

Mere expression “place of arbitration” is not determinative of 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. (Supreme Court of India)

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Mankastu Impex Private Limited v AirVisual Limited

Court: High Court of Bombay (Nagpur) | **Case number:** Arbitration Petition No. 32 of 2018 |
Citation: 2020 SCC OnLine SC 301 | **Bench:** R Banumathi, AS Bopanna and Hrishikesh Roy JJ | **Date:** 5 March 2020

A. The dispute resolution clause

Mankastu, an Indian company, and AirVisual, a Hong Kong company, had a memorandum of understanding (“the MoU”) for sale and distributorship in India of air quality monitors.

The governing law and dispute resolution clause of the agreement provided in material part that:

- (a) “This MoU is governed by the laws of India”. (clause 17.1)
- (b) “[C]ourts at New Delhi, shall have the jurisdiction”. (clause 17.1)
- (c) “Any dispute shall be referred to and finally resolved by arbitration administered in Hong Kong”. (clause 17.2)
- (d) “The place of arbitration shall be Hong Kong. The number of arbitrators shall be one. The arbitration proceedings shall be conducted in English language”. (clause 17.2)
- (e) “A party may seek injunctive remedy from a court having jurisdiction, before, during or after the pendency of any arbitration proceeding”. (clause 17.3)

When a dispute arose between the parties, Mankastu applied to the Supreme Court under Section 11 (6) ACA for the appointment of an arbitrator.¹ AirVisual objected.

B. The question before the Court and its decision

The question before the court was, what was the seat of arbitration? If it was Hong Kong, as AirVisual argued, the Indian court had no jurisdiction.² If, however, the seat was India, the court had jurisdiction.

Speaking for the 3-judge bench, Banumathi J found that the seat of arbitration was at Hong Kong. As a consequence, only the Hong Kong courts had “supervisory power over the arbitration proceedings”.

She also then considered the effect of Clause 17.1, which provided that the “courts at New Delhi shall have the jurisdiction”, and found the answer in Clause 17.3 by which parties had agreed that “a court having

¹Earlier Mankastu had also filed an application under Section 9 for interim measures against Air Visual and IQAIR, a non-signatory. Mankastu mainly alleged that, contrary to the MoU, Air Visual had sold its business to IQAIR without the latter assuming any liability or obligations of the existing contracts. The matter—still pending—came up for hearing on several occasions from 13 December 2019 to 14 February 2020. The question of the seat was not considered by the court presumably because it does not matter for an application under Section 9 ACA whether arbitration is seated in India or outside [per proviso of Section 2 (2) ACA which permits Indian courts to grant interim measures in a foreign seated arbitration].

²Because it is the law of the arbitral seat that governs a host of matters relating to the conduct and administration of an arbitration. These include selection and removal of arbitrators, as well the question which court has jurisdiction. And it is the court at the arbitral seat that has jurisdiction over these matters.

jurisdiction” may grant an interim measure before, during or after the arbitration proceedings. She said Clause 17.1 gives the courts at New Delhi (a limited) jurisdiction to grant interim relief under Section 9 ACA.

C. The court’s reasons

These were the courts reasons: –

- (a) First, Banumathi J found that the matter would be an international commercial arbitration within the meaning of Section 2(1)(f) ACA as AirVisual was a Hong Kong company.
- (b) Second, that preliminary point out of the way, the court then referred to Section 2 (2) ACA (“this part shall apply where the place of arbitration is in India”) and noted in excerpt paragraph 194 of *Bharat Aluminum Company and others Kaiser Aluminum Technical Service, Inc. and others*, (2012) 9 SCC 552 (BALCO). Paragraph 194 of BALCO briefly states the conclusion of that judgment, namely, that the ACA has accepted the territoriality principle, and Part I of ACA does not apply to a foreign seated arbitration.
- (c) Third, then after noting some arguments, Banumathi J pointed to the importance of the seat of the arbitration citing *Enercon (India) Limited and others Enercon GMBH and another*, (2014) 5 SCC 1, a 2-judge bench decision of the Supreme Court of India by Surinder Singh Nijjar and F. M. Kalifulla JJ.
- (d) Fourth, she said it is well-settled that “seat of arbitration” and “venue of arbitration” cannot be used interchangeably. She noted that mere expression “place of arbitration” does not mean that the parties selected a seat, and the intention to choose a seat should be determined from other clauses of the agreement and conduct of the parties.

“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.” (emphasis added)

- (e) Fifth, she applied that statement of principle to the facts and said that 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.
- (f) Sixth, she referred to another clause of the agreement (the dispute “shall be referred to and finally resolved by arbitration administered in Hong Kong”) and said that on a “plain reading of the arbitration agreement” (that is, the two lines of Clause 17.2 together) it is clear that: –
 - (i) The reference to Hong Kong as “place of arbitration” is not a reference to the simple as the “venue” for the arbitral proceedings but final resolution by arbitration administered in Hong Kong.
 - (ii) The phrase “shall be referred to and finally resolved by arbitration administered in Hong Kong” clearly suggests that the arbitration is seated at Hong Kong and the “laws of Hong Kong shall govern the arbitration proceedings as well as have power of judicial review over the arbitration award”.
- (g) Seventh, she again emphasised that the expression “arbitration administered in Hong Kong” is an indicia that the seat of arbitration is at Hong Kong.
- (h) Eight, she cited *Eitzen Bulk A/S v. Ashapura Minechem Ltd.* and another (2016) 11 SCC 508 (F M Kalifulla and S A Bobde JJ, decided on 13 May 2016) for the proposition that “when the parties have chosen a place of arbitration in a particular country, that choice brings with it submission to the laws of that country”. She also cited *Indus Mobile Distribution (P) Ltd. v. Datawind*

Innovations (P) Ltd. and others (2017) 7 SCC 678 for the proposition that choice of seat is akin to an exclusive jurisdiction clause.

- (i) Ninth, the court responded to Mankastu’s arguments about the New Delhi-jurisdiction clause and held that the clause meant giving the parties the right to apply for interim relief in the New Delhi courts. She noted that even in a foreign seated arbitration, the proviso to Section 2 (2) ACA authorises the following (but not an application under Section 11):
- (i) an application for interim measure (under Section 9);
 - (ii) an application for the court’s assistance in taking evidence (under Section 27);
 - (iii) “appeal against the orders” under “Section 37 (1) (a)” (*sic*)³; and
 - (iv) an appeal to the Supreme Court (and not providing for a second appeal) (under Section 37 (3)).

D. Editor’s comments

The court’s reasoning is fundamentally flawed, and yet its decision right.

Let us consider the following statements, which are the basis of the court’s reasoning

“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.”

These are wrong propositions:

- (a) First, the place of the arbitration *is* the seat of arbitration. And if that is true, as now almost universally acknowledged, it must be false and inherently contradictory to say that the “place of arbitration” cannot be the basis of determining the seat. It is as good as saying that the seat of arbitration cannot be the basis of determining the seat of arbitration!
- (b) Arbitration based on the territorial theory works because of the concept of legal home of the arbitration. That concept has come to be signified by the synonymous expression “seat” and “place”. The agreement that “the place of arbitration shall be Hong Kong” should be considered as just another way of saying that the “seat of arbitration shall be Hong Kong”.
- (c) There is an overwhelming weight of authority to say that place of arbitration and seat of arbitration are synonymous: –
 - (i) The New York Convention refers to “the law of the country where the arbitration took place”. No one suggests that this “place” is not a reference to the seat. [Article V(1)(d)].
 - (ii) The UNCITRAL Model Law does not use the word “seat” but its synonym “place”. Article 20 is titled “place of arbitration”, and Article 20 (1) says that “the parties are free to agree on the place of arbitration”. It cannot possibly be suggested that this is not a provision for the seat of arbitration.
 - (iii) Section 20 ACA, modelled on the Model Law, mirrors Article 20 and says the same thing. Again, no one has ever suggested that Section 20 (1) does not refer to the seat.

³Since Section 9 ACA is made applicable to a foreign seated arbitration, Section 37 (1) (b), which provides that an appeal shall lie against and order granting or refusing an interim measure under Section 9, also has been made applicable. The court erroneously refers to Section 37 (1) (a) (possibly because it was looking at an earlier version of the statute which carried this typographical mistake).

- (iv) While the rules of many arbitral institutions use the term seat, there are yet others which use the expression place. For example, the rules of the International Chamber of Commerce. [Article 18- The place of the arbitration shall be fixed by the Court unless agreed upon by the parties].
 - (v) Various commentators agree that seat and place are synonyms. In their-often quoted statement, Redfern and Hunter have said, “The concept that an arbitration is governed by the law of the place in which it is held, which is the ‘seat’ (or ‘forum’ or locus arbitri) of the arbitration, is well established in both the theory and practice of international arbitration.” Mr Born notes “preliminarily, it is important to distinguish between the “seat” of the arbitration (sometimes referred to as the place of the arbitration) and the geographic location of the hearings or meetings in the arbitration”. He also cites an experienced practitioner who said that “the importance of the place of arbitration cannot be overestimated.”
- (d) Second, as noted in a descriptive update on *Mankastu*, the court’s observations are contrary to the court’s holding and reasoning in *BALCO*.⁴ The entire *BALCO* judgment refers and recognises the place of arbitration as the seat of arbitration.
- (e) Third, while the court prefaces its proposition by stating “it has also been established”, the court does not cite the “established” precedent. Even it was a reference to the largely incomprehensible *Hardy* (cited *infra*) (which too conflates seat and place with the venue of arbitration), clearly, the court found it difficult to pinpoint any passage in support.
- (f) Fourth, when Article 20 of the Model Law says that the parties are free to choose the place of arbitration, the simplest and the most direct way to convey that choice is to provide that “the place of arbitration shall be Hong Kong”.

It is simply too late in the day for the Supreme Court to get confused with terminology. Consider the following sentence from the judgment: “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.”

It is clear that the court conflated two distinct concepts: “place of arbitration” and the “venue of arbitration”.

The source of the confusion in some minds maybe because the terminology in this area has been inconsistent.⁵ In his widely read paper⁶, Alastair Henderson has suggested that, though synonyms, ‘seat’ is preferable over ‘place’ (also) “to differentiate juridical attachment from the physical place where hearings and meetings are held, thus avoiding ambiguity and the potential for arguments about the intended location of the seat where arbitration agreements are poorly drafted in this respect”.

Then, consider this sentence which is found in the *BGS case (cited infra)*: “[I]t will thus be seen that wherever there is an express designation of a “venue”, and no designation of any alternative **place** as the “seat”. In the quoted sentence, the expression ‘place’ refers to a geographical location. Even with the utmost care, the use of the expression place, though it can frequently lead to a misunderstanding, cannot be avoided. Because, after all, it is a commonly used word in the English language to denote an area or region!

The inconsistency referred by Hill and the ambiguity referred by Henderson is, it may seem, inherent in the Model Law itself.⁷ Article 20 (1) says that the parties are free to choose the place of arbitration, and Article

⁴Abhijnan Jha and Abhishek Singh at <https://www.azbpartners.com/bank/place-v-s-seat-v-s-venue-redux-mankastu-impex-private-limited-v-airvisual-limited/>.

⁵See this lucid and fascinating paper by Jonathan Hill, Determining the Seat of an international arbitration, 63 Int'l & comp. L.Q. 515 (2014), available on HeinOnline.

⁶ Alastair Henderson, *Lex Arbitri, Procedural Law and the Seat of Arbitration*, 26 SAclJ 886 (2014).

⁷ Hill also refers to Article 20 of the Model Law as an example.

20 (3) uses the expression “place” when referring to the convenient geographical location of hearings (as opposed to the seat). Article 20 (3) provides that the tribunal may “meet at any place” for the hearings. Section 20 ACA mirrors Article 20 of the Model Law. But it is not Section 20 ACA that weighed with the court in *Mankastu*. It is not even referred. At any rate, Article 20 (3) and Section 20 (3) must be contrasted with Article 20 (1) and Section 20 (1). It is one thing for the parties to specify the “place of arbitration” in their agreement, and it is quite another for the tribunal to select a place for some or all of the arbitration hearings. It has not been suggested anywhere that a choice as to the “place of arbitration” is a choice by the parties of the venue of arbitration under Article 20 (3)/Section 20(3) ACA.

The point as to the potential for arguments in cases where the agreements are poorly drafted (Henderson’s argument) also does not apply to *Mankastu*. The agreement was not poorly drafted irrespective of the fact that one party advanced an argument that the place of arbitration should be read as the venue. It was an unambiguous expression of the party’s “intentions”. Also, the choice of the parties of Delhi as jurisdiction cannot be termed poor drafting simply because poor or not must be seen in the context. The jurisdiction clause was not the one that confused the court.

Looking from the Union’s perspective, at best, the question the court should have asked is what is the effect, if any, of a clause vesting jurisdiction in the court at Delhi when the place of the arbitration was Hong Kong? This enquiry would have been similar to the one made by the English court in *Braes of Doune Wind Farm (Scotland) Ltd. v. Alfred McAlpine Business Service Ltd.*, (2008) 1 CLC 487 where the express choice by the parties of the seat of arbitration was disregarded. The parties chose Scotland as the seat of the arbitration. The court examined the matter and found that the seat was somewhere else because, by another clause, the English court had exclusive jurisdiction. The arbitration rules of an English institution was adopted.

The logic of the *Braes Doune* court was though parties have chosen a seat, given the other provisions of the agreement, was that a choice as to the seat of arbitration? The *Mankastu* court has a different logic: the expression “place of arbitration” is not a choice as to the seat, so the intention of parties as to seat must be found elsewhere.⁸

Ultimately, the court found that the seat of arbitration was Hong Kong and dealt with the jurisdiction clause. This is consistent with the parties express choice of the place of arbitration.

The time is here that the court recognises that the expression place of arbitration is a term of art. In fact, iconic.

P.S. –Hardy and BGS

In *Union of India v. Hardy Exploration and Production (India) Inc.*, (2019) 13 SCC 472 (Dipak Misra CJ, AM Khanwilkar, Dr DY Chandrachud JJ), a 3-judge bench was constituted to decide the basis for determining the seat of the arbitration when the agreement only specifies the venue. Several observations were made in the judgment on that question (which are wholly puzzling, to say the least, and requires a separate devoted piece to analyse). On the specific facts, it was found that the seat of arbitration was Delhi and not Kuala Lumpur (which was only the venue).

Another 3-judge bench of the Supreme Court in *BGS SGS Soma JV v. NHPC Ltd.*, 2019 SCC OnLine 1585 considered *Hardy* in the course of answering the question what are the tests for determining the seat of arbitration. Extracting several passages from the judgment, but without directly commenting on the reasoning in *Hardy*, the *BGS* court concluded that the *Hardy* court should have applied the tests set out in *Shashoua v. Sharma*, 2009 EWHC 957 (Comm): that is, where the venue is selected, but the seat is not, a supranational body of rules govern the arbitration, and there are no other significant contrary indicia, the stated venue is the juridical seat.

⁸ The clause giving jurisdiction to the Delhi court was outweighed by a combined reading of clause as to the place of arbitration and the clause which provided that the arbitration will be administered in Hong Kong.

The *BGS* court said that the *Shashoua* principles were affirmed in the 5-judge bench decision in *BALCO* and the *Hardy* court fell in error in not applying them. The *BGS* court then said that *Hardy* was contrary to law (*BALCO*) and cannot be considered good law.

The petitioner Mankastu had relied on *Hardy* to argue that venue can become seat only “if no other condition is postulated, and if a condition precedent is attached to the term place, the said condition indicia has to be satisfied first”.

AirVisual had relied on *BGS* to say that Hong Kong was the seat because the arbitration was being administered in Hong Kong. The petitioner Mankastu, based on *Chandra Prakash and others v. State of Uttar Pradesh and another*, (2002) 4 SCC 234, argued that *BGS* could not have overridden *Hardy*, a decision by another co-ordinate bench of equal strength (though there is a recent and better authority on the point). However, the *Mankastu* court did not go into the question of *BGS v. Hardy*.

It is submitted that it will need to be carefully examined if *BGS* was correct in saying that *Hardy* cannot be considered good law. Any criticism must surely consider if the doctrine of *per incuriam* applies (even though the *BGS* court does not deploy the phraseology). The main question would be: by not using the English *Shashoua*, did *Hardy*, in its reasoning and result, run counter to the binding authority of *BALCO*?