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SEAT AND THE LAW OF ARBITRATION

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In its landmark decision in *Balco*,[2] the Indian Supreme Court ruled that Part I of the Arbitration and Conciliation Act, 1996 (Indian Arbitration Act) will have no application to international commercial arbitration held outside India. The Court held that "*regulation of conduct of arbitration and challenge to an award would have to be done by the courts of the country in which the arbitration is being conducted*"; and that such court is then the supervisory court possessed of the power to annul the award.[3] The court thus affirmed the "*Shashoua* principle",[4] which is now firmly established in arbitration jurisprudence in India. This principle lays down that an agreement as to the seat of arbitration brings in the law of the seat as the curial law and is analogous to the exclusive jurisdiction clause.[5] The parties thus agree not only to the curial law of the seat but also that any challenge to an interim or final award will be made only in the court of the place designated as the seat of arbitration.

With these observations the Court ended a decade-long regime of law laid down in *Bhatia*[6] which conferred concurrent jurisdiction to the domestic courts for deciding the challenge to an award made at a seat of arbitration outside India. The ruling in *Balco* is in accord with the judicial thinking in most jurisdictions, and will no doubt continue to hold the field. The Court, however, also ruled that "*the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments*";[7] and that "*the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings*".[8] This ruling is based on a line of decisions[9] of English Courts and which lay down the principle that the law governing the arbitration agreement will ordinarily coincide with the law of the seat, and the parties' choice of seat (rather than the law

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2 *Bharat Aluminium Company v. Kaiser Aluminium Technical Service Inc*. (2012) 9 SCC 552 (*Balco*) [Para 194].

3 *Ibid*. [Para 123].

4 Principle stated at Para 23 of *Shashoua & Ors. v. Sharma* [2009] EWHC 957 (Comm) (2009) 2 All ER 477 (Comm) (quoted at Para 110 of *Balco*), referred to as the "*Shashoua* principle" in *BGS SGS Soma*, Note 19 below [Paras 94 and 96].

5 *Supra*, Note 1 [Para 110].

6 *Bhatia International v. Bulk Trading S.A.* (2002) 4 SCC 105 (*Bhatia*).

7 *Supra*, Note 1 [Para 76].

8 *Supra*, Note 1 [Para 116].

9 *C v. D* [2007] EWCA Civ 1282 [insurance policy was governed by the law of the State of New York], *Shashoua*, *supra*, Note 3 [agreement was governed by the laws of India].

applicable to the main contract) will be decisive. In a recent decision in *Enka v. Chubb,*[10] the UK Supreme Court questioned the premise of those decisions on the issue of determination of law governing the arbitration agreement (vis-à-vis the seat of arbitration) and has restated the rule in that regard.

Under the law laid down in *Balco*, parties' choice of seat of arbitration has significant legal consequences: it endows exclusive jurisdiction on the local court not only to supervise the arbitration proceedings but also to decide the challenge to the arbitral award resulting from it; and such choice also operates as choice of law of the seat as the law governing the arbitration. The choice of seat therefore assumes great importance in the conduct of arbitration and in the proceedings that follow it.

In this paper we will first examine the approach of courts in India in identifying the seat (versus venue or place) of arbitration and the law that applies to arbitration (including the validity and scope of the arbitration agreement). We will then examine the impact of the decision in *Enka v. Chubb* on the jurisprudence in India on this issue.

Choice of Seat

In *Balco*, the Court held that the seat of arbitration is intended to be its centre of gravity. It, however, recognised that it is not mandatory for the arbitrator to hold all the proceedings of the arbitration at the seat alone, and that it is open to the arbitrators to hold meetings at a location convenient to all.[11] The Court also recognised that "seat" and "place" are often used interchangeably.[12] If the parties expressly designate the seat of arbitration, no interpretation is required nor any inference is required to be drawn, and the legal consequences attached to such choice follow. However, there has been a great deal of controversy regarding the intention of the parties when they do not specify the seat, or they describe the location of the arbitration proceedings in the arbitration agreement as "venue" or "place" rather than "seat". What is the true intention of the parties in such cases with regard to the seat of arbitration? This question has engaged our courts in a number of cases.

Indian courts take into account indicia present in the contract and the surrounding circumstances for construing the true intention of the parties. In its decision in *Imax*, having regard to the parties' choice

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10 *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* [2020] UKSC 38 (*Enka v. Chubb*).
11 *Supra*, Note 1 [Para 75].
12 *Supra*, Note 1 [Para 76].

of the ICC Rules of Arbitration (ICC Rules),[13] and the decision of the International Chamber of Commerce (ICC) (in consultation with the parties) to hold arbitration in London, which the parties accepted, the Supreme Court concluded that the parties had agreed to have the seat of arbitration in London.[14] In a case where the arbitration clause provided for arbitration in accordance with the procedure prescribed by the London Maritime Arbitration Association through a tribunal comprising members of the "London Arbitration Association", and the contract was governed by English law, the Court inferred the intention of the parties to have the seat of arbitration in London.[15] The Court construed the arbitration clause providing that the "place of arbitration shall be Hong Kong", coupled with a provision that disputes shall be resolved by "arbitration administered in Hong Kong", to be the designated seat of arbitration by the parties.[16]

In *Enercon,*[17] the parties had chosen Indian law as the governing law of contract, with the Indian Arbitration Act to apply to arbitration proceedings, and had designated London as the "venue" of arbitration. The Court concluded that the "seat" of arbitration was in India since the parties had agreed to apply the Indian Arbitration Act to the arbitration proceedings, and they had thus, by making such choice, agreed to apply the curial law provisions of the Indian Arbitration Act.[18] In *Hardy Exploration,*[19] where the contract provided Indian law as the governing law of contract, and the UNCITRAL Model Law for arbitration proceedings, the Court did not construe the designation of venue as designation of seat. It acknowledged the power of the tribunal under the Model Law to determine the seat, but found, on facts, that there had been no such determination, and therefore the seat was in India.[20]

This rule of construction was evolved mainly to fix the seat of arbitration in international arbitration under the New York Convention involving parties of different nationalities, to ensure certainty with regard to the supervisory court and the court for post-arbitration proceedings. The Indian Supreme Court has, however, applied this rule to arbitration seated in India as well even though the Indian Arbitration Act contains a specific provision – Section 2(e) – for determining such court. Section 2(e) provides for the same rule for determination of the jurisdictional court for arbitration as if it were a suit having the same "subject-matter". In *Balco* (Para 96), the Court interpreted the term "subject-

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13 Choice of the ICC Rules to apply to arbitration proceedings seated in London by itself would not be sufficient to conclude that the parties intended to apply English law to arbitration. See *supra*, Note 9 [Para 115].

14 *Imax Corporation v. E-City Entertainment (India) Private Limited* (2017) 5 SCC 331 [Para 29].

15 *Harmony Innovation Shipping Limited v. Gupta Coal India Limited and Anr.* (2015) 9 SCC 172.

16 *Mankastu Impex Private Limited v. Airvisual Limited* (2020) 5 SCC 399.

17 *Enercon (India) Limited and Ors. v. Enercon GMBH and Anr.* (2014) 5 SCC 1 (*Enercon*).

18 *Ibid*. [Paras 98 and 116].

19 *Union of India v. Hardy Exploration and Production (India) Inc.* (2019) 13 SCC 472 (*Hardy Exploration*).

20 In a later judgment in *BGS SGS Soma JV v. NHPC Ltd. (2020) 4 SCC 234* (*BGS SGS Soma*) [Para 94], a coordinate bench has found that the court did not correctly apply the ratio of the decision in *Balco*, and therefore reached a wrong conclusion, and the seat, in fact, was in Kuala Lumpur.

matter" to include the seat of arbitration and held that "*In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.*"[21] The Court, thus, acknowledged that under Section 2(e) there could be concurrent jurisdiction of two courts in a domestic arbitration. The uncertainty on account of the concurrent jurisdiction is removed by Section 42 which restricts the parties to one of the two courts to which the proceeding in relation to the arbitration is first brought.

Indian courts have, nevertheless, applied the *Shashoua* principle to domestic arbitration.[22] This approach was approved by the Supreme Court in *BGS SGS Soma.*[23] The Court found the acknowledgment of concurrent jurisdiction of domestic courts in Para 96 of *Balco* in conflict with the rest of the judgment. It decided to disregard it based on the rule of construction that a judgment must not be construed as a statute and that it must be read as a whole.

Law of Arbitration

Beginning with *Balco*, the Supreme Court has uniformly accepted the principle that the choice of seat will generally imply the choice of law of the seat as the law governing the arbitration unless the parties have expressly provided for another law to apply.[24] In fact, *Balco* goes a step further and holds that even if the parties provide for application of the Indian Arbitration Act to a foreign seated arbitration, it would only mean that the "*parties have imported…those provisions which govern the internal conduct of the arbitration which are not inconsistent with mandatory provisions of English procedural law/curial law*".[25] Indian courts have thus wholeheartedly embraced the principle that the choice of seat will generally imply the choice of law of the seat to govern the arbitration, i.e., the "*seat approach*". There is little or no room in current jurisprudence in India for the "*main contract approach*",[26] which advocates that in the absence of an express choice of law governing an arbitration agreement, the law governing the main contract (either expressly or by implication) ought to be construed as that law. Indian courts have leaned in favour of the seat approach, relying mainly on the

21 *Supra*, Note 1 [Para 96].
22 *Indus Mobile Distribution Private Limited v. Datawind Innovation Private Limited* (2017) 7 SCC 678; *Brahmani River Pellets Limited v. Kamachi Industries Ltd* (2020) 5 SCC 462.
23 *Supra*, Note 19, *BGS SGS Soma.*
24 *Eitzen Bulk v. Ashapura Minechem Limited and Anr.* (2016) 11 SCC 508 [Para 34].
25 *Supra*, Note 1 [Para 117, following *Union of India v. McDonnell Douglas Corpn.* (1993) 2 Lloyd's Law Report 48].
26 In a judgment reported as (2020) 10 SCC 1 [Para 92.2] the Supreme Court, confirming this approach, held that "*the law governing Arbitration Agreement must be determined separately from the law applicable to the substantive contract".*

line of decisions of English courts approving it[27] and presumed international consensus in that regard. The decision of the UK Supreme Court in *Enka v. Chubb* has challenged this approach and the presumed consensus supporting it.

Enka v. Chubb

In *Enka v. Chubb*, the UK Supreme Court was posed the question as to which national law governs the validity and scope of the arbitration agreement in the absence of an express choice by the parties, when the law governing the contract containing it is different from the law of the seat of arbitration.

The Court applied common law rules for this determination as applying any other law "*would introduce an additional layer of complexity into the conflict of laws analysis without any clear justification and could produce odd or inconsistent results*".[28] The Court (by a majority decision) concluded that "*As a matter of principle and authority there are therefore strong reasons why an agreement on a choice of law to govern a contract should generally be construed as applying to an arbitration agreement set out or otherwise incorporated in the contract.*"[29]

Two main reasons have been cited in support of the "seat approach": one, that an arbitration agreement is separable from the rest of the contract (Separability principle); and two, that there is an overlap between the curial or the procedural law which follows the choice of seat and the substantive law governing the arbitration agreement (the overlap argument). These reasons were considered by the Court in *Enka v. Chubb.*

On a review of authorities, the Court found that the concept of separability of the arbitration agreement has been devised to ensure that discharge by frustration (or for other reasons) of the underlying contract will not discharge the parties' agreement to arbitrate. The purpose of the Separability principle is limited to that; it is nonetheless part of the bundle of rights and obligations recorded in the contractual document. The Court, thus, concluded that as a general rule the choice of law governing the contract should properly be construed as the law governing the arbitration agreement included in it as well.[30] The overlap argument too was rejected by the court. The Court acknowledged that by choosing the seat, the parties "*agree that the law and courts of a particular*

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27 *C v. D* [2007] EWCA Civ 1282; *Shashoua, supra*, Note 3; and *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA* [2012] EWHC 42 (*Sulamérica*).
28 *Supra*, Note 9 [Para 33].
29 *Supra*, Note 9 [Para 54].
30 *Ibid*. [Paras 60-64].

country will exercise control over an arbitration which has its seat in that country to the extent provided for by that country's law. A choice of seat can in these circumstances aptly be regarded as a choice of the curial law."[31] The court, however, reasoned that "*the curial law which applies to the arbitration process is conceptually distinct from the law which governs the validity and scope of the arbitration agreement. Whether a choice of the curial law carries any implication that the parties intended the same system of law to govern the arbitration agreement – and, if so, the strength of any such implication – must depend on the content of the relevant curial law.*"[32]

In this context, the Court examined the English Arbitration Act, 1996 – particularly Section 4(5) – and concluded that its provisions "*do not justify any general inference that parties who choose an English seat of arbitration thereby intend their arbitration agreement to be governed by English law*".[33]

The Court laid down the following rules for identifying the law governing the arbitration agreement:

(i) The choice of the governing law of the contract will generally apply to the arbitration agreement which forms part of the contract.

(ii) The choice of a different country as the seat of arbitration is not, without any further indication, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement.

(iii) Additional factors which negate such inference are (a) provision in the law of the seat which mandates its application to arbitration held there; and (b) if the application of the governing law of the main contract will render the arbitration agreement invalid or ineffective.

(iv) A clause providing for arbitration in a particular place will not by itself justify an inference that the contract (or the arbitration agreement) is intended to be governed by the law of that place. Where, however, the parties have chosen the seat of arbitration but have not made a choice of the law to govern the contract or the arbitration agreement within it, the arbitration agreement will be governed by the law to which it has the closest connection, i.e., the law of the seat.[34]

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31 *Ibid*. [Para 68].
32 *Ibid*. [Para 69].
33 *Ibid*. [Paras 82 and 94].
34 [Para 170], *Enka v. Chubb.*

In the facts of the case, the court concluded that the parties had not expressed their choice of law applicable to the contract before it or the arbitration clause contained in it, nor did the terms of the contract "*point ineluctably to the conclusion that the parties intended Russian law to apply*".[35] The court therefore applied the default rule of identifying the law to which the arbitration agreement was most closely connected. It ruled that English law as the law of the seat was that law, and it would apply to the arbitration agreement.

Impact on Jurisprudence in India

Enka v. Chubb clearly recognises the distinction between curial law and curial jurisdiction on the one hand, and the law governing the arbitration agreement on the other. While the parties' agreement on the seat will ordinarily imply their agreement that the law and the court of that country will regulate the arbitration, it does not always imply that such law will also govern the arbitration agreement. Choice of seat, thus, implies choice of curial law and curial court, and not always the law governing the arbitration agreement. Decisions of Indian courts do not clearly recognise this distinction. They often regard parties' choice of seat as also their choice of law of the seat for all aspects of arbitration without any reference to choice of law for the contract. This trend was set in *Balco* as is evident from the observations quoted above.[36] In *Imax*, while noting that the parties had expressed their choice for the law applicable to the contract, the Supreme Court observed, "*The general principle is that, in the absence of any contradictory indication, it shall be presumed that the parties have intended that the proper law of contract as well as the law governing the Arbitration Agreement is the same as the law of the country in which arbitration is agreed to be held.*"[37] In *Ashapura Minechem*, the Court said, "*as a matter of fact the mere choosing of the juridical seat of 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.*"[38] The Supreme Court thus favoured the seat approach for identifying the law governing the arbitration agreement.

For these conclusions, the Court has mainly relied on the *Shashoua* principle[39] (noted above) which is, in turn, founded on the decisions in *C v. D,*[40] and the decision in *Sulamérica* (Commercial Court). The

35 [Para 155], *Enka v. Chubb.*
36 *Supra*, Note 1 [Paras 76 and 116].
37 *Imax*, *supra*, Note 13 [Para 22].
38 *Supra*, Note 23 [Para 34].
39 *Supra*, Note 3.
40 *Supra*, Note 8.

decision in *Sulamérica* was appealed and the Court of Appeal, while deciding the appeal, considered the decision in *C v. D*. Both these decisions were critically examined in *Enka v. Chubb*.

Sulamérica[41]

The case involved a contract governed by Brazilian law and provided for arbitration in London. The Court of Appeal concluded that English law, the law of the seat, would apply to the arbitration agreement. In *Enka v. Chubb*, the Court reviewed the decision and found that the main reason for the decision against applying Brazilian law to the arbitration agreement was that its application would have been invalid under that law. This the parties could not have intended. This was the decisive reason to construe the parties' intention to apply English law to the arbitration as an implication of choosing London as the seat. The construction was adopted to save the arbitration agreement from invalidity.[42] In fact, the Court approved the main contract approach.[43]

C v. D[44]

In *Enka v. Chubb,* the Court questioned the correctness of this decision. It noted[45] the reservation expressed by the Court of Appeal in *Sulamérica* (at Para 24) that the rule (followed in *C v. D*) that an arbitration agreement is governed by the law of the seat even where there is a choice of law clause in the contract cannot easily be reconciled with the earlier authorities or well-established principle. It found the reason given for disapplying the law chosen by the parties to govern the insurance to the arbitration agreement contained in it, insufficient.[46]

In light of the decision in *Enka v. Chubb*, courts in India may consider a more nuanced approach for determining the law governing arbitration agreements, and the rules stated in it provide useful guidance for that purpose. In pre-*Balco* cases, which are still coming to the courts, and where the decision turns on the question whether or not parties had excluded Part I of the Indian Arbitration Act by their choice of seat in a foreign country, these rules will have a particularly significant role.

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41 [2012] EWCA Civ 638.
42 *Ibid*. [Paras 101-105].
43 See Para 11 of *Sulamérica:*
"*It is common for parties to make an express choice of law to govern their contract, but unusual for them to make an express choice of the law to govern any arbitration agreement contained within it; and where they have not done so, the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate*" (quoted at Para 49, *Enka v. Chubb*).
44 *Supra*, Note 8.
45 [Para 50], *Enka v. Chubb.*
46 [Para 119], *Enka v. Chubb*