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International Arbitration Law Review

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Case Comment

India: Supreme Court settles the "seat" vs "venue" debate

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Arbitration and Conciliation Act 1996 (India) s.34

Case:

Union of India v Hardy Exploration and Production (India) Inc unreported 2018 (Sup Ct (Ind))

***Int. A.L.R. N-25** **Summary**

Arbitration agreements must be read in a holistic manner to determine the seat and correspondingly the jurisdiction of the supervisory court, if the seat or place of arbitration is not specified in the arbitration agreement between parties. If the parties have agreed on a "venue" but not a "seat" in their arbitration agreement, courts must look at appended or attached factors to determine the seat of arbitration. Determination, as referred to in art.20(1) of the UNCITRAL Model Law, signifies an expressive opinion.

Introduction

Proceedings for the setting aside of an arbitral award are initiated at the seat of arbitration before the courts possessing supervisory jurisdiction. The Supreme Court of India was recently faced with the question of which laws would be applicable to post-award arbitration proceedings when the parties have agreed upon only the "venue" of arbitration and not the "seat" of arbitration in the case of Union of India v Hardy Exploration and Production (India) Inc.[1] The Court interpreted the arbitration agreement between the parties and the reference to the UNCITRAL Model Law on International Commercial Arbitration 1985 (Model Law) to determine the seat of arbitration.

Facts

The parties had entered a production-sharing contract in November 2016 (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.

The clauses related to applicable laws and arbitration under the PSC read as: "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.

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. ***Int. A.L.R. N-26***

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 approached the Delhi High Court for setting aside of the arbitral award under s.34 of the Arbitration and Conciliation Act 1996 (the Act). An application for setting aside an arbitral award can be filed under s.34 of Part I of the Act for arbitration proceedings seated in India. HEPI opposed this application stating that the award was a "foreign" award as the seat of arbitration was Kuala Lumpur. The Delhi High Court ruled that place of making the award was Kuala Lumpur and s.34 of Part I the Act would not apply.2 The Union of India appealed the judgment of the Delhi High Court before the Supreme Court.

Held

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 another factor(s) is 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 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. As the arbitration clause makes a reference to the Model Law, the Court interpreted its provisions, as extracted below:

"Article 20. Place of arbitration.—(1) 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 the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, 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 goods, other property or documents.

…

Article 31. Form and contents of award.—(3) 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."

The Court noted that "place" and "seat" of arbitration can be used interchangeably. As per art.20(1) of the Model Law, if the place of arbitration is not agreed between the parties, the arbitral tribunal can determine the same. Article 31(3) stipulates that the award shall state the date and the place of arbitration as determined in accordance with art.20(1). In the present case, 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 ***Int. A.L.R. N-27*** 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 s.34 of Part I of the Act as the award rendered is not a "foreign award".

Comments

Through this judgment, the Supreme Court has stipulated and reiterated the manner of determination of the seat of arbitration as below: Parties can expressly agree upon the seat or place of arbitration in their arbitration agreement;

If the seat is not expressly agreed upon, it can be deduced from the arbitration clause and concomitant factors, such as the venue and an additional factor;

The seat of arbitration can also be determined through the incorporation of rules such as the Model Law in the arbitration agreement, which stipulates that if parties do not agree on the place of arbitration, the same shall be determined by the arbitral tribunal.

While the Supreme Court interpreted the arbitration clause and the Model Law to conclude that Kuala Lumpur is *not* the place of arbitration (by noting that there was no express determination of the place of arbitration by the arbitral tribunal), the Court has not applied the same tests to determine why India *is* the place of arbitration. It would have been helpful if the Court had made the positive determination that India is the seat of arbitration by interpreting the facts of the case and applying the jurisprudence and criteria discussed by it.

This case is yet another example of why it is advisable that parties exercise caution while drafting arbitration clauses in their agreements by constructing them with more clarity and by expressly specifying the seat or place of arbitration. This would assist in avoiding delay and deliberation at the stages of post-award setting aside or enforcement proceedings.

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Int. A.L.R. 2018, 21(6), N25-N27

1. Civil Appeal No.4628 of 2018.

2. Union of India v Hardy Exploration & Production (India) Inc, FAO (OS) 59/2016 and CM Nos 7062-63/2016 and 7066/2016.