Supreme Court of India settles the law in India with regard to Seat Vs Venue

Introduction:

In a recently concluded case Eneron India Ltd., Vs Eneron Gmbh (2014) the Supreme Court of India which is the final Court of India has settled the law in India with regard to Seat Vs Venue in International Arbitration proceedings. Normally the Juridical seat/ seat of arbitration, carries along with it the choice of that country's arbitration/crucial law. Even though the concept of seat of arbitration and its importance is well known a very peculiar situation arose in this case because venue of arbitration was specified in the arbitration agreement and seat of arbitration was not specified by the parties. Since venue was specified as London, the Courts of UK and India passed contra orders assuming jurisdiction because of the scope for interpretation in the recitals of the arbitration agreement. Finally Supreme Court of India relying on Judgments of various foreign Courts and Indian Courts settled the issue between the parties and also the law for International arbitration disputes in India.

Brief Facts of the case:

The arbitration agreement between the parties specifically stated that the law governing the contract, law governing the agreement and crucial law are all Indian laws. It also specifically stated that the venue of arbitration is London. The parties are from Germany and India. The Germen party approached UK Courts and got some injunction orders restraining the opposite party from approaching Indian Courts for any relief. Indian parties got orders from Indian local courts in Daman in India. The Indian local Court Daman came to the conclusion that the free consent to the contract was missing (even though signed by both the parties) hence contract itself was not valid and consequentially dismissed the application seeking reference of the matter to the arbitration filed under Section 45 of the Arbitration and conciliation Act, 1996 and granted an anti-arbitration injunction. The Appellate Court in Daman vacated the anti-arbitration injunction and reversed the order of the trial Court. The High Court of Bombay came to a conclusion that both Indian and UK Courts have concurrent jurisdiction over the matter. English High Court also passed an order in the

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form of anti-arbitration order which was later vacated on some undertakings (which are not that relevant to the present topic) given by the parties. The High Court of Bombay disposed the Writ petitions with the following points:

A. The scope of the enquiry under the Writ Petition No. 7804 of 2009 is restricted to the existence of the arbitration agreement and not the main underlying contract (which can be challenged before the Arbitral Tribunal);
B. Prima facie, there is an arbitration agreement;
C. The curial law of the arbitration agreement is India;
D. London, designated as the *venue* in Clause 18.3 of the draft IPLA, is only a convenient geographical location;
E. London is not the *seat*;
F. English Courts have concurrent jurisdiction since the *venue* of arbitration is London.

Legal questions arose in the case before the Supreme Court of India:

In the Supreme Court of India parties argued the following points:

1. There was no concluded contract and hence arbitration agreement was not valid
2. It was also argued that the matter cannot be referred to arbitration because this arbitration agreement is unworkable and reference cannot be made without altering the arbitration agreement which is not permissible in law. (Relied Upon Bushwall Vs Vortex(1976) 1 WLR 591& Shin Satellite Co Ltd., Vs Jain Studio Ltd., (2006)2SCC628)
3. Even though seat of arbitration is not specifically stated in the arbitration agreement, can the seat of arbitration be determined by the court on the basis of the other components of the arbitration agreement?

Final Decision of the Court:

The Supreme Court of India held that there are very strong indicators to suggest that the parties always understood that the *seat* of arbitration would be in India and London would only be the *"venue"* to hold the proceedings of arbitration. We find force in the contention that the facts of the present case would make the ratio of law laid down in **Naviera Amazonica Peruana S.A.** v.

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CompaniaInternacional De Seguros Del Peru 1988 (1) Lloyd's Rep 116',applicable in the present case. On the facts of the case, it was observed in Naviera Amazonica case (supra) that since there was no contest on Law 1 and Law 2, the entire issue turned on Law 3, "the law governing the conduct of the arbitration". This is usually referred to as the *curial or procedural law, or the lexfori.* Thereafter, the Court approvingly quoted the following observation from *Dicey and Morris on the Conflict of Laws* (11thEdn.): "English Law does not recognize the concept of a de-localized arbitration or of arbitral procedures floating in the rans national firmament, unconnected with any municipal system of law". It is further held that "accordingly every arbitration must have a '*seat*' or 'locus arbitri' or 'forum' which subjects its procedural rules to the municipal law which is there in force". The Court thereafter culls out the following principle:

> *Where the parties have failed to choose the law governing the arbitration proceedings, those proceedings must be considered, at any rate prima facie, as being governed by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings*

The aforesaid classic statement of the conflict of law rules as quoted in Dicey and Morris on the Conflict of Laws (11thEdn.), Vol. 1, was approved by the House of Lords in **James Miller and Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.** (1970) 1 Lloyd's Rep. 269 : (1970) A.C. 583 Mustill, J. in **Black Clawson International Ltd.** *v.* **PapierwerkeWaldhof-Aschaffenburg A.G.** (1981) 2 Lloyd's Rep. 446 at P. 453, a little later characterized the same proposition as "the law of the place where the reference is conducted, the lexfori". The position of law in India is the same.

Applying the same closest and the *intimate* connection to arbitration, it would be seen that the parties had agreed that the provisions of Indian Arbitration Act, 1996 would apply to the arbitration proceedings. By making such a choice, the parties have made the *curial law* provisions contained in Chapters III, IV, V and VI of the Indian Arbitration Act, 1996 applicable. In **Bharat Aluminium Co.** v. **Kaiser Aluminium** (2012) 9 SCC 552 it has been categorically held that Part I of the Indian Arbitration Act, 1996, will have no application, if the *seat* of arbitration is not in India.

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Hence in the present case, London is mentioned only as a *"venue"* of arbitration which, in the facts of this case cannot be read as the *"seat"* of arbitration.

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