# SEAT VS VENUE OF ARBITRATION: THE NECESSITY, THE ABSURDITY AND THE ROAD AHEAD

Utsav Garg, BA LLB(H), Amity Law School, Noida

## ABSTRACT

Arbitration has provided the Indian judiciary with an alternate system for resolving disputes among parties in order to reduce the burden of the courts, which has also proved itself to be quite effective in solving disputes relating to all kinds of matters ranging from civil to commercial, industrial and even family law. In the current scenario, ADR or Alternate Dispute resolution has without doubt become the preferred form of dispute resolution for people doing businesses which operate in India as well as for those who are doing business with Indian firms, when the only other choice is to go for litigations in already overburdened courts which is a sure shot way to suffer under painstakingly slow adjudication processes. However, the Arbitration law in India has itself been not free of controversies over the years. One of the major problems faced by arbitrators across the world including India is the question of determination of the 'Venue' and 'Seat' of Arbitration. The uncertainty which prevails in the Indian Arbitral jurisprudence relating to seat and venue has caused unnecessary friction in the otherwise smooth sailing process since the seat of arbitration has direct consequences upon the procedural and substantive law applicable as well as the enforceability of the Arbitral award. This paper uses the qualitative research methodology to study the various aspects of the confusion which exists in addition to the advances which have already been made regarding the dispute and then try and suggest the way forward to solve this conundrum as well as the way to sidestep such roadblocks effectively.

**Keywords:** arbitration, seat of arbitration, venue of arbitration, seat vs venue, shashoua principle, ADR, exclusive jurisdiction, place of arbitration

## 1. Introduction

While the Arbitration and Conciliation Act, 1996[1], is a pretty straight forward piece of legislation, the latest controversy which has picked up traction in the arbitral jurisprudence is the seat-venue conundrum which has also lead to considerable uncertainty in Indian courts on how to determine the seat of arbitration. Even though the Supreme Court of India has provided us with some judgements of great import upon such nuances of seat, venue and place of arbitration, the picture is not yet fairly clear and there remains considerable uncertainty regarding the same.

The confusion arises due to the fact that the Arbitration and Conciliation Act, 1996, does not provide any clear definition for "seat" and "venue" of arbitration but has only defined the "place of arbitration".

The general understanding regarding the difference between the seat and venue of arbitration is that the "seat of arbitration" refers to the place whose courts will be having jurisdiction over the enforceability and nullity claim of an award. The selection of any location as the seat of arbitration will have the effect that the courts of that location will have supervisory jurisdiction over the arbitration proceedings and the law of that jurisdiction will be the procedural law of arbitration while, the "venue of arbitration" refers to the physical location where the proceedings i.e. the arbitration dealings or hearings are heard.

It is imperative to understand that the Arbitration and Conciliation Act, 1996, does not explicitly define the terms 'seat' or 'venue'. The Section 20 of the Act[2] only mentions the 'place of arbitration' and even there the section only says that parties are free to choose a place of arbitration. It has been further provided that in case no place of arbitration has been designated, it shall be determined by the arbitral tribunal on the basis of the circumstances of the case and with regard to the convenience of the parties. Because of this ambiguity which has been created in absence of any crisp and clear definition, the terms venue and seat of arbitration have been used loosely and interchangeably thus leading to some controversies and disputes regarding the same. Noticeably, even though the Law Commission of India had suggested that separate and clear definitions should be provided to both 'seat' and 'venue' under the 2015

[1] THE ARBITRATION AND CONCILIATION ACT, 1996, ACT No. 26 OF 1996.
[2] Ib., Section 20.

Amendment Act[3], the same was not adapted in the amendment.

**2. Shashoua Principle**

In order to understand the principle used by the Indian courts to distinguish between the concepts of "seat" and "venue" of arbitration, in the context of international arbitration, it becomes necessary to understand the ratio decidendi laid down in the a case decided by the England and Wales High Court, i.e. the Roger Shashoua v. Mukesh Sharma[4]. The principle is also commonly known in India as the Shashoua Principle by the courts in India. In this case, the parties had selected London as the venue of arbitration but any seat of arbitration had not been expressly selected in the arbitration agreement signed between the parties. The judge in this case was of the opinion that since the parties have only agreed to select a venue of arbitration and have not appointed any place as a seat of arbitration, it would be a much better approach to refer venue as the seat of arbitration. The Shashoua Principle laid down the way for the courts to take the position that in cases where the venue or place of arbitration has been specified and no mention has been made as to the seat of arbitration in the arbitration agreement or arbitration clause, it would be safe to assume that the parties meant to have the venue of the arbitration or the place of arbitration accredited as the seat of arbitration, in cases where the parties have opted for a supranational body of rules to govern the arbitration and no other indication has been made to the contrary.

Following the Shashoua vs. Sharma case[5], this principle had been very well interwoven with the Indian ADR jurisprudence. The Supreme Court of India has recognised and upheld this principle in a lot of cases.

**3. Bharat Aluminium Co vs. Kaiser Aluminium Technical Services Inc.[6]**

Some understanding was laid upon the aspect of "seat" of arbitration in the ***Bharat Aluminium Co vs. Kaiser Aluminium Technical Services Inc.***[7] by the Supreme Court of India. In this case, the arbitration agreement had designated a foreign country as the venue or the place of arbitration and at the same time had opted for Arbitration and Conciliation Act[8] to be the *lex arbitri* i.e. the law governing the arbitration proceedings. The arbitration agreement stated that

---

[3] The Arbitration and Conciliation (Amendment) Act, 2015, No. 3 of 2016.
[4] Roger Shashoua v. Mukesh Sharma, (2009) 2 Lloyd's Rep 376.
[5] Ibid.
[6] Bharat Aluminium Co vs. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.
[7] Ibid.
[8] Supra note 1.

"*The Court of Arbitration shall be wholly in London".* The Supreme Court of India held that the legal position which arises out of the synopsis of all decisions is that the choice of a foreign country by the parties as the seat of arbitration stipulates that the parties have decided that the law of that country will have be binding upon the arbitration proceedings with respect to the conduct and supervision of arbitration. The court further held that the choice of Arbitration and Conciliation Act, 1996, as the *lex arbitri* or the curial law will have no effect over the choice of seat of arbitration and thus, Part I of the Act[9] will not be applicable over the arbitration proceedings and thus will not enable the courts in India to have supervisory jurisdiction over the arbitration proceedings and the award. This means that the party which seeks to resist the enforcement of the award cannot do so under the Section 34 of the Arbitration and Conciliation Act[10].

Thus this case served to reaffirm the Shashoua principle and establish it more securely in the Indian arbitrational jurisprudence. On the other hand it also served to affirm the importance of determining the seat of arbitration so that the applicability of the Part I of the Act can be determined. Also, it was established in the same case that in cases where the seat of arbitration has been designated to be outside India, the parties cannot make any application for interim relief under Section 9 of the Act[11].

**4. Enercon (India) Limited and Ors vs. Enercon GmbH and Anr.** [12]

It was in the case *of* ***Enercon (India) Limited and Ors vs. Enercon GmbH and Anr.***[13], that the Supreme Court of India further provided a clear cut distinction between the seat and venue of arbitration. In this case, the arbitration had been included in an Intellectual Property Licensing Agreement (IPLA) between the parties, where it had been specified that the IPLA shall be governed by the Indian law and the venue of arbitration had been designated to be London where the provisions of the Indian Arbitration and Conciliation Act, 1996 were to be applied. When the dispute arose between the parties regarding the validity of the arbitration clause, parallel proceedings were commenced by both the parties both in India and in England. Enercon India started proceeding before a Daman Trial Court and then the High Court of Judicature at Bombay in order to have the arbitration clause be held invalid. Subsequently,

[9] Supra note 1.
[10] Supra note 1, Section 34.
[11] Supra note 1, Section 9.
[12] Enercon (India) Limited and Ors. vs. Enercom GMBH and Anr., Supreme Court of India, CIVIL APPEAL NO.2086 OF 2014, d.d. 14 February 2014.
[13] Ibid.

Enercon India appealed to the Supreme Court of India for the same. The Supreme Court of India held that the seat of arbitration is to be India. The SC relied on the judgement given in the case of ***Naviera Amazonica Peruana S.A. vs. Compania Internacional De Seguros Del Peru***[14] and applied the implied and closest connection test to determine the seat of arbitration. The Supreme Court held that the Indian law was chosen to be the law which will govern all the aspects of the arbitration. It was pointed out in the case that "the substantive law of the contract in Indian Law; law governing the arbitration is Indian arbitration law; curial law is that of India; Patents law is that of India; IPLA is to be acted upon in India; enforcement of the award is to be done under the Indian law; and all the assets are also in India."[15] Thus applying the test of implied and closest connection the seat of arbitration was held to be India.

Although, the Supreme Court was ever eager to apply the same judgement as in the 2012 BALCO case but the facts of the case ascertained that since the Indian Arbitration law governs the arbitration and not any supranational or transnational body of law, the venue could not be construed to be the seat of arbitration. Adding to it the fact that the parties involved in the case had no connection whatsoever with London as one party was from India and the other was German, there was no sufficient reason to designate England or London as the seat as against the choice of India.

Since after the BALCO judgement it had been laid down that the Part I of the Arbitration and Conciliation Act 1996 would only be applicable in cases where the seat of arbitration was India and the parties themselves had specifically applied portions from the Part I, it implies that the parties also wanted the seat of arbitration to be India. There is another facet to the same case which needs to be kept in mind though. Had the English court which had been approached by the Enercon GmbH upheld that it had supervisory jurisdiction over the in respect to the arbitration proceedings, the outcome of the seat-venue debate would have been much different. The English court had given importance to the 'principle of comity' between courts in different jurisdictions and took the position that since the issue of the seat was pending before the Indian courts it could not find that the correct seat was London and thus assume supervisory jurisdiction.[16] Even then the English judge, Mr Justice Eder had concluded that he considered the word 'venue' in the arbitration clause to be the same and synonymous with the word 'seat', where no place had been expressly designated as the seat of arbitration. He was of the opinion

[14] Naviera Amazonica Peruana S.A. vs. Compania Internacional De Seguros Del Peru, [1988] 1 Lloyd's Rep. 116.
[15] Supra note 12.
[16] ENERCON GmbH vs. ENERCON (INDIA) LIMITED, [2012] EWHC 689 (Comm).

that the reference to the Indian Arbitration and Conciliation Act did not make any difference to the above interpretation.[17]

However all done and dusted the case was decided by the Supreme Court of India and the prevailing position taken by the court was that in light of all the arguments, the seat of arbitration is India.

### 4.1. Principle of Exclusivity of Jurisdiction

There is one more takeaway from this case. The SC opined that once the seat of arbitration had been fixed at India, then it is the Indian courts that would have exclusive jurisdiction to exercise supervisory powers over the arbitration. This principle laid forth in the Enercon case[18] is more commonly known as the ***Principle of Exclusive Jurisdiction***. Thus it has been laid down that designating a place as the seat of arbitration has some far reaching consequences as to the substantive aspects of the arbitration proceedings themselves and thus the question as to 'what will be the seat of arbitration' needs to be answered quite adamantly and carefully. Such is the importance of the seat of arbitration.

#### 4.1.1. Swastik Gases (P) Ltd vs. Indian Oil Corporation Limited[19]

In this case, the Supreme Court's decision reiterated the Principle of Exclusivity of Jurisdiction. The arbitration agreement contained a clause that the agreement would be subject to the jurisdiction of the courts at Kolkata. However, the appellant filed an application under the Section 11(6) of the Arbitration and Conciliation Act[20] before the High Court of Rajasthan for the appointment of an arbitrator. The Rajasthan High Court rejected the application citing the exclusive jurisdiction of the Kolkata courts. However, the appellant took the matter to the Supreme Court contenting that part of the cause of action arose in Rajasthan and by that logic Rajasthan High Court shall have due jurisdiction. The Supreme Court held that while it was not disputed that part of cause of action has arisen both in Jaipur and Kolkata, the exclusive jurisdiction clause in the agreement made the intention of the parties to exclude the jurisdiction of other courts clear. Therefore, the Supreme Court held that the courts at Kolkata alone would have exclusive jurisdiction.

---

[17] Ibid.
[18] Supra note 12.
[19] Swastik Gases (P) Ltd v Indian Oil Corporation Limited, (2013) 9 SCC 32.
[20] Supra note 1, Section 11(6).

### 4.1.2. *Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited*.[21]

The same principle of the exclusivity of jurisdiction had been reiterated by the Supreme Court in the case **Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited**. The court opined that in case of any arbitration proceedings, once the seat of arbitration has been set it becomes synonymous to an exclusive jurisdiction clause. Therefore, the courts situated at the 'seat' have the exclusive power to exercise jurisdiction and control to regulate the proceedings of arbitration. The court further provided that one such a seat has been set and such exclusive jurisdiction has been assumed by the courts at the seat even the courts where the cause of action arose will have no jurisdiction over the dispute and the subsequent proceedings.

Thus, ***Principle of Exclusivity of Jurisdiction*** provides an additional cover of importance to the seat of arbitration and poses yet another argument in the favour of correctly and effectively distinguishing between the venue and seat.

## 5. Union of India vs. Hardy Exploration and Production (India) Inc.[22]

The parties in this case had entered into a product-sharing-contract (PSC) for the extraction, development and production of hydrocarbons in a geographic block in India. Disputes arose between the parties as the Union of India allegedly relinquished the rights of Hardy Exploration and Production (India) Inc. (HEPI) to the geographic block prematurely. HEPI initiated arbitration proceedings against the Union of India for re-entry to the geographic block and payment of interest on its investment. The arbitral tribunal rendered its award in favour of HEPI in February 2013. The award was signed and declared in Kuala Lumpur.

However in the PSC agreement the clause related to the applicable laws and arbitration said that,

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

*"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."*

[21] Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited, Supreme Court of India, CIVIL APPEAL NOS. 5370-5371 OF 2017, d.d. 19 April 2017.
[22] Union of India vs. Hardy Exploration and Production (India) Inc., 2018 SCC Online SC 1640.

*"Arbitration proceedings shall be conducted in accordance with the UNCITRAL 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."*

*"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."*

The Union of India moved to the Delhi High Court for setting aside the award under the Section 34 of the Arbitration and Conciliation Act 1996[23]. The HEPI opposed the application contenting that since the seat of arbitration was Kuala Lumpur, the award is a "foreign" award and thus cannot be included under the ambit of Section 34[24]. The Delhi HC agreed that the place of making of award was Kuala Lumpur and thus Section 34[25] would not apply. The Union of India appealed the judgement of the Delhi High Court before the Supreme Court of India.

The Supreme Court noted that an arbitration clause must be read holistically to understand its intentions to determine the seat of arbitration. The Supreme Court clarified that there is no confusion with regard to the difference between the venue and the seat of arbitration. However, if the "venue" of arbitration alone is mentioned in the arbitration clause, it can be considered the "seat" of arbitration only if some other factors are added to it as a concomitant. If the intention of the arbitration clause through a choice of venue and appended factors leads to conclusion that the seat is outside India, Part I of the Act[26] will be excluded. Interpreting the facts of the case, the Supreme Court noted that the arbitration clause between the parties makes a reference to the "venue" as Kuala Lumpur.

Since the arbitration clause referred to the UNCITRAL Model Law[27] as the curial law of arbitration, the SC interpreted its provisions such as Article 20(1)[28] which states that *"The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of*

[23] Supra note 1, Section 34.
[24] Ibid.
[25] Ibid.
[26] Supra note 1.
[27] UNCITRAL Model Law on International Commercial Arbitration, United Nations Document A/40/17, annex 1 and A/61/17, annex 1.
[28] Ib., Article 20(1).

*the case, including the convenience of the parties"*, and Article 31[29] which states that *"The award shall state its date and the place of arbitration as determined in accordance with Article 20(1). The award shall be deemed to have been made at that place"*.

In the instant case, a three judge bench of the Supreme Court noted that although the award was signed and declared in Kuala Lumpur, there was no express determination of the place of arbitration by the arbitral tribunal. The Court opined that "determination" would require a positive act and an express opinion. Reversing the judgment of the Delhi High Court, the Supreme Court held that the venue Kuala Lumpur could not be considered as the place or seat of arbitration. The Supreme Court concluded that courts in India would have jurisdiction to consider the application for setting aside of the award under Section 34 of Part I of the Arbitration and Conciliation Act 1996 as the award rendered is not a "foreign award".

Thus, in this case the Supreme Court of India deviated from its earlier position on the subject of seat vs. venue debate and set aside the Shashoua Principle. The Court declared that the venue does not automatically assume the position of the seat. It requires a positive act and something concomitant attached to it. Similarly, a place becomes a seat when one of the conditions precedent are satisfied. It does not assume the status of the seat of arbitration on its own.

**6. BGS SGS Soma JV vs. NHPC Ltd.[30]**

In the year 2019, the Supreme Court of India had to revisit the Seat vs. Venue conundrum and therein reinstated the Shashoua Principle in contrast to the previous judgement of the same court in the Hardy Exploration case[31].

In the case, the Supreme Court of India set out a Bright-Line test for determining whether or not a venue which has been chosen by the parties for the arbitration qualifies as the seat of arbitration.

I. If a named place is identified in the arbitration agreement as the "venue of arbitration proceedings", the use of the term "arbitration proceedings" means that the entire arbitration proceedings including the making of the award are to be conducted at such place of choice. In such a case, the venue of arbitration automatically assumes the position of the seat of arbitration.

[29] Ib., Article 31.
[30] BGS SGS Soma JV vs. NHPC Ltd., 2019 SCC Online SC 1585.
[31] Supra note 22.

II. In contrast, if the arbitration agreement contains language such as "tribunals are to meet or have witnesses, experts or the parties" at a particular venue, this suggests that only hearings are to be conducted at such venue. In this case, with other factors remaining consistent, the chosen venue cannot be treated as the seat of arbitration.

III. If the arbitration agreement provides that arbitration proceedings "shall be held" at a particular venue, then that indicates arbitration proceedings would be anchored at such venue, and therefore, the choice of venue is also a choice of the seat of arbitration.

IV. The above tests remain subject to there being no other "significant contrary indicia" which suggest that the named place would be merely the venue for certain proceedings and not the seat of arbitration.

V. In the context of international arbitration, the choice of a supranational body of rules to govern the arbitration (for example, the ICC Rules) would further indicate that the chosen venue is actually the seat of arbitration. In the context of domestic arbitration, the choice of the Indian Arbitration and Conciliation Act, 1996 would provide such indication.

It has to be noted that while in the Hardy Explorations case[32] it had been laid that the venue of arbitration cannot be construed to be the seat of arbitration in absence of any contrary indication, the BGS Soma JV judgement[33] laid down that the venue of arbitration ipso facto assumes the position of the seat of arbitration in absence of any "significant contrary indicia", i.e., any significant contrary indication.

But even then the Supreme Court did not provide any explanation as to what will constitute significant contrary indication. The Court did not even provide any clarification whether any jurisdiction clause which provide jurisdiction to the courts of any place other than the venue of arbitration will constitute significant contrary indication. Thus, the Supreme Court in this whole-heartedly adopted the Shashoua principle and reinstated it in the Indian arbitration jurisprudence. The Supreme Court in its course of supporting and upholding the Shashoua Principle went so far as to hold that the earlier decision of the Supreme Court in the Union of India vs. the Hardy Exploration and Production (India) Inc.[34] was *per incuriam* since it had failed to follow the Shashoua Principle previously approved by the five judge constitutional

[32] Supra note 22.
[33] Supra note 30.
[34] Supra note 22.

bench decision in the BALCO case[35]. However, it is often said that since the benches in both cases constituted of 3 judges, a concurrent bench could not have decided Hardy Exploration[36] judgement to be *per incuriam*.

**7. Mankastu Impex (P) Ltd vs. Airvisual Ltd.**[37]

This case when it came before the Supreme Court was a beast of a different kind in the seat-venue debate. The agreement between the parties contained no mention of the words 'seat' and 'venue'.

Mankastu Impex Pvt Ltd., an Indian company, had entered into a Memorandum of Understanding (MoU) containing an arbitration agreement with Airvisual Ltd. which is a firm based in Hong Kong. The arbitration agreement contained the following clauses:

*"any dispute, controversy... shall be referred to and finally resolved by arbitration administered in Hong Kong"*

*"the place of arbitration shall be Hong Kong..."*

The governing clause in the MoU provided that:

*"this MoU is governed by the laws of India... and the courts of New Delhi shall have jurisdiction"*

Upon the arising of a dispute, Mankastu approached the Supreme Court of India under the Section 11(6) of the Arbitration and Conciliation Act[38] for the appointment of a sole arbitrator. They did so based on the argument that since the Indian law was the governing law and courts at New Delhi had jurisdiction, the seat of arbitration was New Delhi, and accordingly, the Supreme Court could appoint a sole arbitrator. It further argued that Hong Kong was only the venue of arbitration and not the seat of arbitration. In doing so, Mankastu relied on the Hardy Exploration[39] judgement of the Supreme Court.

Airvisual Ltd. contested this action of Mankastu on the grounds that the arbitration agreement provided that the place of arbitration shall be Hong Kong and such arbitration shall be

---

[35] Supra note 6.
[36] Supra note 22.
[37] Mankastu Impex vs. Airvisual Ltd., 2020 SCC Online SC 301.
[38] Supra note 1, Section 11(6).
[39] Supra note 22.

administered in Hong Kong. They argued that because the arbitration agreement provided such, the courts in India did not have the jurisdiction to appoint a sole arbitrator. In doing so, Airvisual relied upon the BGS Soma JV[40] judgement of the Supreme Court of India.

In response to this, Mankastu employed the much used argument that since the benches in both cases constituted of 3 judges, a concurrent bench in the BGS Soma JV case[41] could not have decided Hardy Exploration judgement[42] to be per incuriam and thus it continued to be good law. Thus this case had been set on the path to essentially become a confrontation between the judgements of the respective benches in the respective previously decided cases.

However, instead of affirming the BGS Soma JV[43] judgement and ending the controversy, the Supreme Court of India chose to sidestep the entire disagreement by employing a different method of determining the seat. Supreme Court noted that the use of the expression 'place of arbitration' could not provide any decisive insight upon the intention of the parties to designate a place as the seat of arbitration and other clauses, in addition to the conduct of the parties, need to be referred to draw judgement upon the same so that the true intention of the parties could be construed. The SC referred to the clause which specified that such arbitration was to be *administered* in Hong Kong, and ultimately held that the parties had intended to designate Hong Kong as the seat of arbitration.

Thus, in this case Supreme Court established the position that mere mention of a place of arbitration does not imply the place to be designated as the seat of arbitration. In order to reach a conclusive decision regarding the same it is necessary to observe and take into account further provisions of the agreement along with the conduct of the parties to sketch out the true intentions of the parties.

### 8. M/S. Inox Renewables Ltd. vs. Jayesh Electricals Ltd.[44]

This case presented a problem before the Supreme Court of India which was quite different from the previous cases which the apex court had encountered with regards to the problem of determining the seat of arbitration. In this case the Supreme Court had to decide upon the

[40] Supra note 30.
[41] Supra note 30.
[42] Supra note 22.
[43] Supra note 30.
[44] M/S. Inox Renewables Ltd. vs. Jayesh Electricals Ltd., Civil Appeal No. 1556 of 2021, Arising out of SLP (C) No. 29161 of 2019.

implications of changing the venue or place of arbitration by the mutual consent of the parties.

M/S. Gujarat Flourochemicals Limited ('GFL') and Jayesh Electricals Limited ('JEL') entered into an Agreement cum Purchase Order for manufacture and supply of power transformers to wind farms. The Purchase Order contained an arbitration clause which fixed Jaipur as the venue of arbitration. If the award were to be unacceptable to either party, it was agreed that the parties could seek remedies under Indian law; and that the jurisdiction for the same will be with the courts of Rajasthan. The Agreement cum Purchase Order contained the following clauses:

*"all disputes and differences if any shall be settled by arbitration in the manner hereinafter provided… **The venue of 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 with the courts of Rajasthan"*

While the agreement was still valid, GFL entered into a Business Transfer Agreement (BTA) with M/S. Inox Renewables Ltd., in which the entire business of GFL was transferred to Inox in a slump sale. The BTA also contained an arbitration clause which fixed Vadodara as the seat of Arbitration and the exclusive jurisdiction with respect to the disputes arising out of the agreement was also vested with the courts at Vadodara. Jayesh Electricals was not a party to the BTA. Thereafter when some disputes arose between Inox and Jayesh Electricals, they applied jointly to the Gujarat High Court for the appointment of a sole arbitrator under Section 11(6) of the Act[45]. The arbitrator passed an award in the favour of Jayesh Electricals which was challenged by Inox in the Commercial Court of Ahmedabad. It had been recorded in the award passed by the sole arbitrator that:

*"As per the arbitration agreement, the venue of arbitration was to be Jaipur. However, the parties have mutually agreed, irrespective of a specific clause as to the venue, that the place of arbitration would be at Ahmedabad and not at Jaipur. The proceedings, thus, have been conducted at Ahmedabad…"*

The court dismissed the application for the want of jurisdiction and held that the proper court to file an appeal was at Vadodara. Inox further filed a Special Civil Petition before the Gujarat High Court where it was dismissed for the same reason that the court did not have jurisdiction

[45] Supra note 1, Section 11(6).

and it was held that since both are parties to the Purchase Order, due to the 'exclusive jurisdiction' clause therein being in favour of courts at Jaipur, the respective courts will have jurisdiction and not the courts at Vadodara or Ahmedabad.

Inox moved to the Supreme Court of India with a Special Leave Petition (SLP). Inox argued that the judgement of the Gujarat High Court correctly held that the BTA was irrelevant but it failed to consider that the Award had specifically recorded that the venue or place of arbitration had been shifted to Ahmedabad by mutual consent. Inox based their argument on the judgement in the case of ***BGS SGS Soma JV vs. NHPC Limited***[46].

Jayesh Electricals contended that according to the decision of the Supreme Court in ***Videocon Industries Limited vs. Union of India and Anr***[47] and the ***Indus Mobile Distributor Private Limited vs. Datawind Innovations Private Limited***[48], the place of agreement cannot be shifted without a written agreement between the parties. It was further argued that what was shifted by mutual consent of parties was merely the venue of arbitration and not the seat or place of arbitration.

The Supreme Court while issuing the judgement in the case relied on its judgement in ***BGS Soma JV*** case[49] and rejected the contentions of the Jayesh Electricals. It referred to the arbitral award and observed that the venue of arbitration was specifically shifted to Gujarat by mutual consent of the parties. It held that the Purchase Order must be read as a whole. The clauses of seat and venue must be read together, as the Courts of Rajasthan are vested with exclusive jurisdiction only because the parties wanted Jaipur to be the venue. Hence, the change in venue to Ahmedabad, as recorded by the arbitrator, divested the exclusive jurisdiction from the Courts of Rajasthan and placed it in the Courts of Ahmedabad. Thus, the Court concluded that a change in venue by mutual consent of the parties was akin to shifting the seat of arbitration to the new venue. Thus by the way of depending on the ***BGS Soma JV*** case[50] to decide this judgement, the Supreme Court upheld its previous decision in the aforementioned case and made the Bright-Line test binding over the future cases.

[46] Supra note 30.
[47] Videocon Industries Limited vs. Union of India and Anr., 2011 6 SCC 161.
[48] Supra note 21.
[49] Supra note 30.
[50] Supra note 30.

## Conclusion

Over the years there has been a lot of fluctuation in the stand of the Indian arbitration jurisprudence and the Supreme Court of India over the issue of Seat and Venue debate which is in itself a very relevant debate in the contemporary legal system when the country and its legislative and legal institutions are continuously moving towards adopting ADR over the conventional methods of dispute resolution. Litigation on the determination of the seat/venue conundrum is becoming increasingly rampant.

Before the latest Inox case there were two different judicial opinions which had been taking form in determining the seat of arbitration: one was that of the Shashoua Principle which had been adopted in the ***Shashoua vs. Sharma***[51] case and was further propounded upon in the ***BGS Soma JV*** case[52], and the another one which favoured the concomitant factor test of the ***Hardy Exploration*** case[53].

The Inox case[54] has clearly chosen to favour the first line of judicial opinion. The decision of the SC in the case will be binding on such cases before the Indian Courts where the seat of the arbitration has not been declared and only the venue of arbitration has been identified in the arbitration clause. If the conduct of the parties shows that the venue was in fact intended to be the seat, then the Court would consider the venue to be tantamount to the seat of arbitration in such cases.

However, seeing the trend of the judicial decisions upon the issue or determination of seat over the time there cannot be a sure shot guarantee regarding the stand which the Supreme Court of India might take in the next case which comes before it. It cannot be denied that the seat of arbitration holds a much greater significance than the venue of arbitration with regards to the arbitration proceedings. So any existing ambiguity in this regard can be used by some contumacious parties to derail the process of arbitration by adopting delaying tactics and challenging the jurisdiction of the courts of the seat. Thus, it would be well advisable for the parties to use crystal clear and express language to designate the separate 'venue' and 'seat' of arbitration. If so desirable, it can also be mentioned by the parties that the seat of arbitration will be the governing law of arbitration and it will remain immune to change even if the

[51] Supra note 4.
[52] Supra note 30.
[53] Supra note 22.
[54] Supra note 44.

hearings happen at different places. It would also be well advisable that the parties make good use of the Principle of Exclusivity of Jurisdiction by inducting the appropriate clauses in the Arbitration Agreement, so that the status of the desired seat of arbitration remains firm and unmoved.