To “seat” or not to “seat”: Art thou relevant!!

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William Shakespeare’s soliloquy from Hamlet is an apt expression for parties who end up with the wrong seat of arbitration, by either having failed to make a choice or making the wrong one. Two recent decisions from the highest courts in India and Singapore, reverberated in the international arbitration community, have gone into the relevance of choosing a seat in an international arbitration as the basis for their decisions. The more recent is the decision by Singapore’s Court of Appeal in PT First Media TBK v Astro Nusantara International BV & Ors¹ (“Astro”) which was delivered on 31 October 2013, and the other is the decision of the Supreme Court of India in Bharat Aluminium Company vs Kaiser Aluminium Technical Services Inc² (“Balco”), which was pronounced on 6 September 2012. The two judgments reflect a sign of the times. Astro has lead the way in developing international arbitral jurisprudence and set an indelible mark on the subject, whereas Balco has played catch-up, and placed Indian arbitral jurisprudence at par with other countries that have adopted the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”). Through Balco and other recent judgments,³ the Indian Supreme Court, which has been internationally lauded for the development of constitutional jurisprudence, has now won praises for jurisprudentially attuning India’s laws with international commerce.

Interestingly, although the courts in Astro and Balco were dealing with entirely different factual scenarios, both courts narrowed the controversy to the relevance of the seat under the Model Law. Even though both court’s proceeded on the footing that the Model Law had not accepted the transnational or supranational theory, under which an arbitration does not derive its validity from the local system of law where it is seated, they adopted a different threshold on the relevance that a seat plays in an international arbitration under the Model Law.⁴ It is the difference in approach that throws up an interesting conundrum: not one which is irreconcilable, but one which can be the subject to a full-fledged treatise by itself.

Seat makes no difference to choice of remedies against an arbitral award

In Astro, the Singapore Court of Appeal was faced with a very interesting issue which arose from an arbitration award rendered in an international arbitration seated in Singapore. A party which had not challenged an arbitral Tribunal’s jurisdictional award despite having a statutory right to do so under the Singapore International Arbitration Act (Cap 143A) (the “IAA”), and which had also not filed an application to set aside the final award despite having a statutory right to do so, approached the Singapore court to resist the enforcement of the award. The application, at the first instance, came up before the High Court and was dismissed. The High Court held that if Singapore had been chosen as the seat of arbitration it was incumbent for a party to have taken the positive step of challenging the award by filing the appropriate setting aside application, and the failure to do so precluded such party from resisting enforcement in Singapore. The High Court’s view was founded on the IAA having excluded

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¹ [2013] SGCA 57
² (2012) 9 SCC 552
³ These include the judgments of the Indian Supreme Court in Vodafone International Holdings BV vs Union of India (2012) 6 SCC 613 and Shri Lal Mahal Limited vs Progetto Grano SPA (Civil Appeal No 5089 of 2013).
⁴ See paragraphs 76 and 77 of Astro. Through the Indian Supreme Court does not expressly cite the supranational or the transnational theory in its decisions, submissions on that, including the example of France, was cited during the oral submissions before the Court by the lead counsel for the Respondent, Mr H.N. Salve (Senior Advocate).

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Chapter VIII of the Model Law, which included the relevant provisions that set out the grounds for refusing recognition or enforcement of an award. The High Court took the view that the exclusion of Chapter VIII set out the legislative intent of not giving a party a choice of either choosing the active remedy of setting aside an award or the passive remedy of resisting enforcement, if the arbitration was seated in Singapore and enforcement was sought to be resisted before a Singapore court. In the process, the High Court drew a distinction between an international arbitration award rendered in an arbitration seated in Singapore, and an international arbitration award rendered in a seat outside Singapore, holding that the grounds for resisting enforcement, as set out in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the “New York Convention”), would only apply in Singapore, if the arbitration award was rendered in an arbitration which was not seated in Singapore.

The Court of Appeal reversed the High Court’s decision. The Court of Appeal accepted the submission that the imperative in the Model Law was the jurisprudential diminution on the emphasis of seat of arbitration. The court held that the philosophy of reducing the emphasis on seat was so strong that in order to deny a party the choice of remedies, i.e. having the choice of either taking the active step of setting aside an award or the passive step of resisting enforcement, Parliament would have had to expressly legislate out of it. In reaching that conclusion the Court of Appeal relied on the fact that the double exequatur rule set out in the Convention on the Execution of Foreign Arbitral Awards 1927 (the “Geneva Convention”), which required leave of the court to be obtained both from the court of the seat and the court of enforcement, had been given a go-by in the New York Convention. Given that Singapore had adopted the New York Convention, the court noted that “the seat of arbitration which was influential because of the double exequatur rule therefore became less significant under the New York Convention.” The Court then went on to hold that “the drafters of the Model Law, in aligning the Model Law with the New York Convention, were plainly desirous of continuing this trend of de-emphasising the importance of the seat of arbitration.” Ergo, while not accepting the supranational or the transnational theory and recognising that Article V(1)(e) of the New York Convention applied to Singapore, the court took the view that choosing Singapore as the seat of arbitration would not deprive a party of its choice of remedies against an arbitral award. In short, parties choosing Singapore as the seat of arbitration would not be deprived of a remedy against an arbitration award that would be available to them if the seat were outside.

**Seat makes the difference when determining the supervisory court**

Addressing the issue from an entirely different perspective, and having often been criticised for interfering in international arbitrations seated outside India, the Supreme Court of India in *Balco* rejected submissions which sought to equate an international arbitration award rendered by an arbitral tribunal in a seat outside India on the same pedestal as an international arbitration award rendered by an arbitral tribunal with its seat in India. In the process the Supreme Court set aside its earlier judgments that allowed an Indian Court to put a toehold into international arbitrations seated outside India, including having the jurisdiction to set aside an award under India’s Arbitration and Conciliation Act 1996 (the “Arbitration Act”) in certain circumstances if Indian law governed the substance of the dispute.

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5 Section 36 of the Model Law sets out the grounds for refusing enforcement of an international arbitration award.
6 *PT First Media TBK v Astro Nusantara International BV & Ors* [2013] SGCA 57, paragraph 23.
7 Ibid, paragraph 62.
8 Ibid, paragraph 64.
9 Ibid, paragraph 90.
The Supreme Court’s view was based on the submission that under the Model Law, on which framework the Arbitration Act had been enacted, seat was the centre of gravity in an international arbitration. The court proceeded on the basis that “[s]imilarly, the acceptance of the territorial principle in UNCITRAL has been duly recognized by most of the experts and commentators on international commercial arbitration” and went on to hold that “[w]e are unable to accept the submission of the learned counsel for the appellants that the Arbitration Act 1996 does not make seat of the arbitration as the centre of gravity of the arbitrations.”

In short, the Supreme Court accepted the view that the parties’ choice of seat of an international arbitration was so fundamental that it reflected party autonomy to exclude from the arbitration any interference except from the court of the seat, unless the legislature expressly provided otherwise. Article V(1)(e) of the New York Convention was cited before the Indian Supreme Court to assert that the New York Convention recognised two possible courts where an international arbitration award could be set aside, and one of those was the court under whose law the award was made. The Supreme Court rejected the submission that the terminology “under the law of which, that award is made” in Article V(1)(e) of the New York Convention enabled an Indian court to have the jurisdiction to set aside an international arbitration award if the seat of the arbitration was outside India even if the arbitration was governed by Indian law, and held that any interpretation which hindered the process of the consensual resolution of international commercial disputes through arbitration would not be accepted.

Through *Balco*, the Indian Supreme Court steered judicial intervention back to the hands-off approach that the Indian Parliament had legislated through the enactment of the Arbitration Act, by holding that the choice of seat outside India made all the difference.

The art thou conundrum

In *Astro* and *Balco*, the court relied on international treatises, judgments and the *travaux préparatoires* of the Model Law. Both decision auger well for the growth of international arbitrations. What begs the question is whether either court could have arrived at the same conclusion if they had chosen the other’s basis? Would the Indian Supreme Court have so emphatically done away with any judicial interference in an arbitration seated outside India if it had held that the concept of seat of arbitration had been de-emphasised by the Model Law? Similarly, would the Singapore Court of Appeal have been able to hold that for the choice of remedies against an arbitral award there would be no distinction between an international arbitration award rendered in Singapore or outside, if it had proceeded on the basis that seat was the centre of gravity? Or would the judicial support to international arbitrations have been the *proprio vigore* for both courts to have arrived at the conclusions that they respectively did? Fortunately, both the decisions are reconcilable, if one sets the relevance of seat to be at a threshold where it excludes a foreign court’s supervisory jurisdiction unless expressly included by the legislature, but does not deprive a party of a remedy against an arbitral award unless expressly excluded by the legislature. Perhaps it is best to await a decision from a court of a third country. As a sign of the times, that may also come from Asia.

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10 *Bharat Aluminium Company vs Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552, paragraphs 74 and 75

11 Ibid, paragraph 154