Failure to determine the Seat of Arbitration

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In a recent Judgment dated 25th September 2018, Supreme Court of India, in the matter of **Union of India Vs Hardly Exploration and production (India) Inc** reported as 2018 SCC Online 1640 allowed the petitioner to maintain an application seeking to challenge an arbitrator award under S.34 of the Arbitration and conciliation Act, 1996 even though award was passed in an arbitration held in Kulalumpur. Even after so many years of arbitration experience till date parties enter into incomplete, erroneous arbitration agreements and end up in various problems in various stages of arbitration. The following is the arbitration clause that came to be scrutinized by the Supreme Court in the above said case:

"*32.1. The contract shall be governed and interpreted in accordance with the laws in India*

33.9. 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 provisions of this Article 33, the provisions of this Article 33 shall govern.

33.12. The venue of conciliation or Arbitration pursuant to this Article unless otherwise parties agree, shall be Kuala Lumpur and shall be conducted in English Knowledge."

Analysis of the clause: To initiate an international arbitration, a minimum of one of the parties should be from a different jurisdiction. Here Hardley exploration may be a foreign company but Hardley Exploration and Production (India) Inc is also an indian Company. In addition to that Parties have chosen, Indian laws for the interpretation of the Contract. The arbitration clause does not indicate either the seat of arbitration or the procedural law. If the parties have selected the seat of arbitration and not the procedural law, then the procedural law applicable to the seat shall be applicable to the arbitration. If

parties have decided and incorporated the procedural law and have not expressly specified, the seat then the country in which the said procedural law is applicable shall be the seat of arbitration. But in the present case, neither the procedural law nor the seat of arbitration is chosen by the parties.

But the parties have decided and incorporated laws governing the contract and the venue of arbitration. The law governing the contract is Indian law. The venue of Arbitration is Kuala Lumpur, Malaysia. They have also chosen the language of arbitration which is English. Hence, there is no express selection of seat of arbitration.

Law relating to Seat and procedural law: The general understanding is the seat of arbitration is the legally recognized place of arbitration. Once parties a select and incorporate the said seat of arbitration in the arbitration clause, the procedural law and the supervising courts are also indirectly selected. Because, the seat and procedural law cannot be of different jurisdictions. The procedural law is the arbitration law of one specific country dealing with the powers of the supervising courts while supervising an arbitration, challenging and setting aside of the awards etc., The procedural law of one country cannot be exercised by the courts of another country and hence procedural law and seat cannot be from different jurisdictions.

Law Relating to Seat and Venue of Arbitration: Seat has the legal importance and venue of arbitration does not have any legal importance. Even though parties have chosen a seat, it is not always mandatory to conduct the arbitration in the seat specified in the arbitration clause. Taking into consideration, the convenience of the parties, arbitral tribunal may conduct arbitration hearings in different places. Every arbitration will have only one seat but there can be multiple venues of arbitration, if necessary. Hence, the venue of arbitration does not alter the supervising courts or the procedural law.

Importance of determination of the seat by the Arbitrator: When a seat is not specified in the arbitration clause, it is the duty of the arbitrators to determine the same and record the same in the award. But unfortunately, the arbitrator appointed did not determine the seat of arbitration. In case of failure of the arbitration tribunal to determine the seat of arbitration, the issue remains open. Hence, the seat as well as supervising courts remain undetermined. In such a situation one of the party being aggrieved by the award challenges the same in India under S.34 of the Arbitration and conciliation Act, 1996 and the other resisting the same on the ground that only Malaysia has the Jurisdiction.

Conclusion of the Supreme Court of India: The Supreme Court of India dealt with various judgments prescribing certain methodologies and principles to be applied by the Courts while determining the seat and the result of the arbitrator not determining the seat. After taking into consideration the failure of parties to select a seat in the arbitration agreement and the failure of the arbitrator to determine the same, it came to the conclusion that parties have not effectively excluded the Part I of the Act. Hence, the Supreme Court held that the application filed by the appellant under S.34 of the Act seeking to set aside the award is maintainable in India.