SEATING THE ARBITRATION: THE UNFINISHED JOURNEY OF THE INDIAN SUPREME COURT

Dushyant Manocha[*]

Abstract

Over the course of the last couple of decades, the Indian Supreme Court has tackled the issue of jurisdiction of Indian courts in arbitrations with foreign elements from different perspectives and with varying degrees of success. Over time and with some setbacks on the way, the Indian Supreme Court course corrected in BALCO and aligned our jurisprudence with internationally accepted principles by making the juridical seat the focal point for answering the jurisdiction question. However, while BALCO may have ushered in a new era, Indian courts are still struggling to develop a framework within which the juridical seat can be ascertained. This is especially true for pluri-directional cases where the arbitration agreement points to multiple locations.

This article explains how two of the most important judgments, Hardy Exploration and BGS SGS Soma, which have tried to lay down tests for ascertaining the juridical seat, have failed, in part, because of their predisposition to lay down bright line tests. This article

[*]Dushyant Manocha is a Partner at Manocha and Ghosh Law Associates. The author may be reached at *dushyantmanocha@gmail.com*.

argues that given the idiosyncrasies of arbitration clauses, it is not possible to lay down objective tests to determine the juridical seat. It further argues that the only manner in which the law can meaningfully develop on this point is if there is recognition of the fact that arbitration agreements need to be seen in the same light as any other commercial contract and must be interpreted keeping in mind commercial common sense. Finally, it offers some signposts which may be relevant for interpreting such difficult arbitration agreements.

I. INTRODUCTION

The level of arbitration discourse in India is fairly sophisticated and has seen a tremendous upward shift in the recent past. While India may still be catching up with some of the other jurisdictions where arbitration is more culturally engrained, the understanding of the subject and its appreciation, both by courts and its users, has seen a paradigm shift in the last couple decades. Despite all this savvy however, drafting of arbitration clauses remains an area which has historically left a lot to be desired.[1] Experts have noted that arbitration clauses, often referred to as 'midnight clauses' i.e., the last clause to be negotiated in long drawn commercial negotiations, are often the result of unwieldy compromises. This is mainly because insufficient thought is given as to how disputes would be resolved (arguably

[1]Stephen R. Bond, 'How to Draft an Arbitration Clause' (1989) 6(2) Journal of Int'l Arbitration 65, 78.

because at the time of such negotiations, a dispute scenario seems far-fetched).[2]

These chronic arbitration clauses, especially the ones involving multiple jurisdictions, have historically been heavily litigated in India. The central issue in most of these litigations is determination of jurisdiction over a given arbitration since a *seat court* exercises much greater control over a locally seated arbitration.[3] Ironically though, if there is one issue in arbitration law which ought not be litigated at all, it is this issue. This is for two obvious reasons: First, litigation on this issue involves other systems of law and is therefore expensive with a litigant having to often retain multiple sets of lawyers qualified to practice in different jurisdictions.[4] Second, litigation on this issue can not only be minimized but can arguably be almost eradicated if arbitration clauses are smartly drafted.

The bright side of course of poorly drafted arbitration clauses and the ensuing litigations is the development of arbitration law jurisprudence in India. The Supreme Court of India (*Supreme Court*) has been tackling the jurisdiction issue from varying perspectives for a very long time. While a Constitution Bench of the Supreme Court in *Bharat Aluminium Company v. Kaiser Aluminium Company*[5] **("BALCO")** aligned our jurisprudence with internationally accepted principles by making juridical seat the focus of the jurisdiction question,[6] today the disputes largely relate to finding that juridical seat.

[2]Alan Redfern & others, *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009) para 2.04.
[3]G.B. Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 1542.
[4]*Videocon Industries Limited v. Union of India & Anr*, (2011) 6 SCC 16.
[5]*Bharat Aluminium Company v. Kaiser Aluminium Company*, (2012) 9 SCC 552.
[6]G.B Born, *International Arbitration: Law and Practice* (1st edn, Kluwer Law International 2012) 105.

Numerous decisions of the Supreme Court have tried to delineate objective tests to find the juridical seat. However, the issue still remains largely cloudy. While some may argue that Justice Rohinton Fali Nariman's opinion in *BGS SGS Soma JV v. NHPC Limited*[7] ("***BGS SGS***") delineates a bright line test worth following,[8] this article argues that the decision in BGS SGS is highly problematic, both on procedure and merits, and is arguably not worth following as a precedent. This article argues that there cannot be a bright line test for determining the juridical seat in difficult cases and any attempt to provide a straightjacket formula, is an exercise in futility. However, there can be a larger interpretative framework within which such cases can be dealt with and this article is a small step towards identifying such a framework.

To begin with, this article traces the historical position set out in BALCO. This case set the stage by making the juridical seat the focal point of the jurisdiction debate. Further, the article it analyses how the post-BALCO Supreme Court entrenched the BALCO principles within our arbitration jurisprudence. Therefore, the jurisdiction question in India came to be viewed solely in light of the juridical seat. This article then examines a few key decisions of the Supreme Court including BGS SGS which have attempted to lay down objective tests for determination of the juridical seat and offers a critique, arguing that despite BGS SGS, the issue is far from settled and requires a relook. Finally, the article offers its own solutions within which the jurisdiction question must be answered especially for difficult cases.

[7] *BGS SGS Soma JV v. NHPC Limited*, 2019 SCC OnLine 1585.

[8] Anjali Anchayil & Ashutosh Kumar, 'Choice of Seat or Venue: Supreme Court of India Dithers' (*Kluwer Arbitration Blog*, 13 May 2020) <http://arbitrationblog.kluwerarbitration.com/2020/05/13/choice-of-seat-or-venue-supreme-court-of-india-dithers> accessed 5 January 2021.

II. BALCO AND BEYOND

A. The BALCO Judgment

It was not until about six years and much academic ridicule later,[9] that the Supreme Court doubted the correctness of *Bhatia International v. Bulk Trading SA*[10] **(**"**Bhatia International**"**)** and its progeny.[11] On January 16, 2008, a two judge Bench of the Supreme Court doubted the correctness of *Bhatia International* and decided to have a relook at the case.[12] Finally, the issue was decided to be considered by a Constitution Bench which noted it to be *pristinely legal.*[13] Various issues were raised and addressed before the Supreme Court in BALCO, but at the heart of it all, was whether *Bhatia International* had been correctly decided. In effect, the Supreme Court was considering whether Indian courts could have interfered in foreign seated arbitrations.

During the course of oral arguments in BALCO, there was surprising support for Bhatia International. However, despite such support, the Supreme Court overruled Bhatia International in its entirety and unequivocally held the juridical seat to be the *centre of gravity.*[14]

BALCO's holding of the seat to be the centre of gravity was truly a watershed moment, mainly for two interrelated reasons: First, it was for the first time that there was a pure objective test for post-BALCO courts to answer the jurisdiction question by ascertaining the juridical seat. It was evident that before BALCO, there was no test for a court

[9]J. Martin Hunter & Ranamit Banerjee, 'Bhatia, BALCO and beyond: One step forward, two steps back?' (2013) 24(2) National Law School of India Review 1, 9.
[10]*Bhatia International v. Bulk Trading SA*, (2002) 4 SCC 105.
[11]*Venture Global Engineering v. Satyam Computer Services Limited and Another*, (2008) SCC 190.
[12]*Bharat Aluminium Co. v. Kaiser Aluminium Technical Services*, (2012) 9 SCC 649.
[13]*BALCO* (n 5) para 2.
[14]*BALCO* (n 5) para 75.

to examine the jurisdiction question which was dependent upon the vagaries of the application of Part I of the 1996 Act. Second, the recognition of the seat to be the centre of gravity of an arbitration, aligned our jurisprudence with that of internationally recognised principles. This meant that debate had to now enter its next logical phase, namely, the manner in which the juridical seat had to be ascertained, especially in *pluri-directional* cases where *signposts pointed in different directions*.[15]

B. Supreme Court beyond BALCO

a) Enercon (India) Limited and Ors. v. Enercon GmBH and Anr.[16] ***("Enercon")***

Enercon became one of the first cases post BALCO to test the waters of the seat centric theory espoused by BALCO. Enercon was strictly governed by the principles of Bhatia International (on account of Bhatia International's prospective overruling by BALCO).[17] However, the discussions in Enercon and the line of enquiry of the Supreme Court, had little to do with Bhatia International.

The issue before the Supreme Court, which was the result of a poorly drafted arbitration clause,[18] was whether it was Indian or English courts which had jurisdiction over the disputes. The disputing parties were Indian and German and the only express designation was that the *venue of the arbitration proceedings shall be London.* The other systems of law were agreed to be Indian law.

[15]Jonathan Hill, 'Determining the seat of an international arbitration: Party autonomy and the interpretation of arbitration agreements' (2014) 63 Int'l and Comparative Law Quarterly 517, 534.
[16]*Enercon (India) Limited and Ors. v. Enercon GmBH and Anr.*, (2014) 5 SCC 1.
[17]*BALCO* (n 5) para 197.
[18]Dr. Abhishek Manu Singhvi, 'Memoirs of a personal journey through Indian Arbitration Law' (2016) 4(2) Indian Journal of Arbitration Law 14.

Instead of looking at the issue from the inclusion or exclusion of Part I (as Bhatia International would have warranted), the Supreme Court looked at the dispute from the perspective of the juridical seat, as dictated by BALCO.

The Supreme Court concluded that given that all the laws were agreed to be Indian laws, the seat of arbitration was necessarily India. It held that the designation of London as the venue, was only meant to be the physical geographical location.[19] Despite the advancement of arbitration jurisprudence, one could however see the remains of *National Thermal Power Corporation v. Singer Company and Others*,[20] where an overwhelming choice of the Indian system of laws persuaded the Supreme Court to assume jurisdiction.

The importance of Enercon however, is to be seen from a different perspective. While the ultimate conclusion was arguably wrong, Enercon unambiguously fortified the BALCO principles inasmuch as it made it clear that juridical seat was determinative of jurisdiction and was akin to an exclusive jurisdiction clause.

b) *Reliance Industries Limited v. Union of India*[21] ***("Reliance – I")***

Soon after Enercon came Reliance – I, where the jurisdiction question hinged in relation to an arbitral award where the seat was London; the governing law of the contract was Indian law; the arbitration agreement was governed by English law and the subject matter of the contract and its performance, was in India.

Like Enercon, Reliance – I was also, strictly speaking, governed by Bhatia International. Therefore, in theory, what the Supreme Court really had to see was whether or not Part I of the 1996 Act stood

[19] *Enercon GmBH v. Enercon (India) Limited*, [2012] EWHC 689 (Comm).
[20] *National Thermal Power Corporation v. Singer Company and Others*, (1992) 3 SCC 551.
[21] *Reliance Industries Limited v. Union of India*, (2014) 7 SCC 603.

excluded, a question much similar to what it had decided in Videocon in a similar fact situation.[22] Much like Videocon, Reliance – I held that Indian courts lacked jurisdiction and that Part I of the 1996 Act stood excluded. However, while Videocon's reasoning was founded upon the arbitration agreement being governed by English law, Reliance – I's reasoning primarily hinged around the fact that the arbitration was a foreign seated arbitration, which gave English courts the exclusive jurisdiction over the disputes. The Reliance – I court noted as under:

"*In our opinion, it is too late in the day to contend that the seat of arbitration is not analogous to an exclusive jurisdiction clause… Once the parties had consciously agreed that the juridical seat of the arbitration would be London and that the arbitration agreement will be governed by the laws of England, it was no longer open to them to contend that the provisions of Part I of the Arbitration Act would also be applicable to the arbitration agreement.*"[23]

One must contrast Reliance – I with Venture Global. Both the decisions were applying the principles of Bhatia International in foreign seated arbitrations. While Venture Global found Part I of the 1996 Act to be applicable, Reliance – I noted that having a foreign seat *ipso facto* excluded the applicability of Part I of the 1996 Act. This was a clear indication of the shift in the psychology of Indian courts on the importance of the juridical seat.

c) ***Union of India v. Reliance Industries Limited and Ors.*** [24] ***("Reliance – II")***

The Union of India failed in its attempts to first get the Reliance – I judgment reviewed[25] and thereafter, even the curative petition[26] filed

[22] *Union of India v. Reliance Industries Limited*, [2013] 199 DLT 469.
[23] ibid para 45.
[24] *Union of India v. Reliance Industries Limited and Ors.*, (2015) 10 SCC 213.

by the Union of India was dismissed.[27] However, unfettered, the Union of India continued to approach Indian courts invoking their supervisory jurisdiction over the very same arbitration, which led to Reliance – II.

Reliance – II came about from the refusal of the Delhi High Court to entertain an application filed by the Union of India under § 14 (also in Part I, which Reliance – I had ruled was not applicable to the arbitration proceedings in question). Relying on Reliance – I, the Delhi High Court dismissed the § 14 application against which, the Union of India approached the Supreme Court.

Importantly, Reliance – II clarified that post BALCO, in matters still being governed by Bhatia International, Indian courts would not exercise jurisdiction in foreign seated arbitrations (like Reliance – I). In Reliance – II, the Supreme Court held as under:

"*…Therefore, even in the cases governed by the Bhatia principle, it is only those cases in which agreements stipulate that the seat of the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration as being outside India that would continue to be governed by the Bhatia principle*."[28]

Therefore, the Supreme Court in Reliance – II, arguably for the first time, laid down a bright line test for future courts to ascertain if Part I was excluded while applying the principles of Bhatia International.

C. Concluding remarks

The post BALCO era completely changed the narrative of the jurisdiction question. While the pre-BALCO agreements were

[25]*Union of India v. Reliance Industries Limited,* Review Petition (C) No. 1378 of 2014 dismissed on 31 July 2014.
[26]*Rupa Ashok Hurra v. Ashok Hurra & Anr.*, (2002) 4 SCC 388.
[27]*Union of India v. Reliance Industries Limited,* Curative Petition (C) No. 313 of 2014 dismissed on 12 February 2015.
[28]*Reliance – II* (n 25) para 21.

governed by the Bhatia International principles, the application of the Bhatia International itself became seat centric. Additionally, and perhaps most importantly, while the theory of concurrent jurisdiction of Indian and foreign courts (as arguably established by NTPC – Singer and resurrected by Bhatia International)[29] was still alive in theory, in practice, the Supreme Court had made it clear that foreign seated arbitrations would not be interfered with by Indian courts. Much of the credit for this shift goes to BALCO and Enercon, both of which were authored by the same Supreme Court justice.

III. FINDING THE SEAT

Post BALCO, the question of jurisdiction came to be viewed from the perspective of the juridical seat. Naturally then in the post-BALCO era, to answer the jurisdictional question, courts had to first ascertain the juridical seat. Interestingly, most of the cases which the Supreme Court dealt with during this time were actually governed by the principles of Bhatia International. However, since by now it was clear that the *seat* was the determinative criteria, even for the application of Bhatia International, the Supreme Court had to develop a theory for finding the seat.

A. Union of India v. Hardy Exploration and Production (India) Inc.[30] ***("Hardy Judgment")***

The occasion to conclusively answer the question of how to determine the juridical seat arose in Union of India's disputes with Hardy Exploration and Production (India) Inc. (a foreign company). The contract, similar to Videocon, designated Kuala Lumpur as the *venue* for the arbitration proceedings.

[29] *Reliance – II* (n 25) para 15.
[30] *Union of India v. Hardy Exploration and Production (India) Inc.*, (2019) 13 SCC 472.

Disputes arose and an arbitral award was rendered at Kuala Lumpur in favour of Hardy Exploration and Production (India) Inc. The Union of India challenged the arbitral award before the Delhi High Court and ultimately, a Division Bench of the Delhi High Court dismissed the challenge holding that Indian courts did not have the jurisdiction to interfere in the arbitral award in question.

The Union of India appealed. The matter was initially heard by a bench comprising of two judges.[31] However, noting some confusion over the legal position, the Hardy Reference court decided to refer the question of law to a larger bench for an authoritative pronouncement. The question of law, which the Hardy Reference court thought was important enough to be answered by a larger bench was not clearly and explicitly mentioned in the actual reference order. However, it would seem that what troubled the Hardy Reference court was the manner in which the juridical seat had to be determined in cases where only the venue was stipulated.[32]

The reference came to be placed before a three judge bench of the Supreme Court in the Hardy Judgment. Unfortunately though, even the Hardy Judgment did not specify the exact question which was being answered. The Supreme Court merely reproduced the Hardy Reference and stated: *That is how the matter has been placed before us*.[33] What followed this is a judgment which is hard to comprehend. The Hardy Judgment just quoted from earlier judgments of the Supreme Court without giving the reader any context. Surprisingly though, out of nowhere the reference gets answered and the Hardy Judgment concludes as follows:

"…*That apart, if there is mention of venue and something else is appended thereto, depending on the nature of the prescription, the*

[31]*Union of India v. Hardy Exploration and Production (India) Inc*., (2018) 7 SCC 374.
[32]ibid para 16.
[33]*Hardy Judgment* (n 30) para 5.

Court can come to a conclusion that there is implied exclusion of Part I of the Act."[34]

The Hardy Judgment concluded, as a matter of law, that in case a venue is specified and there is *something else,* then depending upon the prescription of that something else, a specified venue can qualify as a seat thereby excluding the jurisdiction of Indian courts. Mathematically put, the Hardy Judgment held as follows:

$$\text{Venue} \neq \text{Seat}$$

$$\text{Venue} + \Delta = \text{Seat}$$

where Δ is that variable (or *something else*) which, depending upon its prescription, could make the venue the seat of arbitration.

While the Hardy Judgment postulated a test (for which there was little justification in the text of the judgment), the application of the said test in the very same judgment, is confusing and makes little sense. The confusion is evident from the following:

- The Supreme Court noted that when 'place' is agreed upon, it gets the status of a 'juridical seat'. However, this would only happen if only the 'place' is mentioned and no other condition finds a mention. In other words, the word 'place' if used in an unqualified manner with no conditions precedent, can be said to be a 'seat'.[35]
- However, subsequently, in direct contrast with the above, the Supreme Court noted that a place cannot be used as a seat and that it can become a seat if one of the conditions precedent are satisfied. Therefore, place does not *ipso facto* assume the status of a seat.[36]

It was on the basis of the above that the Supreme Court concluded that Kuala Lumpur was not the seat of the arbitration and held that '…[*T*]*hus understood, Kuala Lumpur is not the seat or place of*

[34]*Hardy Judgment* (n 31) para 24.
[35]*Hardy Judgment* (n 30) para 34.
[36]*Hardy Judgment* (n 30) para 35.

arbitration and the interchangeable use will not apply in stricto sensu.[37] The following points need mention:

- In the contract between the parties, Kuala Lumpur was stated to be the *venue* of the *arbitration proceedings*. There was no mention of a *place* in the contract. Therefore, the conclusion that *place* cannot be interchangeably used as a *seat,* makes absolutely no sense. This is especially since the Supreme Court was ostensibly answering a legal reference on the meaning and nature of these very terms.
- Notwithstanding the above, when can a *place* be interchangeably used as a *seat,* is not clear from the Hardy Judgment. In fact, the Hardy Judgment gives contradictory views on the issue.
- Having laid down the test for when can a *venue* be considered a *seat*, the only other task before the Supreme Court was to ascertain whether in the facts of that case, could Kuala Lumpur be the juridical seat. That was not done.
- Applying its own test, Kuala Lumpur ought to have been declared as the juridical seat since it was the designated venue and there was a lot of *something else,* which warranted it being the juridical seat too. This included:
    i. It was not a convenient geographical venue for disputes concerning the Union of India and a company incorporated in the United States. The designation of Kuala Lumpur therefore had to have some other function for it to be explicable.
    ii. The conclusion that Kuala Lumpur was merely a 'neutral venue' makes little sense. It was highly unlikely that stakeholders from India and United States would travel to Kuala Lumpur, at great expense including taxpayers' expense, to conduct arbitration proceedings in a 'neutral' room in Kuala Lumpur when the juridical seat remained in India.

[37] *Hardy Judgment* (n 30) para 35.

iii. The term used was *arbitration proceedings* shall be in Kuala Lumpur. It was not just a case where a hearing or a meeting was contemplated to be held in Kuala Lumpur. It meant the entire arbitration proceedings were to be anchored in Kuala Lumpur.

iv. The arbitral award was in fact *made* at Kuala Lumpur.

v. The arbitration clause in this case was remarkably similar to the one in Videocon. Both the agreements were production sharing contracts entered into by the Union of India in the mid-1990s. In Videocon, the Union of India vehemently argued (and is still arguing), that Kuala Lumpur (even though designated as the *venue*, much like here) was the juridical seat of arbitration. It took a diametrically opposite view in this case.

If one looks at all the above, there is no doubt that there was enough of *something else* to conclude that Kuala Lumpur was the juridical seat of the arbitration. However, despite these clear and categorical indicators, the Supreme Court held Kuala Lumpur to be the geographical venue of the arbitration.

Notwithstanding the outcome, the Hardy Judgment was clearly a missed opportunity. There was a reference order from a bench of two judges to a larger bench and the legal question referred was clearly important. The Supreme Court ought to have grasped the nettle and authoritatively laid down the law. Instead, the Supreme Court pointlessly quoted from earlier judgments and concluded, without any context, that *venue* was the *seat* if there was *something else.* To make matters worse, it failed to even correctly apply that test in the facts of the case.

While the Hardy Judgment clearly presented an opportunity, though missed, the Supreme Court created the opportunity, where none existed, to answer this very question in BGS SGS.

B. The BGS SGS Judgment

The question before the Supreme Court in BGS SGS was whether Delhi or Faridabad was the seat of the arbitration. The facts were fairly simple and largely uncontroverted. The contract provided that *arbitration proceedings shall be held at New Delhi/Faridabad, India.* Other systems of laws, at least for the disputes at hand, were Indian. Disputes arose and an award was rendered in favour of BGS SGS Soma at New Delhi which was challenged by the counter party in Faridabad. The challenge was resisted on the ground that New Delhi was the seat of arbitration and therefore, any challenge to the arbitral award had to be made in New Delhi. This objection was allowed and Faridabad courts held New Delhi to be the seat. This decision was appealed before the Punjab and Haryana High Court which reversed the judgment of the Faridabad courts and held Faridabad courts to have jurisdiction. This decision was assailed by BGS SGS Soma before the Supreme Court.

The question before the Supreme Court was therefore which of the two cities, New Delhi or Faridabad, had jurisdiction in an award, which was admittedly a domestic award. To answer this question, the Supreme Court, rather unnecessarily, decided to *lay down the law on what constitutes the "juridical seat" of arbitral proceedings, and whether, once the seat is delineated by the arbitration agreement, courts at the place of the seat would alone thereafter have exclusive jurisdiction over the arbitral proceedings.*[38]

BGS SGS painstakingly delineates fundamental concepts of seat/venue/place in arbitration law, both from the perspective of the statute and judgments. It finally came up with a test, contrary to what was laid down in the Hardy Judgment, on how to determine a seat of arbitration in case a venue is specified. However, before examining the validity of the test laid down in BGS SGS, it is important to understand how the Supreme Court come to that conclusion.

[38] *BGS SGS* (n 7) para 23.

Broadly speaking, BGS SGS has two aspects: The first aspect deals with the concept of a juridical seat and the implications of designating one, especially in light of the confusion created by Para. 96 of BALCO. The second aspect of BGS SGS lays down the actual test. The following paragraphs examine both these aspects in some detail.

a) The juridical seat of arbitration and Para. 96 of BALCO

While the meaning and implications of a juridical seat had been settled by the Supreme Court even before BGS SGS, the Supreme Court nonetheless discussed in some detail the concepts of seat/venue, admitting that some of its earlier decisions had not properly distinguished between these concepts.[39] It noted that BALCO had put an end to the confusion by accepting the internationally recognised principle that arbitrations are anchored in their juridical seat. The problem however, was that BALCO itself created some doubt over this proposition (in the domestic context) at Para. 96 of the judgment, which had been relied upon by some of the High Courts to espouse a theory of concurrent jurisdiction of two sets of courts – the seat court and the cause of action court(s). Para. 96 of BALCO, in its relevant part, reads as under:

"In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place… 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."

It would therefore appear that BALCO advocated that even if a seat is chosen, for a domestic setting, seat courts as well as courts which otherwise have jurisdiction based on laws of civil procedure, would both be competent. If so, this was seemingly contrary to what

[39] *BGS SGS* (n 7) para 35.

BALCO otherwise held, namely, the supremacy and exclusivity of the seat courts.

The Supreme Court in BGS SGS, attempts to 'explain away' the anomaly of Para. 96 of BALCO by observing that judgments of courts are not to be read as statutes and need to be read in the context in which they appear.[40] It further argues that read as a whole, conflicting portions of a judgment need to be harmonised and if that is also not possible, the real test is to see if the ratio of the judgment can be culled out without the use of the conflicting portions and failing all of these, the precedential value of a judgment becomes questionable.[41]

Applying the aforesaid tests on how to read a judgment, BGS SGS holds that BALCO does not support a concurrent jurisdiction theory, even for domestic arbitrations. It further bolsters its conclusion by noting that subsequent decisions of the Supreme Court, especially Enercon and Reliance – I have read BALCO to support the theory that a selection of seat is akin to an exclusive jurisdiction clause.

b) Tests for determination of seat

Having settled the confusion on Para. 96 of BALCO, BGS SGS proceeded to lay down the tests for determining the seat of an arbitration. The starting point, and arguably the ending point, of the discussion was the English decision in *Shashoua v. Sharma*[42] **(**"**Shashoua**"). In Shashoua, the English Commercial Court, relying on § 3 of the Arbitration Act, 1996 (*English Act*) held that:

"Whenever there is an express designation of the arbitration venue as London and no designation of any alternative place as the seat, combined with a supranational body of rules governing the arbitration and no other significant contrary indicia, the inexorable

[40] *BGS SGS* (n 7) para 43.
[41] *BGS SGS* (n 7) para 45.
[42] *Shashoua v. Sharma*, [2009] EWHC 956 (Comm).

conclusion is, to my mind, that London is the juridical seat and English law the curial law."[43]

BGS SGS adopted the above test in the following words:

"It will thus be seen that wherever there is an express designation of a "venue", and no designation of any alternative place as the "seat", combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding."[44]

In coming to the above conclusion, BGS SGS examined both English as well as Indian judgments to conclude that the venue would be the seat of arbitration if there is nothing to suggest otherwise. What would bolster such a presumption would be if the arbitration is governed by a *supranational body of rules*, which in the domestic context would be the 1996 Act.[45] In mathematical terms, this conclusion is almost contrary to the Hardy Judgment inasmuch as BGS SGS suggests as follows:

$$\text{Venue} = \text{Seat}$$

$$\text{Venue} - \Delta \neq \text{Seat}$$

where Δ is that variable (or *significant contrary indicia*) which takes away from venue being the seat.

BGS SGS after concluding the above, dedicated an entire section doubting the correctness of the Hardy Judgment and ultimately held it to have been wrongly decided. BGS SGS concluded that since BALCO had approved the test laid down in Shashoua, Hardy

[43]ibid para 34.
[44]*BGS SGS* (n 7) para 64.
[45]*BGS SGS* (n 7) para 85.

Judgment, insofar as it failed to follow the Shashoua principles, was wrong and was thus not good law.[46]

C. Mankastu Impex Private Limited v. Airvisual Limited[47]

*("**Mankastu**")*

Soon after BGS SGS, the Supreme Court was faced with a situation where it had to choose between the Hardy Judgment or BGS SGS. In Mankastu, a petition was filed under § 11 of the 1996 Act seeking appointment of an arbitrator. The arbitration clause, in its relevant part, provided as under:

"*17. Governing Law and Dispute Resolution*

***17.1** This MoU is governed by the laws of India, without regard to its conflicts of laws and provisions, and courts at New Delhi shall have jurisdiction.*

***17.2** Any dispute, controversy, difference or claim arising out of or relating to this MoU, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered in Hong Kong.*

***The place of arbitration shall be Hong Kong.*"**[48]

The Petitioner relying on the Hardy Judgment, contended that Hong Kong was only a venue and not a seat. It could be a seat only if there are indicators to that effect, and there were none in the facts of the case. It was further argued that since both the Hardy Judgment and BGS SGS were judgments by three judges, it was incorrect for BGS SGS to have held that the Hardy Judgment was incorrectly decided and therefore, BGS SGS itself was not good law.

[46] *BGS SGS* (n 7) para 97.
[47] *Mankastu Impex Private Limited v. Airvisual Limited*, (2020) 5 SCC 399.
[48] ibid para 18.

On the contrary, the Respondent placing reliance on BGS SGS, argued that the venue (i.e., Hong Kong) was in fact the seat unless there were contrary indicia to that effect. Since there were no contrary indicia coupled with the fact that the clauses use terms like arbitration administered in Hong Kong, was clearly indicative of the fact that Hong Kong was chosen to be the seat of arbitration. On the interplay between the Hardy Judgment and BGS SGS, the Respondent argued that the latter being a subsequent decision ought to prevail.

Much like the Hardy Judgment and BGS SGS, Mankastu was also a bench of three judges and before it lay the question of choosing between the Hardy Judgment or BGS SGS, especially since an argument to that effect was raised. However, it completely side-stepped the issue noting that given the facts of the case, they were not *inclined to go into the question on the correctness of BGS Soma or otherwise.*[49]

On a reading of the arbitration clause, Mankastu held that Hong Kong was meant to be more than the venue of arbitration. It noted that the term *arbitration administered in Hong Kong* was sufficiently indicative of the parties' intention to have Hong Kong as the seat of arbitration. Accordingly, the petition was dismissed.

Mankastu was clearly a missed opportunity for putting the controversy to rest especially since the conflict between the Hardy Judgment and BGS SGS was raised before it as an issue. However, the Supreme Court skirted the question and decided the case before it without explicitly favouring either of the two conflicting judgments. On its own merits, Mankastu does not seem to follow a clear legal principle nor does it contribute to the debate in any manner whatsoever.

[49]ibid para14.

IV. WHY IS BGS SGS PROBLEMATIC?

Even though BGS SGS emphatically held the Hardy Judgment to have been incorrectly decided, the question still remains - has BGS SGS been correctly decided and is it worth being followed as a precedent? Mankastu could have cleared the air, but chose not do so. It would appear that BGS SGS is wrong, both on procedure and on merits. The following paragraphs elaborate on this claim.

A. Procedural fallacies of BGS SGS

a) Overruling of a judgment of coequal strength

The Hardy Judgment and the judgment in BGS SGS were delivered by benches of co-equal strength. The law as settled by a Constitution Bench of the Supreme Court in *Central Board of Dawoodi Bohra Community and Anr. v. State of Maharashtra and Anr.*[50] **("Dawoodi Bohra")** is sufficiently clear and notes that in such cases, the subsequent court (i.e., BGS SGS) is dutybound to refer the matter to a larger bench. It notes:

"It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum..."[51]

Therefore, the only recourse available with BGS SGS was express its doubts over the correctness of the Hardy Judgment and refer the matter to a larger bench for consideration. Instead, BGS SGS proceeded to overrule the Hardy Judgment thereby casting a doubt over its own credibility.

[50] *Central Board of Dawoodi Bohra Community and Anr. v. State of Maharashtra and Anr.*, (2002) 2 SCC 673.
[51] ibid para 12.

b) Reasons for overruling the Hardy Judgment

BGS SGS held the Hardy Judgment to have been wrongly decided since the latter ostensibly failed to follow the Constitution Bench decision in BALCO. While ironically, BGS SGS itself failed to follow a Constitution Bench decision, the Hardy Judgment on the other hand did not fail to follow BALCO.

BGS SGS noted that Shashoua had been expressly referred (at Paras. 108 and 109) and followed (at Para. 110) in BALCO. The Hardy Judgment, insofar as it failed to follow Shashoua, was in conflict with BALCO and hence wrongly decided. A closer look at this claim would show that it is without merit:

- Undoubtedly, Shashoua was discussed at Paras. 108 – 110 of BALCO. In fact, at Para. 110 of BALCO, the Supreme Court even quoted the portion of Shashoua where the *Shashoua principles* have been discussed and which were adopted by BGS SGS.
- However, Paras. 108 – 110 formed part of a larger subset (starting at Para. 95) of BALCO where Supreme Court was discussing the concept of party autonomy in the context of an international commercial arbitration. More precisely, the Supreme Court was explaining the concepts of venue and seat, which even as per BGS SGS, were misunderstood by some of the earlier decisions.
- This explanation on the difference between venue and seat was concluded at Para. 100 where BALCO quoted with approval a passage from Redfern and Hunter, The Law and Practice of International Commercial Arbitration (1986).
- Thereafter, from Para. 101, BALCO cited examples of decided case laws (including Shashoua) only with a view to demonstrate the importance of a seat and how matters can be complicated in cases where multiple jurisdictions are involved. This is more than evident from the text of BALCO itself:

"*How complex the situation can become can be best demonstrated by looking at some of the prominent decisions on the factors to be taken*

into consideration in construing the relevant provisions of the contract/arbitration clause."[52]

Therefore, at no point does BALCO endorse the Shashoua principles and to hold otherwise, is a misreading. Equally incorrect is the claim that Hardy was wrongly decided since it failed to follow the Shashoua principles as 'upheld' in BALCO since BALCO never endorsed the Shashoua principles.

If there was any doubt on whether or not BALCO adopted Shashoua, the same was conclusively cleared by Enercon. Interestingly, both BALCO and Enercon were authored by the same Supreme Court justice and arguably, speak to the mind of the BALCO court. Enercon noted that while reference was made to certain judgments in BALCO, the Supreme Court in BALCO was not deciding as to when can a venue be equated with a seat. It observed as under:

"…Reference can be made to BALCO, wherein this Court considered a number of judgments having a bearing on the issue of whether the venue is to be treated as seat. However, the court was not required to decide any controversy akin to the one this court is considering in the present case. The cases were examined only to demonstrate the difficulties that the court will face in a situation similar to the one which was considered in Naviera Amazonica."[53]

It is therefore abundantly clear that BALCO was not deciding a controversy wherein it was required to decide when can a venue be equated with a seat. To hold that BALCO *approved* the Shashoua principles, is incorrect simply because it textually did not do so and more importantly, that was not an issue before BALCO, as rightly noted by Enercon.

[52] *BALCO* (n 5) para 101.
[53] *Enercon* (n 16) para 107.

c) No occasion to lay down a test

A majority of the decision in BGS SGS is dedicated to surveying English and Indian decisions on the issue of finding a juridical seat in an international commercial arbitration. The judgments cited in BGS SGS concerned themselves with finding which courts, out of the many systems of law involved in those cases, had jurisdiction and for that, most of those judgments had to theorise ways to find the seat of the arbitration. However, no such issue arose in BGS SGS.

The issue in BGS SGS was fairly simple, namely, whether it was New Delhi or Faridabad which had jurisdiction to entertain a challenge to a domestic award. There was absolutely no need or justification to lay down a test for finding a seat for a foreign seated international commercial arbitration. All the cases discussed in BGS SGS with the exception of perhaps one judgment, were cases where the issue was between courts of two different countries. In BGS SGS, the entire exercise was purely academic and thus not binding as a precedent of the Supreme Court.

d) Para. 96 of BALCO

Much debate in BGS SGS centred around Para. 96 of BALCO. To recapitulate, while BALCO made the juridical seat the centre of gravity for foreign seated arbitrations, Para. 96 suggested that two courts could have concurrent jurisdiction in a domestic setting. BGS SGS explained away this 'anomaly' by holding that even for domestic arbitrations, the choice of a seat meant an exclusive jurisdiction clause and the theory of concurrent jurisdiction was alien to the 1996 Act and not supported by BALCO.

A closer look at these claims of *BGS SGS* would make it evident that they are perhaps unfounded. BALCO did in fact espouse a concurrent jurisdiction theory for locally seated arbitrations and one need not go further than examining Enercon which clarified this in the following words:

"In BALCO, it has been clearly held that concurrent jurisdiction is vested in the courts of seat and venue, only when the seat of arbitration is in India. The reason for the aforesaid conclusion is that there is no risk of conflict of judgments of different jurisdictions, as all courts in India would follow the Indian law."[54]

That being the position of law, the substratum of BGS SGS falls. There was clearly no need for BGS SGS to examine English judgments and lay down tests for determination of the juridical seat as the dispute in BGS SGS pertained to a domestic award, which could arguably have two courts exercising concurrent jurisdiction. The solution therefore would have been exclusively within the domain of Section 42 of the 1996 Act.[55]

B. Merits of BGS SGS

Leaving aside the fact that BGS SGS was not required to lay down tests for determination of a juridical seat, even the test which BGS SGS does lay down, which is essentially a replication of Shashoua, is wanting in the Indian context. The following paragraphs attempt to make good this claim.

a) Difference between the legislative frameworks

Indian courts often find themselves following English decisions on the issue of the seat of arbitration. However, commentators have noted that in cases where arguments seem finely balanced, any court is likely to lean in favour of its own jurisdiction, a phenomenon known as 'forum preference.'[56] A classic example seems to be the decision in *Braes of Doune Wind Farm (Scotland) Ltd. v. Alfred McAlpine Business Services Ltd.*, [57] **("Braes of Doune") ** where

[54]*Enercon* (n 16) para 106.
[55]The Arbitration and Conciliation Act 1996, s 42.
[56]Robert A. Sedler, 'Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'' (1983) 34 Mercer L. Rev. 593.
[57]*Doune Wind Farm (Scotland) Ltd. v. Alfred McAlpine Business Services Ltd., (Braes of Doune)*, [2008] EWHC 426 (Comm).

despite an express stipulation that '*the seat of arbitration shall be Glasgow, Scotland'*, the court held that on a proper interpretation, the seat must be deemed to be England because of an exclusive jurisdiction clause giving jurisdiction to English courts. The case in Braes of Doune must be contrasted with *U&M Mining Zambia Ltd v Konkola Copper Mines plc.*,[58] wherein the parties agreed England to be the place of arbitration and conferred exclusive jurisdiction over Zambian courts. On a parity of reasoning, Zambia ought to have been the seat. However, the court, in direct contrast with its reasoning in Braes of Doune held England to be the seat thereby completely ignoring the exclusive jurisdiction clause conferring jurisdiction to Zambian courts.

In any event, whether or not English courts do in fact prefer London as the seat of arbitration, there are good reasons for Indian courts to avoid an overreliance on English decisions in cases where Indian courts are dealing with the issue of discerning the juridical seat of arbitration.

The reason for such circumspection stems from the difference between the 1996 Act and the English Act. Section 20 of the 1996 Act, which is arguably the equivalent of Section 3 of the English Act, are the two provisions which deal with the concept of juridical seat. However, their prescription of how to identify a juridical seat, is vastly different warranting a differential interpretative treatment.

Section 3 of the English Act allows for a *designation* of a seat failing which it permits a *determination* of the same.[59] Section 3 of the English Act allows the following to designate a seat:

- Parties to the arbitration agreement;

[58]*U&M Mining Zambia Ltd v. Konkola Copper Mines plc.,* [2013] EWHC 260 (Comm).
[59]The Arbitration and Conciliation Act 1996, s 3.

- By a third party like an arbitral or other institution or a person if so permitted by parties;
- The arbitral tribunal if so authorised by the parties.

In the event that a seat has not been *designated* by way of one of the modes noted above, § 3 of the English Act contemplates a fall-back provision which allows for a *determination* of the seat. The difference in the terms used, 'designation' and 'determination', is crucial especially when contrasted with § 20 of the 1996 Act.

When a *designation* does not happen, the fall-back provision of § 3 of the English Act permits a court to *determine* the seat. While undertaking this determination, an English court would be at liberty to take into account a myriad of factors including, but not limited to, the contractual understanding between the parties. To put it differently, a court determining the seat under the fall-back provision of § 3 may not necessarily be confined to the express terms of the agreement and may be at liberty to consider external aids of interpretation. The ability to look beyond the agreement stems from the fact that the court has been statutorily tasked with *determining* the seat in case the parties or their agents fail to *designate* one. Therefore, English courts are well within their right to go beyond the agreement for undertaking this determination.

By contrast, § 20 of the 1996 Act does not provide the kind of flexibility § 3 of the English Act does. § 20 of the 1996 Act only allows the parties to agree on the seat failing which it mandates the arbitral tribunal to decide the seat having regard to the circumstances of the case. The Indian court, it must be noted, has no power to *determine* a seat. If a dispute reaches the court where the seat has not been fixed by the parties or decided by the arbitral tribunal, an Indian court, unlike its English counterpart, does not have the independent power to *determine* the seat. It can only interpret the agreement to decipher the intention of the parties. That being the case, the Indian court is limited in its inquiry to the terms of the arbitration agreement

and does not have the flexibility of an English court to travel beyond the express terms of the agreement to *determine* the juridical seat. Therefore, an Indian court must be careful before importing the tests of an English court for the latter has more latitude in the determination of a juridical seat.

b) The Shashoua principles

The analysis of the juridical seat question in Shashoua commenced with § 3 of the English Act. The agreement in Shashoua provided for London as the venue and Indian law as the governing law. The substratum of the claimant's case before the court was rooted more in common sense than nuanced legal principles. The claimant contended that if a venue was named, it would be expected that the parties would also specifically name a seat. In case the parties failed to specifically name a seat, the venue must be treated as the seat. The court found force in this contention. However, from this simple notion of a contractual *casus omissus*, the court formulated the Shashoua principles.

The adoption of these *Shashoua* principles in *BGS SGS* is incorrect for the following reasons.

i. London Arbitration

The Shashoua principles presuppose London arbitration to be a well-known phenomenon. Whether or not London arbitration is a well-known phenomenon, is a separate debate. However, the reasoning that if London is mentioned, albeit as a venue, absent any contrary indication, it would be deemed to be the seat since it is, in a manner of speaking, a term of trade where *London arbitration* understood to mean a London seated arbitration.

In my view, it was rather presumptuous for an English court to conclude *London arbitration* to be a *well-known phenomenon*, absent any evidence or analysis. In any event, that is clearly not the case in India (nor did BGS SGS claim so). Therefore, the Shashoua

principles, which are clearly based on this claim of London arbitration being a well understood term of trade and therefore, absent any contrary indication, a London venue was the equivalent of a London seat, cannot and should not be imported into the Indian arbitration jurisprudence.

BGS SGS insofar as it adopts the Shashoua principles and in fact, seeks to overrule the Hardy Judgment on the ground of its failure to follow them, fails to appreciate the backdrop in which these principles were laid down by an English court.

ii. Fall back provision of § 3

In Shashoua, it was clear that the court was cognizant of the fact that it was a stretch for it to conclude that the parties had designated London to be the seat of the arbitration only on the strength of the plain language of the contract. This was especially so since the court was basing its decision on factors which were alien to well settled legal principles, namely, an abstract concept of a *London arbitration.* Therefore, the court notes that even if that was not the case, it was *determining* London to be the seat of the arbitration as per the fall-back provision of § 3 of the English Act.

That being the case, given the differences between the legislative frameworks of the 1996 Act and the English Act, the adoption of the Shashoua principles, which clearly seem to have been nestled in the fall-back provision of § 3 of the English Act, runs contrary to the text of the 1996 Act.

C. Concluding remarks

The unceremonious overruling of Hardy in BGS SGS in effect means that presently, there is no judgment of the Supreme Court which settles this debate beyond any pale of doubt. While arguably, BGS SGS being a subsequent decision, should hold the field, however, its questionable overruling of Hardy and its potential incorrect reading of BALCO, makes BGS SGS itself susceptible to claims of *per*

incuriam. Mankastu of course missed an opportunity to have the question conclusively decided by a larger bench.

V. IS THERE A CORRECT TEST?

There cannot possibly be a bright line test which answers to all disputes of jurisdiction. While simpler situations where the agreement points out to a single location do not pose a serious challenge, cases in which the agreement points to multiple locations create issues.

Fewer issues would arise if arbitration clauses used consistent terminology to neatly distinguish between concepts like 'seat' and 'venue.' However, as has been the experience, cases are not often this simple in practice. In a majority of the cases, the determination of the juridical seat is often left to the interpreter and which interpretation, is to a great degree, a creative exercise. Therefore, any attempt to lay down an objective test, is destined to fail. Having said that, it is not impossible to provide a doctrinal framework, which if used with a bit of common sense, can tremendously help answer the jurisdiction question specially in the difficult cases.

The starting point of any framework necessarily has to be the juridical seat. Any theory which attempts to answer the jurisdiction question without making the seat as the focal point, misses the point. The answer to finding the seat, however, cannot be confined to a formula espoused in the Hardy Judgment or BGS SGS. It has to be the result of a judicious judicial interpretation, keeping in mind the long-standing principles of contract interpretation. Courts have interpreted contracts including commercial contracts for as long as they have existed and there is no reason to deviate from that wealth of knowledge for arbitration agreements. For interpreting commercial contracts, courts have, over the years, developed principles and theories, which are sufficient to interpret arbitration agreements. At

the heart of any such interpretative theory is the acknowledgment of the fact that a commercial contract needs to be interpreted keeping in mind commercial common sense. Keeping that bedrock principle in mind, the following factors may provide a helpful guide.

A. Neutrality

A court while attempting to find the juridical seat, should be cognizant of the fact that commercially prudent parties would not normally have a 'neutral geographical location' as the physical venue for the arbitration. Therefore, if a location finds mention in the contract which has literally nothing to do with the parties or the execution of the contract, chances are, that the parties meant it to be the juridical seat. In the arbitration context, what is meant by neutrality is that none of the parties have a home advantage in terms of the curial laws and that is why, parties perhaps choose a neutral location. To put it differently, neutrality does not refer to a neutral room where lawyers and arbitrators hold proceedings.

A classic case in point is the Enercon judgment. The operative stipulation was that the *venue of the arbitration proceedings shall be London.* London could not have been a convenient geographical location for disputes concerning an Indian and a German company and where the evidence would be located in India and possibly in Germany. London had nothing to do with either the parties or the execution of the contract. Therefore, the only logical explanation for London to find mention in the contract was for it to serve as the juridical seat inasmuch as it was the *neutral* place where none of the contesting parties had a home advantage. However, the Supreme Court felt otherwise and held London to be the venue. This is despite the fact that in Enercon GmBH which was an offshoot of the same dispute between the same parties, the English High Court of Justice, Queen's Bench Division, had already observed London to be the seat

of the arbitration. On the concept of neutrality, it was noted as under:[60]

"…In my judgment, the designation of London therefore had to have some other function for it to be explicable… However, as submitted by Mr Joseph QC, neutrality in this sense is to be understood in terms of a neutral place to anchor the proceedings. In other words a place which is neutral and will not favour either side…"

B. 'Dropping the anchor'

The other factor which the courts must ascertain is to see where have the parties intended to 'drop the anchor.' In other words, the courts must try and find out where did the parties want the arbitration, as a whole, to be held. Admittedly, finding this is not an easy task, however, in most contracts, there are giveaways which make it possible for a judicially trained mind to find it.

A good example is the decision of the Delhi High Court in *Union of India v. Hardy Exploration & Production (India) Inc.*[61] (which was subsequently overturned by the Supreme Court in the Hardy judgment). The contract, in its relevant part, provided that the venue of the *arbitration proceedings* shall be Kuala Lumpur and in the absence of a designated seat, the Delhi High Court held Kuala Lumpur to be the seat of the arbitration. One of the factors which weighed with the Delhi High Court was the usage of the term arbitration *proceedings* (as opposed to arbitration *hearings/meetings*). Therefore, the Delhi High Court concluded that since the *proceedings* were held in Kuala Lumpur coupled with the fact that the award was in fact made there, the intention of the parties was clear that Kuala Lumpur was the seat of arbitration. Once again, on appeal, the Supreme Court felt otherwise.

[60] *Enercon GmBH* (n 20) para 62.
[61] *Union of India v. Hardy Exploration & Production (India) Inc*., 2016 SCC OnLine Del 4098.

C. Internal inconsistencies

There have been instances where the arbitration agreement itself is arguably self-contradictory. Courts must be varied of such contradictions which at times could possibly help in identifying the seat.

A fine example would be the English decision in *Paul Smith Ltd. v. H&S International Holding Inc.*[62] which contained arguably inconsistent provisions within the arbitration agreement itself. While the juridical seat was to be decided by the International Chamber of Commerce, the arbitration agreement also contained an exclusive jurisdiction clause in favour of English courts. The solution was to designate the English law into the curial law which practically meant that London was to be the seat of arbitration and so was decided by the ICC.

D. Concluding remarks

As mentioned at the start of this section, it is not possible to define with any amount of objectivity, the tests to be employed in finding a seat. Given the almost infinite combinations with which an arbitration clause can be formulated coupled with the fact that mostly, these clauses are not well thought out, the task of finding the seat requires courts to build upon the decades of experience they have in interpreting commercial contracts. In doing so, there is really no need to deviate from the wealth of knowledge and to lay down bright line tests for arbitration agreements because after all, as Justice Oliver Wendell Holmes Jr. said, "*The life of the law has not been logic: it has been experience*."[63]

[62]*Paul Smith Ltd. v. H&S International Holding Inc*., [1991] 2 Llyod's Rep. 127.
[63]Edmund Fuller, 'Oliver Wendell Holmes, Jr.' (*Encyclopaedia Britannica*, 20 April 2020) accessed 19 June 2021.