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Losing Before You Begin: Imprecise Arbitration Clauses

Union of India v Hardy Exploration and Production (India) Inc [2018] INSC 415

| by Abang Iwawan |

The seat of arbitration is an important consideration in arbitration proceedings, especially those involving cross-border disputes. The choice of seat determines the law governing the arbitration, the national court having supervisory jurisdiction over the arbitration, and ultimately the scope and extent of such supervisory powers.

In 2016, the Malaysian Federal Court in *Government of India v Petrocon India Ltd* held that the word "*venue*" used in the context of an arbitration agreement implicitly means the "*seat of arbitration*".

However, in a recent case involving a similar arbitration clause, the Supreme Court of India rejected the Malaysian Federal Court's position and made a distinction between the term "*venue*" and "*seat*" used in the context of an arbitration agreement. In *Union of India v Hardy Exploration and Production (India) Inc* (a case between a British company and the Government of India involving dispute over oil & gas exploration rights), the Supreme Court of India held that:

(a) The "*venue*" of arbitration does not *ipso facto* equate the "*seat*" of arbitration, and these terms cannot be used interchangeably. The venue merely denotes the geographically convenient place chosen to conduct the arbitration hearings, while the seat is a juridical concept.

(b) Consequently, although the arbitration agreement in that case expressly stipulated that the venue of arbitration shall be in Kuala Lumpur (i.e. *a neutral jurisdiction*), in the absence of an express agreement with regard to the "*seat*" of arbitration, and in the circumstances of the case, the seat was India, giving the Indian courts supervisory jurisdiction.

These two cases illustrate the inherent danger of imprecise language in international contracts; that ambiguous language may be interpreted

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differently in different jurisdictions, with unanticipated consequences. Parties are therefore reminded to be careful when drafting arbitration clauses in an international contract, as the use of the wrong expression (such as the use of the word "venue" when intending "seat") may not have the intended result. For example, a Malaysian party which sought an advantage by stipulating Kuala Lumpur as the *venue* of the arbitration, may find that in fact the *seat* is a different jurisdiction which provides a "home court" advantage to the adverse party.

The Indian Supreme Court decision may be viewed here.

The Malaysian Federal Court decision may be viewed here.

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If you have any queries or would like to know more about arbitration, please contact the author or his team partner Dato' Nitin Nadkarni (nn@lh-ag.com).

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