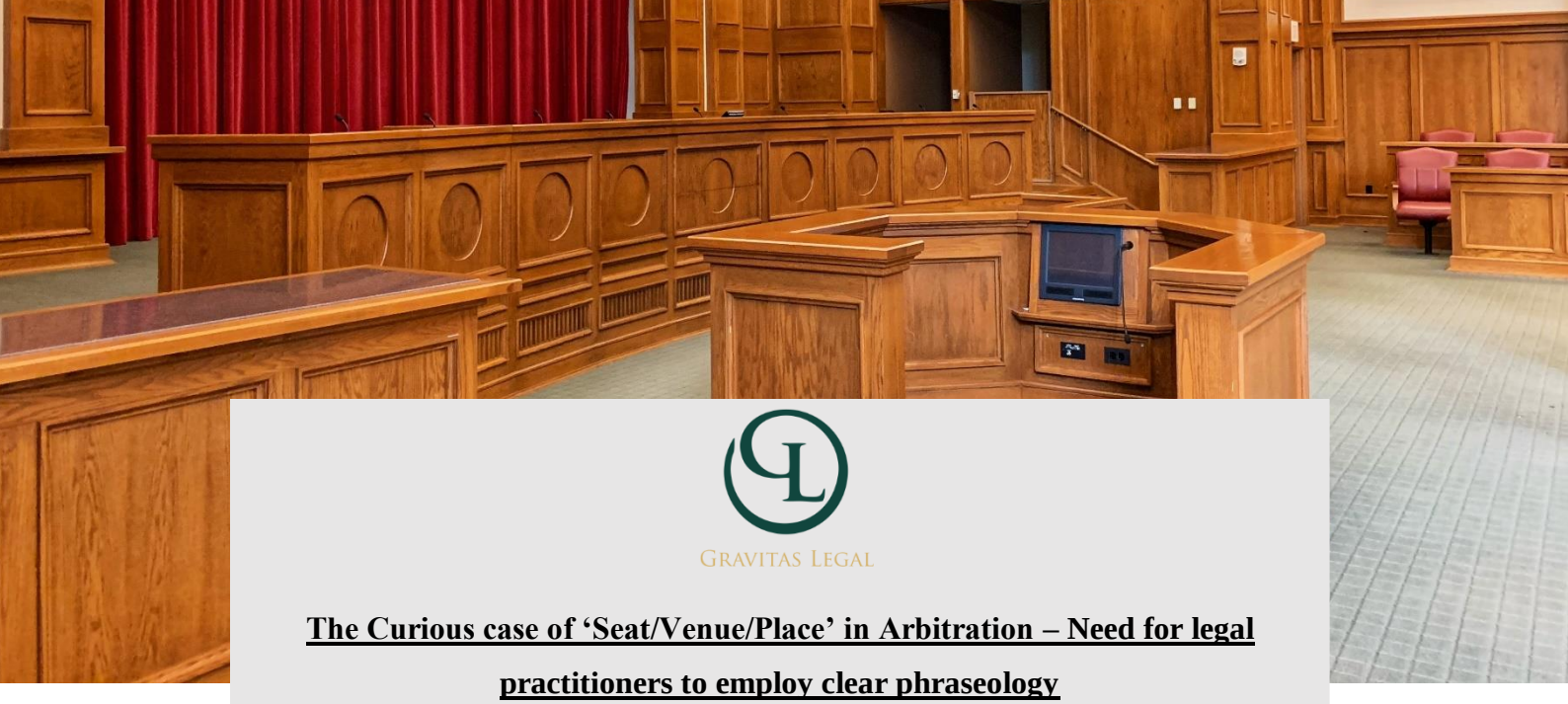

GRAVITAS LEGAL

The Curious case of 'Seat/Venue/Place' in Arbitration – Need for legal practitioners to employ clear phraseology

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An attempt to catalog and straighten up the labyrinth, which surrounds the intricate subject: 'Seat/Place/Venue' of Arbitration.

At the outset, it needs to be strictly borne mind that the Arbitration and Conciliation Act, 1996 does employ the words 'seat' or 'venue' of arbitration and only employs the word 'place' of arbitration in the sense of 'juridical seat'. The relevant statutory provision being Section 20 of the Arbitration Act, which reads as under:

"20. Place of arbitration.—
(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."

[Emphasis added]

Sub-section (1) to Section 20 gives the parties a right to choose the 'place' of arbitration. Sub-section (3) again uses the word 'place' but with reference to meeting of the members of an arbitral tribunal. This apparent ambiguity was first addressed by the Supreme Court in ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc***[i]**,** (BALCO), by recognizing the seat as the "centre of gravity" of arbitration, which in actuality is the juridical seat of Arbitration. Nonetheless, in line with international practice, the Supreme Court observed that the arbitral hearings might take place at a location other than the seat of arbitration. The distinction between "seat" and "venue" was, therefore, recognized by judicial ingenuity.

The issue of 'juridical seat' assumes significance because the choice 'juridical seat' of arbitration, in International Arbitration, attracts the law applicable to such location. In other words, it would not be necessary to specify which law would apply to the arbitration proceedings, since the law of the particular country would apply *ipso jure*[ii].
Likewise, in domestic arbitration, the choice of 'juridical seat' determines the Court, which shall, in terms of Section 42 of the Arbitration and Conciliation Act, 1996, have the jurisdiction over the arbitral proceedings and all subsequent applications, such as *inter alia* an application for setting aside the arbitral award. The said Section 42 is reproduced below:

"42. Jurisdiction.—
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."

Latest Pronouncements Governing the Field
Without wasting too many words, let us analyze the four latest Supreme Court judgments, which govern the issue of 'juridical seat', in a condensed and capsulized manner.

The first of these four judgments is the 2018, three-Judge bench decision, in ***Union of India (UOI) v. Hardy Exploration & Production (India) Inc.***[iii] Later, in 2019 came the co-ordinate Bench decision in ***BGS SGS SOMA JV v. NHPC Ltd.***[iv], which allegorically speaking muddied the waters. Again, in 2020 came a three-Judge Bench decision in ***Mankastu Impex Private Limited v. Airvisual Ltd.***[v]

Last is the division Bench decision in ***Inox Renewables Ltd. v. Jayesh Electricals Ltd.***[vi]**,** which wholeheartedly follows the infirm decision in ***BGS Soma*** (supra).

Hardy Exploration (supra)
The Appellant therein had filed an Application before the High Court U/s 34 of the Arbitration Act challenging the correctness of award made by Arbitrators in favour of Respondents. The said Application was contested by Respondent on ground that courts in India did not have jurisdiction to entertain such an application. While dealing with the controversy the Supreme Court referred to the relevant Articles of the Contract in question to delineate on whether they oust the jurisdiction of the courts in India. The relevant portion of Article 32 and 33 read as follows:

"32.1 This Contract shall be governed and interpreted in accordance with the laws of India.

32.2 Nothing in this Contract shall entitle the Contractor to exercise the rights, privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India.

33.9 Arbitration proceedings shall be conducted in accordance with the UNICITRAL Model Law on International Commercial Arbitration of 1985 except that in the event of any conflict between the Rules and the provisions of this Article 33, the provisions of this Article 33 shall govern.

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33.12 The venue of conciliation or arbitration proceedings pursuant to this Article unless the parties otherwise agree, shall be Kuala Lumpur and shall be conducted in English language. Insofar as practicable the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitration proceedings and any pending claim or dispute."

[Emphasis Added]

The Court noted that as per Article 33.12 'venue' for arbitration was agreed to be Kuala Lumpur. But the juridical seat was not agreed. Having regard to Article 33.9 above, the Court referred to Article 20 of the UNCITRAL Model Law, which is akin to Section 20 of the Arbitration Act. After so referring the Court held that there are two modes for determining the place of arbitration or to say the 'juridical seat'. First being, by mutual consent of the parties. The other mode is that where the parties do not agree on the juridical seat, the Arbitral Tribunal shall determine the same. Such a power of adjudication has been conferred on the Arbitral Tribunal under Article 20(1) of the UNCITRAL Model Law and Section 20(2) of the Arbitration Act.

Accordingly, the Court observed that in case of absence of agreement between the parties as to the juridical seat, the Arbitral Tribunal is required to determine the same, by taking into consideration the convenience of the parties. However, in the facts of the case there was no such determination by the Arbitrator and the Arbitrator only held the meeting at Kuala Lumpur and signed the award, which the Court opined, does not amount to determination. Therefore, sittings at various places were held to be relatable to venue only and were not treated at par with the seat of arbitration or place of arbitration. The relevant observations of the Supreme Court in ***Hardy Exploration*** (supra) were:

"33. The word 'determination' has to be contextually determined. When a 'place' is agreed upon, it gets the status of seat which means the juridical seat. We have already noted that the terms 'place' and 'seat' are used interchangeably. When only the term 'place' is stated or mentioned and no other condition is postulated, it is equivalent to 'seat' and that finalises the facet of jurisdiction. But if a condition precedent is attached to the term 'place', the said condition has to be satisfied so that the place can become equivalent to seat. In the instant case, as there are two distinct and disjunct riders, either of them have to be satisfied to become a place. As is evident, there is no agreement. As far as determination is concerned, there has been no determination.

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The said test clearly means that the expression of determination signifies an expressive opinion. In the instant case, there has been no adjudication and expression of an opinion. Thus, the word 'place' cannot be used as seat. To elaborate, a venue can become a seat if something else is added to it as a concomitant. But a place unlike seat, at least as is seen in the contract, can become a seat if one of the conditions precedent is satisfied. It does not ipso facto assume the status of seat. Thus understood, Kuala Lumpur is not the seat or place of arbitration and the interchangeable use will not apply in stricto sensu."

[Emphasis Added]

BGS SOMA (supra)

In ***BGS Soma***, the arbitration clause with which the Supreme Court was concerned with, stipulated, "…Arbitration *Proceedings shall be held at New Delhi/Faridabad, India*…" The three-Judge Bench observed that in all the three appeals by the parties, proceedings were held at New Delhi and the awards were also signed at New Delhi and not in Faridabad. The Bench held that in the absence of contrary expression expressed by the parties, it leads to the conclusion that the parties have chosen New Delhi as the seat of arbitration Under Section

20(1) of the Arbitration Act. In ***BGS Soma***, the Bench held that the judgment in ***Hardy Exploration*** (supra) is contrary to the decision of the Constitution Bench in (**BALCO**) and therefore, cannot be considered good law, for it could to lead to a chaotic situation, wherein a foreign award could not only be challenged in the country in which it was made, but also in India U/s 34 of Part I of the Arbitration Act, 1996.

Besides, the Supreme Court referred to a long march of case laws of both, Indian as well as of other International jurisdictions in order to propound a 'test' for determining a 'juridical seat'. After so referring the Court concluded as follows:

"84. On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration Clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the "venue" is really the "seat" of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as "tribunals are to meet or have witnesses, experts or the parties" where only hearings are to take place in the "venue", which may lead to the conclusion, other things being equal, that the venue so stated is not the "seat" of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings "shall be held" at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a Clause designates a "seat" of the arbitral proceedings. In an International context, if a supranational body of Rules is to govern the arbitration, this would further be an indicia that "the venue", so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the "stated venue", which then becomes the "seat" for the purposes of arbitration."

[Emphasis Added]

Mankastu Impex (supra)

In this case, the Petitioner-an Indian Company had entered into a MoU with the Respondent-a Hong Kong Company. Once disputes arose between the parties, the Petitioner approached the Supreme Court U/s 11(6) of the Arbitration Act. Clause 17 of the MoU was the relevant Clause governing the law and dispute resolution and read as under:

"17. Governing Law and Dispute Resolution

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

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

The place of arbitration shall be Hong Kong.

The number of arbitrators shall be one. The arbitration proceedings shall be conducted in English language.

17.3 It is agreed that a party may seek provisional, injunctive, or equitable remedies, including but not limited to preliminary injunctive relief, from a court having jurisdiction, before, during or after the pendency of any arbitration proceeding."

[Emphasis in Original]

The Court referred to the above Clause of the MoU and reiterates the significance of a seat of arbitration, for it determines which court would have the supervisory power over the arbitration proceedings and also carries with it the choice of a country's arbitration/curial law. The Court thereafter, opined thus:

"20. It is well-settled that "seat of arbitration" and "venue of arbitration" cannot be used inter-changeably. It has also been established that mere expression "place of arbitration" cannot be the basis to determine the intention of the parties that they have intended that place as the "seat" of arbitration. The intention of the parties as to the "seat" should be determined from other clauses in the agreement and the conduct of the parties.

21. In the present case, the arbitration agreement entered into between the parties provides Hong Kong as the place of arbitration. The agreement between the parties choosing "Hong Kong" as the place of arbitration by itself will not lead to the conclusion that parties have chosen Hong Kong as the seat of arbitration. The words, "the place of arbitration" shall be "Hong Kong", have to be read along with Clause 17.2. Clause 17.2 provides that "....any dispute, controversy, difference arising out of or relating to the MoU "shall be referred to and finally resolved by arbitration administered in Hong Kong.....". On a plain reading of the arbitration agreement, it is clear that the reference to Hong Kong as "place of arbitration" is not a simple reference as the "venue" for the arbitral proceedings; but a reference to Hong Kong is for final resolution by arbitration administered in Hong Kong. The agreement between the parties that the dispute "shall be referred to and finally resolved by arbitration administered in Hong Kong" clearly suggests that the parties have agreed that the arbitration be seated at Hong Kong and that laws of Hong Kong shall govern the arbitration proceedings as well as have power of judicial review over the arbitration award."

[Emphasis Added]

Ostensibly, the three-Judge Bench in ***Mankastu Impex*** (supra) dogged a bullet, when it declined to comment on the correct or otherwise of both, ***BGS Soma*** (supra) and as well as the earlier three-Judge Bench decision in ***Hardy Exploration*** (supra).

Albeit, in ***Mankastu Impex*** (supra) the Court did not explicitly follow ***Hardy Exploration***, but it does lean towards the view adopted therein, particularly, when the Court has held that the use of the expression "place of arbitration" could not decide the intention of the parties to designate that place as the seat of arbitration and such intention had to be determined from other clauses in the agreement between the parties and their conduct.
This approach of the Court by emphasizing the need for additional evidence of the intention of parties' rather than the mere use of the expression "place of arbitration" is definite indicator that the Court has sided with the view in ***Hardy Exploration*** (supra).

Inox Renewables (supra)
Finally, let us also discuss the recent division Bench decision in ***Inox Renewables*** (supra), which has quoted with approval the infirm decision in ***BGS Soma*** (supra).

The facts in ***Inox Renewables*** (supra) are a little complex and, therefore, must be dealt in detail. A purchase order (PO) was executed between one GFL and the Respondent-Jayesh Electricals,

which contained an arbitration clause, the relevant portion of which reads as follows:

".5 All the dispute[s] and differences if any shall be settled by arbitration in the manner hereinafter provided.

The venue of the arbitration shall be Jaipur.

In the event of arbitrators' award being not acceptable to either party, the parties shall be free to seek lawful remedies under the law of India and the jurisdiction for the same shall be courts in the State of Rajasthan."

[Emphasis Added]

Subsequent thereto, a slump sale was effect by virtue of BTA (Business Transfer Agreement) whereby entire business of GFL was sold to the Appellant-Inox Renewables. Clause 9.11 and 9.12 of this BTA designated Vadodara as the seat of the arbitration between the parties, vesting the courts at Vadodara with exclusive jurisdiction qua disputes arising out of the agreement. Subsequently, disputes arose between the parties and the Respondent-Jayesh Electricals approached the Gujarat HC at Ahmedabad for appointment of an arbitrator U/s 11. On a joint request made by the parties for the appointment of a sole arbitrator, the Gujarat High Court made the appointment.

An award was made in favour of the Respondent-Jayesh Electricals and against the Appellant-Inox Renewables, wherein on the issue of venue/place of arbitration the Arbitrator held thus:

*12.3 There is no controversy as to the constitution of the Tribunal between the parties and the parties have agreed to get their dispute resolved by a sole arbitrator. As per arbitration agreement, the venue of the arbitration was to be Jaipur. However, the parties have mutually agreed, irrespective of a specific Clause as to the [venue, **that the place**] of the arbitration would be at Ahmedabad and not at Jaipur. The proceedings, thus, have been conducted at Ahmedabad on constitution of the Tribunal by the learned Nominee Judge of the Hon'ble High Court of Gujarat."*

[Emphasis Added]

Aggrieved by the award Appellant-Inox Renewables filed an application U/s 34 before Commercial Court at Ahmedabad, where beither party appears to have challenged the arbitrator's observations regarding the place of arbitration. The Ahmedabad commercial Court dismissed the said application on the ground that courts in Vadodara and not Ahmedabad would have jurisdiction over the matter. In reaching this conclusion, the Commercial Court, it seems, relied on the BTA between GFL and Inox Renewables.

Appellant-Inox Renewables challenged the aforesaid order *vide* a Special Civil Application filed before the Gujarat HC under Article 227. The Gujarat High Court, though, dismissed the special civil application and affirmed the order of the Ahmedabad Commercial Court, but made very peculiar observation whereby it referred to clause 8.5 of the purchase order between GFL and the Respondent and opined even assuming that Ahmedabad would have jurisdiction, if one is to go by Clause 8.5 of the purchase order, exclusive jurisdiction being vested in the courts at Rajasthan, the appropriate court would be the court at Jaipur.

In the aforesaid factual matrix, a division Bench of the Supreme Court, while replying upon the decision ***BGS Soma*** (supra) allowed the appeal and set aside the impugned judgment of Gujarat HC and held that that the shifting of the venue from Jaipur to Ahmedabad was really a shifting of the venue/place with reference to section 20(1) of the Arbitration Act and not section

20(3). In other words, it was change in 'juridical seat', which was akin to an exclusive jurisdiction clause, thereby vesting the courts at Ahmedabad with exclusive jurisdiction to deal with the arbitration.

Some of the highlights of the decision in ***Inox Renewables*** (supra) are as follows:

(i) The Court, after referring to the arbitrator's observations in the award with respect to the place of arbitration, found that the parties had by mutual agreement shifted the place or seat of the arbitration from Jaipur to Ahmedabad.

(ii) As to the jurisdiction clause in the PO conferring jurisdiction on the courts in the state of Rajasthan, the Supreme Court observed that the Rajasthan courts were vested with jurisdiction only because parties had originally chosen Jaipur as the seat of arbitration. The Court clarified that once the seat stood changed to Ahmedabad, the courts at Rajasthan would cease to have any jurisdiction.

(iii) The Supreme Court rejected the Respondent's (Jayesh Electricals) submission that the seat of arbitration could have been changed only by a written agreement. The Supreme Court noted that there was no such requirement under the parties' contract. That this fact was recorded in the arbitral award was sufficient for the Court to uphold the change of the seat, more so, since neither party had challenged the arbitrator's ruling as to the seat of arbitration.

Let us encapsulate the key takeaways from the pronouncements discussed hereinabove:

Hardy Exploration (supra)	***BGS SOMA*** (supra) & ***Inox Renewables*** (supra)	***Mankastu Impex*** (supra)
▪ 'Place' and 'seat' are interchangeably used, in the sense that the said words connote a 'juridical seat' of arbitration. ▪ When only the term 'place' is stated or mentioned and no other condition is postulated, it is equivalent to 'seat' and that finalizes the facet of jurisdiction. But if a condition precedent is attached to the term 'place', the said condition has to be satisfied so that the place can become equivalent to seat.	▪ *The Court has equated 'venue' of arbitration to 'juridical seat'.* ▪ *A change in 'venue' ipso facto tantamount to change in 'juridical seat'.*	▪ "Seat of arbitration" and "venue of arbitration" cannot be used inter-changeably. ▪ Mere expression "place of arbitration" cannot be the basis to determine the intention of the parties that they have intended that place as the "seat" of arbitration. ▪ The intention of the parties as to the "seat" should be determined from other clauses in the agreement and the conduct of the parties.

Apparently, the three-Judge bench decision in ***BGS Soma*** (supra) is an unhealthy ruling, which has the effect potentiality of creating a lot of confusion. The said pronouncement, to the author's mind is not a good law, for two-fold reason, that are:

(i) Firstly, it errs for equating 'venue' of arbitration with the 'juridical seat'. This in turn results in the finding that any change in 'venue' *ipso facto* tantamount to change in 'juridical seat'. The same was not at all the view taken by the five-Judge Constitution Bench in ***BLACO.*** There the five Judges only treated at par, a 'place' of arbitration with the 'juridical seat' of arbitration. 'Party autonomy', which has been a thread across the decision in ***BGS Soma*** (supra) has been stretched too far. The Court went overboard to state 'venue' of arbitration is the same as 'seat' of arbitration. Better thing would have been to rule on the merits of the case alone and make ruling a fact centric one, instead of a principle oriented one.

(ii) Secondly, the decision in ***BGS Soma*** (supra) erodes judicial propriety by stating that an earlier co-ordinate bench decision in ***Hardy Exploration*** (supra) is not a good law. This aspect withers down the doctrine of binding precedent, which is of utmost importance in the administration of judicial system, for it promotes certainty and consistency in judicial decisions. Since both the said decisions were of three-Judge bench, it was not open for the Court in ***BGS Soma*** (supra) to hold that the decision in ***Hardy Exploration*** was incorrect and the Court in ***BGS Soma*** (supra) ought to have referred the matter to larger Bench and placed the matter before the Chief justice of India for appropriate directions.

Manifestly, the intricate issue of 'Seat/venue/Place' has led to substantial judicial discourse. There appears to be a crying need for a larger five-Judge Bench to decide the issue once, and for all. Until then it for legal practitioners to employ clear phraseology in arbitration clauses so as to dispel the confusion that exists between 'Seat/venue/Place' and thereby avoid disarray.

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[i] *(2012) 9 SCC 552*
[ii] *Eitzen Bulk A/S v. Ashapura Minechem Ltd. and Anr. (2016) 11 SCC 508*
[iii] *(2019) 13 SCC 472*
[iv] *(2020) 4 SCC 234*
[v] *(2020) 5 SCC 399*
[vi] *MANU/SC/0285/2021*

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