been conferred jurisdiction by choice of the parties. Moreover, once it can be concluded from a contract that parties have chosen a seat of arbitration; the choice has to be treated as an exclusive jurisdiction clause.

Having held that choice of seat is to be taken as an exclusive jurisdiction clause, BGS also clarified when it can be considered that parties have chosen a seat of arbitration.

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jurisdiction and also which do not have original jurisdiction but which are empowered to hear appeals from different District courts.

[36] If concurrent jurisdiction were to be the order of the day, despite the seat having been located and specifically chosen by the parties, party autonomy would suffer, which BALCO (supra) specifically states cannot be the case. (BGS Soma, Para 52).

[37] Ibid, Para, 57.

[38] Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd, SCC Online Del 9338 (Del HC) (2018)

[39] BGS Soma, Para 60

Supreme Court judgment in *BGS SGS* addressed two important issues which were subject of debate in the High Courts as a consequence of the introduction of concept of seat in *Indian arbitration*. Firstly, it gave clarification on the criteria for the determination of seat in arbitration.[40] Bringing it in tune with international practice to some extent, the judgment clarifies that whenever there is an expression of choice in an arbitration clause, the presumption has to be in favour of choice of seat unless the contract or the dispute resolution clause suggests otherwise.[41] Also, from the facts of the case, it can be inferred that in the absence of any choice of place in the clause, the place where arbitration proceedings are held is to be construed as a seat of arbitration.[42]

This judgment does reinforce some significant changes in the *Indian arbitration* regime: (i) it establishes firmly that the parties can choose a neutral/unconnected forum for exercising supervisory jurisdiction on arbitration proceedings; and (ii) it holds that an arbitration clause that carries choice of a place to govern arbitration proceedings is to be taken as an exclusive jurisdiction clause and that jurisdiction of natural forums can be excluded by choosing an unconnected forum. The Judgment is significant as it brings about a change in the well-established principle that jurisdiction cannot be conferred on Indian courts merely by choice of the parties.

The possibility to choose an unconnected forum within India for bringing in arbitration petitions can be considered as an important development for the *Indian arbitration* regime. It has importance, for example, for those situations where the contract is connected to many different parts of India, including remote and small locations, but the parties have opted for arbitration either through an institution in Delhi or Mumbai or have chosen Delhi as the place of arbitration or a Delhi based arbitrator to resolve their disputes. In such situations, it may be convenient for the parties to have an option to confer jurisdiction on the Delhi courts for exercising supervisory jurisdiction, while Delhi

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[40] While BGS Soma tries to lay criteria for determination of seat, the issue of how to interpret parties agreement seems to be far from reaching any kind of agreement. The Supreme Court in this judgment stated that the previous judgment in Union of India v Hardy Exploration and Production (India) Inc, 13SCC472 (SC, 2019) was incorrectly decided since therein it was held that mere choice of place will not lead to the presumption of choice of seat. BGS Soma endorsed the judgment of the same court in the Brahamni River Pellets Ltd. v Kamachi Industries Ltd., SCC Online SC 29 (SC, 2019), which considered choice of venue as choice of seat. However, recently another three judges bench in Mankatsu Impex Pvt. Ltd. v. Airvisual Ltd., SCC Online SC 301(SC, 2020) has deviated from the view taken in the BGS Soma.

[41] Jonathan Hill, "Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements," *The International and Comparative Law Quarterly* 63, no. 3 (July 2014):517-534.

[42] A very recent judgement of the Bombay High Court in Om Prakash v Vijay Dwarkada Varma, WP No. 4248 of 2019, Bombay High Court, decided on April 27, 2020, uses BGS Soma as a precedent to declare that the place where arbitration proceedings was to be held as seat of arbitration, since the clause was silent on the choice of place and there was also no clear determination of the seat of arbitration by the tribunal. On similar lines also see, Quippo Construction Equipment Ltd. v Janardan Nirman Pvt. Ltd. (CA 2738/2020) (SC) (2020).

maybe unconnected with the dispute. In other words, denying, first, the option of Delhi and second, of treating it as an exclusive jurisdiction clause may cause great hardship to defendant as that would make him/her go to a remote location where the cause of action may have arisen. It may also be a beginning in the direction of making India a hub of international arbitration, opening a possibility for the situation where two foreign parties want to choose India as a seat of arbitration.

While the above advantages are important, and it is encouraging that *BGS Soma* clarified the situation with respect to the possibility of conferring exclusive jurisdiction on a neutral forum. However, despite above advantage, it is also certain that *BGS Soma* has introduced a new avenue of litigation in *Indian arbitration*.

It is true that in international arbitration too, where concept of seat has been its integral and extremely important feature; there are legal battles on - whether the choice of parties is to be construed as a seat or venue or even whether parties have made a choice of seat in a contract. Such legal battles are usually a result of the fact that the dispute resolution clauses, howsoever, important they are, more often than not, are not well negotiated.[43] Clauses which are pathological or just unclear in the expression of choice and yield themselves to multiple interpretations are not uncommon in commercial contracts.[44] Yet another feature of international contracts, which offers a potent avenue of litigation and court intervention on jurisdictional issues in international arbitration, is the issue of the relationship between arbitration clause and jurisdiction clause. However, the domain of international arbitration absorbs this avenue of litigation given the fact that there is a lot at stake in the choice of juridical seat of arbitration. In the Indian context, one needs to raise the question whether it is worth unsettling an established legal position, when the advantages, as the next section argues, appear to be miniscule.

Considering above in the Indian context, a question needs to be raised whether the advantage of offering a convenient physical location sufficient enough to inculcate the cost of a new avenue of litigation in *Indian arbitration*, thereby defeating the whole objective of minimal court intervention?

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[43] Redfern and Hunter on International Arbitration, fifth edition, (Oxford University Press: UK, 2009) para 2.04.

[44] Hill, "Determining the Seat," 517-534.; Born, "Selection of Arbitral Seat ," 2051.

> Although selecting the arbitral seat is not an especially difficult drafting assignment, it is sometimes handled poorly. In a surprising number of cases, arbitration agreements contain ambiguous, vague, inconsistent, or defective selections of the arbitral seat. When this occurs, an arbitral tribunal, arbitral institution, or national court must interpret the parties' agreement to determine what the parties intended. (p. 2072)

Is this new element actually a value addition,[45] and a pro-arbitration approach, especially when one looks at the cost of increased jurisdictional battles even before arbitration can be commenced? Is it really worth unsettling a settled position with respect to jurisdiction? Do we actually have answers to the debatable issues that have been associated with the concept of seat in international arbitration and which now have taken an entry in Indian regime with the introduction of concept of seat in *Indian arbitration*?

Introduction of concept of Seat in *Indian Arbitration*: Is it a Value addition?[46]

The Supreme Court judgement in *BGS Soma* is a milestone for *Indian arbitration* jurisprudence in many ways. As stated above, it has made a significant contribution with an attempt to put to rest the debate which was triggered by the *Indus Mobile* case by giving a very clear answer that BALCO has to be read as giving parties the freedom to confer exclusive jurisdiction on a neutral forum in *Indian arbitration* too. It has also been made clear that any expression of choice in favour of a place in the arbitration clause will lead to a presumption that parties have chosen a seat of arbitration.[47] This addition may be useful as it may be cost-effective for the parties and also takes care of their convenience by allowing them to bring arbitration petitions in the courts nearest to the place where arbitration proceedings are being conducted. But in international arbitration, is the possibility to choose a seat for the conduct of arbitration proceedings actually about cost and convenience? Isn't the choice of seat influenced by other more vital factors?

The convenience of contracting parties undoubtedly can be one factor for choice of a particular place as seat of arbitration.[48] However, as it is well known, choice of seat in international arbitration

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[45] Born, "Selection of Arbitral Seat ," 2051- 2119.Drawing attention towards views which highlight decreasing importance of seat in international arbitration too Born states, "Some commentators have suggested that the location of the arbitral seat has lost importance, because of increasing similarities between national arbitration regimes: "one cannot but conclude that the role of the law of the place of arbitration keeps decreasing." (At p. 2055).

[46] Expressions about relevance of concept of seat in International arbitration has started to emerge as the Apex Court stated recently,

> *The specification of "place of arbitration" may have special significance in an International Commercial Arbitration, where the "place of arbitration" may determine which curial law would apply. However, in the present case, the applicable substantive as well as curial law would be the same.*

Janardan Nirman Pvt. Ltd. (CA 2738/2020). 2020.

[47] BGS Soma, para 64

[48] Born, "Selection of Arbitral Seat," 2051.. Discussing weightage of cost and convenience Born mentions.

> Finally, issues of logistics, cost and convenience are also of some relevance to selection of an arbitral seat. These considerations should virtually never be decisive, both because of the greater importance of the legal consequences of selection of the arbitral seat and because of the possibility of conducting hearings outside the arbitral seat. (At p. 2060).

means choice of juridical seat or legal domicile of arbitration which in turn implies choice of a legal system[49]- the courts and the arbitration law-of a particular country.[50]

There are multiple factors that influence the parties' decision on choice of seat. As leading commentators have suggested that parties may prefer to choose a seat whose law provides unequivocally for the effective enforcement of arbitration agreements, for the desired level of judicial review in annulment proceedings (by neutral, competent courts), for the parties to be able freely to choose their legal representatives and party-nominated arbitrators (*e.g.*, not being limited to locally-qualified lawyers or particular religious groups), for minimal non-arbitrability exceptions, for minimal judicial "supervision" of ongoing arbitrations (*e.g.*, not permitting interlocutory appeals from interim procedural orders by tribunals), for limited after-the-fact judicial review of the arbitral procedures, for limited grounds for review of the award in setting aside proceedings, and for a supportive approach by local courts to requests by arbitrators for judicial assistance in aid of the arbitration. [51]

In fact, one of the main reasons for the distinction between seat and venue and the possibility to conduct arbitration proceedings at different locations without disturbing choice of a juridical seat by parties is the fact that choice of seat is a choice of a legal system, a choice which is based on concerns other than convenience based on physical proximity of the venue and the courts. Also, the neutrality of the legal system/court is not so much a function of its unfamiliarity to both parties. A jurisdiction is considered neutral for not offering any special advantage or disadvantage to any particular party to the dispute.[52]

If we consider the above elements associated with the concept of seat, its introduction in *Indian arbitration* can have very limited utility. In *Indian arbitration* choice of a neutral forum for arbitration proceedings can offer only two benefits- convenience and an equal degree of unfamiliarity with a particular court for both the parties. It cannot mean choice of a legal system as the 1996 Act is a central legislation that is applicable to the whole country in the same way. The working in High Courts may vary in degrees according to the nature of the bar available; there may

[49] Also referred as legal domicile of the parties

[50] Federal state in U.S.

[51] Born, "Selection of Arbitral Seat," 2056-57.

[52] Ibid. The author states,

> In general, however, parties frequently content themselves with selecting (or compromising on) an arbitral seat that will be neutral, objective and efficient, without providing either party a systemic advantage of one sort or the other. (p. 2063)

also be the effect of cultural factors on the functioning of courts. Apart from the above, the High Courts in India are not expected to function in a fundamentally different fashion as legal forums, nor are they expected to deploy different legal cultures. Choice of one High Court over the other is not also about having any procedural advantage available to any one party. Also, when it comes to efficiency and speedy disposal of cases, the difference in High Courts cannot be that significant to become a determining factor for choice of parties. Therefore, imported in India, the concept will apply minus most of its associated advantages.[53]

Shorn of its main characteristics, perhaps the introduction of this concept in *Indian arbitration* needed more consideration than it has received so far at the hands of the Apex Court. Not only this, series of judgements from the Apex Court dedicated to reinforcing this concept in India leave a lot for the parties and the High Courts to grapple with and find answers to. The next section draws attention to some of the issues which would need to be battled out in courts by the contracting parties.

Indian bitration and the Concept of Seat: Unanswered Questions

As already stated, there is no doubt that *BGS Soma* was a much-needed judgement to set at rest the ensuing debate between the High Courts as to what is the correct interpretation of BALCO. However, unfortunately, clarity with respect to the correct interpretation of BALCO is just one part of the whole endeavour of introducing concept of seat. The arbitration regime in India would call for clarity on more issues than merely determining whether BALCO introduced a customised concept of seat or whether the choice of seat is to be treated as an exclusive jurisdiction clause. This section draws attention towards some of the issues which are likely to arise even after final reaffirmation by the Supreme Court about introduction of concept of seat in *Indian arbitration*, and for which answers are not available in any of the Supreme Court judgements, which spearheaded the task.

Relationship between Jurisdiction Clauses and Arbitration Clauses

BGS Soma, as it explains the concept of seat in international arbitration, actually relates to a very specific situation of a contract that contained only an arbitration clause wherein parties had

[53] Recently similar views were expressed by a single judge bench of the Calcutta High Court in the case of Bowlopedia Restaurants India Ltd. v Devyani International Ltd., AP 399 of 2020 (2021).

expressed choice of a place for arbitration proceedings.[54] The contract did not have a jurisdiction clause. *Indus Mobile* also addressed another very specific situation where the arbitration clause and the jurisdiction clause contained the same choice of place- Mumbai. However, dispute resolution clauses in commercial contracts, as is well known, come in a myriad of permutations and combinations, and a contract with only an arbitration clause is just one of those many situations. Some other probable options can be: contracts with both arbitration clause and jurisdiction clause and both mentioning a different choice of place; contracts with arbitration clause with no choice of the place[55] followed by an exclusive jurisdiction clause; contracts with arbitration clause expressing choice of a place followed by a non-exclusive jurisdiction clause.

In Indian jurisprudence, the judgements which addressed the issue of seat so far, unfortunately, do not have answers to resolve the above probabilities. For example, there does not seem to be clarity with respect to those situations where a contract, domestic as well as international, consists of both- the arbitration clause and the jurisdiction clause, and both express a different choice of place. Which of these two clauses should be given preference?[56] Should jurisdiction clause override arbitration or vice versa should be the answer? Or do we reconcile the clauses by saying that for arbitration proceedings, preference should be given to the choice in arbitration clause and other court proceedings be governed by the choice in jurisdiction clause?

Also, what needs to be done in the situations where the arbitration clause does not carry an express choice of place, but there is an exclusive or non-exclusive jurisdiction clause in favour of a

[54]In fact the arbitration clause in this case was quite peculiar as it stated, "arbitration proceedings shall be held at New Delhi/Faridabad." The court considered Delhi as seat of arbitration since arbitration proceedings were held in Delhi. However, interestingly the approach adopted by the Supreme Court is in variation to its position in an earlier case, Emkay Global Financial Services Ltd. v. Girdhar Sondhi, 9 SCC 49 (SC, 2018). In this case the arbitration was conducted at Delhi, and the applicable bye-laws had exclusive jurisdiction clause in favour of Mumbai courts. In this case court was of the view that Delhi, where arbitration proceedings were held was merely a venue, since there was an exclusive jurisdiction clause which conferred jurisdiction on the Courts at Mumbai! Interestingly decision of the Supreme Court in *Emkay* was not cited before a division bench in Delhi High Court in case of Indian Oil Corporation v Fepl Engineering Pvt. Ltd., FAO (OS) (COMM), SCC Online Del 10265 (Del HC, 2019). The arbitration was held as per the provisions provided under MSME, where parties had chosen Delhi as seat of arbitration. Despite the fact that arbitration was held in accordance with provisions of MSME, which conferred jurisdiction to the courts of place of supplier, the court gave preference to choice of parties.

[55] Commonly referred as "blank clauses"

[56]Post BGS Soma, however, for two High Courts so far the approach is to give preference to arbitration clause, even if it is followed by an exclusive jurisdiction clause. For example, Cinepolis India Pvt. Ltd. v Celebration City Projects Pvt. Ltd. MANU/DE/0209/2020 (Delhi HC, 2020). The contract stated that the Courts in Ghaziabad shall have exclusive jurisdiction on the subject matter of this Agreement. The place of the Arbitration shall be at New Delhi. A peculiar and yet another variation of this situation appeared in a recent case before Allahabad High Court, Vedanta Equiptment Pvt. Ltd. v Sany Heavy Industries Pvt. Ltd. MANU/UP/0508/2020 (Allahabad HC, 2020). The contract had an arbitration clause which stated, "Place of Arbitration shall be at Pune" followed by a jurisdiction clause which provided that "***all disputes arising out of or in anyway connected with these*** shall be subject to jurisdiction of the Courts, ***having territorial jurisdiction.***" (emphasis added.) However, the Allahabad High Court gave preference to arbitration clause.

particular place? In such situations, do we presume that all kinds of petitions, arbitration petitions as well as other court proceedings have to be brought to the chosen forum, meaning thereby that the choice of forum in jurisdiction clause would also amount to choice of seat for arbitration?[57] Or else do we have to presume that parties have not chosen any seat of arbitration? Thus, we leave it to be determined by the tribunal and once the tribunal determines a seat, then that place has to have exclusive jurisdiction for arbitration petitions irrespective of the jurisdiction clause? In the above situation, since parties have not chosen a seat, then will the pre-arbitration petitions have to be filed in the courts of the chosen place in the jurisdiction clause, and once the tribunal makes a choice, all other petitions have to be filed in the courts of place (seat) chosen by the tribunal?

"Contrary Indicia" for Determining Choice of Parties

BGS Soma also lays down the criteria for determining seat. It holds that choice in favour of a place has to be construed as choice of seat in the absence of any other "significant contrary indicia" that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings.[58] Once again, while *BGS Soma* looks at a very specific situation where the arbitration clause uses the language "arbitration proceedings at…". However, in practice, the arbitration clauses are examples of the use of range of words, which may vary from a clause having two words 'Arbitration- India" to the contracts which clearly express a choice of seat. In international arbitration, if parties have chosen a venue or place or even seat, a usual "significant contrary indicia", as the judgment also states, which can be used to determine the meaning of parties' choice is- choice of procedural law which is different from that of Seat; for example, an arbitration clause which says arbitration in London to be governed by the *Indian arbitration* and Conciliation Act. In the case of *Indian arbitration* the Apex Court remains silent on what that "contrary indicia" can be? Undoubtedly, choice of different procedural law is not a possibility in *Indian arbitration*. What else could be used to determine the meaning of parties' words, will undoubtedly have to be determined by the Courts across the country in due course in legal battles challenging agreement with respect to a seat within the Indian seat!

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[57] An example of such a situation is judgement of Bombay High Court in General Instruments Consortium v Lanco Infratect Ltd., SCC Online Del 7697 (Bom HC, 2017). The contract herein had a jurisdiction clause which contained arbitration as a choice of dispute resolution method, with no other details or any specific choice for seat or place or arbitration. The clause conferred exclusive jurisdiction on courts of Delhi. The Bombay High Court refused to accept jurisdiction having concluded that parties had chosen Delhi as seat of arbitration.

[58] BGS Soma, Para 64

So how does one interpret a situation where a contract which is significantly connected to Mumbai carries an arbitration clause which provides for arbitration at New Delhi followed by an exclusive jurisdiction clause which mentions that all court proceedings to take place only in the courts of Mumbai? In such a situation for determining seat how much weightage is to be given to the combined facts of real and substantial connection of contract with Mumbai and also of exclusive jurisdiction clause in favour of Mumbai courts?

Criteria to conclude that place of arbitration proceedings is the seat

Moreover, in *BGS Soma*, the court considered Delhi, the place where the arbitration proceedings were held as the seat of arbitration, since the arbitration clause provided choice of two cities as probable places of arbitration- Delhi and Faridabad. Since proceedings were held at Delhi and the award was declared and signed there, the Court concluded that Delhi was the seat of arbitration. The judgement lends itself to an inference that the place where arbitration proceedings are held and the award declared and signed will be considered as seat of arbitration. However, what should be done in situations where the arbitration clause has a choice for seat of arbitration, but arbitration proceedings are conducted, and the award is declared and signed at a different place? In such cases, should it be presumed that parties have agreed to change of seat of arbitration and the supervisory jurisdiction will lie at the place where the arbitration is held? Also, will the situation be different if the arbitration clause does not have any choice of place and arbitration proceedings are held at two different places and award signed and declared at one of these two places? In such a situation which of these two places should be considered seat of arbitration?[59]

Conclusion

The arbitration regime in India, it seems, is destined for huge turbulence. These turbulent situations at times are integral to the nature of the topic, and sometime they are just "man- made". For the Indian regime, unfortunately, the latter seems to be the case more often than not, where inconsistent judicial opinions from the co-ordinate benches tend to dominate the scene. Barely had we come out

[59] An example of such a situation is judgement of Bombay High Court in General Instruments Consortium v Lanco Infratect Ltd., SCC Online Del 7697 (Bom HC, 2017). The contract herein had a jurisdiction clause which contained arbitration as a choice of dispute resolution method, with no other details or any specific choice for seat or place or arbitration. The clause conferred exclusive jurisdiction on courts of Delhi. The Bombay High Court refused to accept jurisdiction having concluded that parties had chosen Delhi as seat of arbitration

to "applicability of Part I to foreign seated arbitration debate"[60], we have now imported on our domestic turf a new avenue of litigation, court intervention and a seemingly never-ending debate on seat venue determination.

This article has argued that by virtue of sections 2(1)(e) and 42 of the 1996, *Indian arbitration*, the issue of relationship between the arbitration clause and the jurisdiction clause and the seat-venue debate wasn't a matter of concern for Indian courts, till the concept of seat was introduced in *Indian arbitration*. The situation was more or less settled for internal allocation of jurisdiction on courts in India- the choice of a city/state in India in arbitration clause did not carry the meaning of choice of a juridical seat. , The parties could confer jurisdiction on one of the natural forums either through an express exclusive jurisdiction clause, which expressly stated the choice of conferring jurisdiction on a particular court for litigation including matters relating to arbitration proceedings. Or else, the choice could be exercised by one of the parties after dispute had arisen by bringing the first arbitration petition in any of the forums where the cause of action had arisen as per section 42 of the 1996 Act. Whereas, now with the introduction of concept of seat, seeking any kind of relief or assistance from the courts in process of arbitration first requires a protracted battle for determining choice of the parties with respect to the seat of arbitration.

This article has argued that given the fact that the 1996 Act is a central legislation, which is applicable in all the federal units of the country, the introduction of concept of seat in *Indian arbitration* needs more consideration than what it has received so far.[61] Looking at its limited value in the *Indian arbitration*, and the narrow scope for party autonomy, which it allows, considering seat as an exclusive jurisdiction clause, denying jurisdiction to the natural forums and importing seat venue debate does not seem to be really in the interest of the *Indian arbitration* regime. Undoubtedly, concurrent jurisdictions may leave scope for forum shopping by one of the parties as and when the dispute arises but then, for the purposes of efficiency in dispute resolution, what is the lesser evil, forum shopping or a new avenue of litigation and increased court intervention?

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[60] *Supra, fn. 11*

[61] Expressions about relevance of concept of seat in International arbitration has started to emerge as the Apex Court stated recently,

> *The specification of "place of arbitration" may have special significance in an International Commercial Arbitration, where the "place of arbitration" may determine which curial law would apply. However, in the present case, the applicable substantive as well as curial law would be the same*.

Quippo Construction Equipment Ltd. v Janardan Nirman Pvt. Ltd. (CA 2738/2020)