EXCLUSIVE JURISDICTION & SEAT OF ARBITRATION:

EXAMINING THE INDIAN ARBITRATION LANDSCAPE

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Abstract

*Erroneous interpretation of statutory provisions and misapplication of dicta laid down by the Supreme Court of India ["**SCI**"] in the Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.* [*"**BALCO**"*] *has caused some uncertainty in determining which courts exercise jurisdiction over arbitrations in India. This error is largely owed to the courts having imported the concept of arbitral seat into domestic arbitrations without any legislative basis. Such misapplication of a concept from international arbitrations has caused an inconsistency within the Arbitration & Conciliation Act, 1996 and has led to an incoherent and disjointed understanding of the scope of party autonomy in drafting arbitration agreements in light of mandatory statutory language. The 246th Report of the Law Commission of India on Amendments to the Arbitration & Conciliation Act, 1996 sought to remedy this situation; however, the resulting amendments in 2015 did not reflect the change. This article examines the legal framework surrounding exclusive jurisdiction clauses in arbitration in India and the relationship between arbitral seat and exclusive jurisdiction. In the light of the text of the legislation, the position taken by courts is seemingly practical, yet arguably without statutory basis. Therefore, relevant amendments to the legislation have been suggested to clarify the scope of arbitral seat in Indian arbitrations.*

I. INTRODUCTION

International arbitration, as a method of dispute resolution, has been preferred by people of commerce over centuries in some form or the other. In a world with increasing cross-border trade and investment, it has become clear that predictability and security in providing flexible dispute resolution processes is imperative to attract foreign investment. For a country like India, this is important as it positions itself as an attractive investment destination.

India has had a mixed history with arbitration – both domestic and international. In recent years, international commercial arbitration has taken off in India, both in terms of increased use by Indian corporations, and structurally by legislative and judicial backing needed for its effective functioning.

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It has been half a decade since the major amendments to the Arbitration and Conciliation Act, 1996 [*"***the A&C Act***"*] were enacted to bring Indian arbitration law in line with global best practices in 2015 (with minor amendments made in 2019 and 2021)[1] and the response from practitioners and academics has been mixed.[2] The pro-arbitration stance of the judiciary has been evident from the reduced judicial intervention in international commercial arbitration.[3]

However, at the heart of international commercial arbitration lies a real conflict between the jurisdictions of national courts and private dispute settlement tribunals. The legitimacy of the system of international commercial arbitration has itself been judged in various jurisdictions through examination of awards as violative of the public policy of their national laws – on questions such as arbitrability, enforcement of awards, and ouster of jurisdiction of courts. This is all the more difficult to understand in the light of the web of complexities woven around the system, for instance, in the interaction between the arbitral tribunal and national courts, and conflict of laws principles.

[1] The Arbitration and Conciliation (Amendment) Act, (2015); The Arbitration and Conciliation (Amendment) Act, (2019); The Arbitration and Conciliation (Amendment) Act, (2021).

[2] Tejas Karia et al., *Post Amendments: What Plagues Arbitration in India,* 5 INDIAN J. ARB L. 230 (2016); Vaishnavi Chillakuru & Naresh Thacker, *Country Chapter on India* in the Asia-Pacific Arbitration Review 2017, GLOBAL ARB. REV. (May. 23, 2017), https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2018/article/india; Prakash Pillai & Mark Shan, *Persisting Problems: Amendments to the Indian Arbitration and Conciliation Act*, KLUWER ARB. BLOG (Mar. 10, 2016), http://kluwerarbitrationblog.com/2016/03/10/persisting-problems-amendments-to-the-indian-arbitration-and-conciliation-act/; Aakanksha Kumar, *The Arbitration Ordinance, 2015 – Less isn't always more. [Part-I]*, ARBITER DICTUM BLOG (Nov. 5, 2015), https://arbiterdictum.wordpress.com/2015/11/05/the-arbitration-ordinance-2015-less-isnt-always-more-part-i/.

[3] Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc., (2012) 9 SCC 552 ["**BALCO**"]*;* Manu Thadikkaran, *Judicial Intervention in International Commercial Arbitration: Implications and Recent Developments from the Indian Perspective* 29 J. INT'L ARB. 681 (2012); Vivekananda N, *Lessons from the BALCO dicta of the Supreme Court*, SINGAPORE INT'L ARB. CENTRE, http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/196-lessons-from-the-balco-dicta-of-the-indian-supreme-court; Ashish Chugh, *The Bharat Aluminium Case: The Indian Supreme Court Ushers In a New Era,* KLUWER ARB. BLOG (Sept. 26, 2012), http://kluwerarbitrationblog.com/2012/09/26/the-bharat-aluminium-case-the-indian-supreme-court-ushers-in-a-new-era.

India's case is no different. An overburdened judiciary,[4] coupled with other problems such as a lack of specialised benches on arbitration law in courts[5] or a special arbitration bar,[6] leads to lack of coherence in the development of the law of international commercial arbitration as applied by the courts. This leads to the incorrect application of the law laid down by the Supreme Court of India ["**SCI**"] and other judicial fora.

Courts at the seat of arbitration retain supervisory jurisdiction over arbitral proceedings in diverse matters such as the appointment of arbitrators, grant and enforcement of interim measures and post-award remedies such as setting aside.[7] Therefore, it is important to determine the principles of jurisdiction that apply and which court should the parties approach.

In May 2017, the SCI *sought to clarify* the position on exclusive jurisdiction of courts in exercise of its supervisory jurisdiction on an arbitration proceeding in *Indus Mobile Distribution Pvt. Ltd.* v. *Datawind Innovations Pvt. Ltd. & Ors*[8]. The dictum of the SCI – relying on erroneous precedent – dealt with the conflict between party autonomy and the statutory principles of jurisdiction in the Act. The SCI disregarded the statutory provisions and vested jurisdiction exclusively in the "seat court". This ratio of *Indus Mobile* has been applied incorrectly and inconsistently by various High Courts across the country. While the SCI has attempted to settle the interpretation of the *Indus Mobile* decision in *BGS SGS SOMA JV* v. *NHPC Limited*[9] ["**BGS**"], there remain several unanswered questions.

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[4] For an interesting analysis on the workload of the Supreme Court see Nick Robinson, *A Quantitative Analysis of the Indian Supreme Court's Workload* 10, J. EMPIRICAL LEGAL STUD. 570 (2013); Alok Prasanna Kumar et al., *The Supreme Court of India's burgeoning backlog problem and regional disparities in access to the Supreme Court*, Consultation Paper, VIDHI CENTRE FOR LEGAL POLICY, (2015).

[5] This position has been sought to be remedied partially by the enactment of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, https://www.indiacode.nic.in/bitstream/123456789/2156/1/AAA2016___04.pdf. *See* Sulabh Rewari & Poorvi Satija, *Are Commercial Courts the answer to India's arbitration woes?,* KLUWER ARB. BLOG (Dec. 25, 2015), http://arbitrationblog.kluwerarbitration.com/2015/12/25/are-commercial-courts-the-answer-to-indias-arbitration-woes/.

[6] The Indian Arbitration Forum is an association of lawyers that aims at reducing the control of the judiciary in arbitration and hopes to encourage best practices in arbitration, *see* Prachi Shrivastava, *Hiroo Advani founds arbitration body with other law firm litigators to bar costly judges from arbitration*, LEGALLY INDIA (Sept. 4, 2013), http://www.legallyindia.com/201309043954/Law-firms/hiroo-advani-founds-iaf-leads-law-firm-movement-to-bar-costly-judges-from-arbitration.

[7] GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 111-126, (2d ed. 2015); NAKUL DEWAN, THE LAWS APPLICABLE TO AN ARBITRATION IN ARBITRATION IN INDIA (Dushyant Dave et al. eds., 2021).

[8] Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd. & Ors., AIR 2017 SC 2105. [*"***Indus Mobile***"*].

[9] BGS SGS SOMA JV v. NHPC Limited, (2020) 4 SCC 234.

This article attempts to deal with the ambiguity that arises from the import of the concept of arbitral seat into domestic arbitrations in the light of the *Indus Mobile* decision. Section II of the article deals with the concepts of arbitral seat and jurisdiction under Indian arbitration law as well as the march of law post- ***BALCO***. In section III, the article traces the use of exclusive jurisdiction clauses and its interpretation by courts in India. In section IV, the article examines the current state of play in relation to the jurisdiction of Indian courts post-*Indus Mobile.* Finally, the article is concluded by suggesting relevant statutory changes and a plea for coherent judicial interpretation.

II. DECODING THE JURISDICTIONAL LABYRINTH

The jurisdictional test under the Act with respect to supervisory jurisdiction of Indian courts in relation to a domestic arbitration is independent of the consent and intention of the parties. It is based on statutory principles such as cause of action. Section II of this article seeks to trace the development of the rules of jurisdiction under international commercial arbitration, examine the jurisdictional test under the Act and consequently explore the march of law through judicial precedent.

A. Arbitral Seat: Implications, Contours & Limitations

As arbitration developed and expanded, it became important to define its interaction and relationship with national legal systems. This led to the introduction of the concept of arbitral seat, which has gained central importance in international commercial arbitration today.[10] Contrary to the theory of delocalisation, the seat theory finds its basis in the territorial thesis.[11] The theory presupposes the need to root arbitration in a national legal system to derive its legitimacy.[12]

The arbitral seat is the juridical home of the arbitration and is a matter of legal fiction created by the arbitration agreement. The concept of arbitral seat is significant as it supplies an arbitration proceeding with the legal framework that governs the arbitration. This includes the national legislation applicable to the arbitration, the law presumptively applicable to the arbitration agreement and post-award remedies. The national law applies both to internal procedures of arbitration [procedural fairness] as well as the external relationship of the arbitration with national courts

[10] Star Shipping AS v. China Nat'l Foreign Trade Trans. Corp., [1993] 2 Lloyd's Rep. 445; Michael Hwang, SC and Fog Lee Cheng, *Relevant Considerations in Choosing the Place of Arbitration,* 2 ASIAN INT'L ARB J. 195 (2008); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, (3d ed. 2021).

[11] For an early conception of the territorial principle, *see* FRANCIS A. MANN, LEX FACIT ARBITRUM IN INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 159 (Pieter Sanders ed., 1967).

[12] For other conceptualisations by arbitration theorists such as delocalisation and autonomous legal order, *see* Jan Paulsson, *Arbitration in Three Dimensions* (LSE Legal Studies Working Paper No. 2,2010); Emmanuel Gaillard, *Aspects Philosophiques du Droit de l'Arbitrage International* (2008).

[supervisory jurisdiction].[13] In addition, the seat presumptively lends the applicable procedural law to the arbitration.

The territorial thesis finds basis in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 [*"***New York Convention***"*] where the post-award remedy of refusal of enforcement is available only before the courts at the arbitral seat [place where award is "made"].[14] One of the best known examples of the territorial thesis is the UNCITRAL Model Law on International Commercial Arbitration ["**UNCITRAL Model Law**"] which provides for its application on the basis of "place of arbitration" under Article 1(2).[15] The drafting history as well as the language of Article 1(2) indicates that supervisory jurisdiction under the UNCITRAL Model Law can be exercised *only* by the courts at the arbitral seat. Such supervisory jurisdiction of national courts at the arbitral seat extends to appointment of arbitrators, assisting in evidence taking, and annulment of awards.

The UNCITRAL Model Law also makes clear, by implication, that there exists a difference between the "seat" and "venue" of arbitration.[16] Under Article 20, the parties by agreement may choose any place of arbitration. However, notwithstanding such choice, the tribunal may meet at any place it considers appropriate.[17] Therefore, the geographic location of hearings or meetings i.e., venue, has to be understood as distinct from arbitral seat.[18] Under Indian law, the territorial principle is contained in Section 2(2).[19] For the purpose of this article, it is important to bear in mind that an arbitral seat in

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[13] GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 111 (2d ed. 2015).

[14] Convention on the Recognition & Enforcement of Foreign Arbitral Awards, Article V, June 10, 1958, 330 U.N.T.S. 3.

[15] UNCITRAL Model Law on International Commercial Arbitration 1985 [*"***UNCITRAL Model Law***"*]. Article I(2) provides: *"(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State".*

[16] Naviera Amazonica Peruana SA v. Cia Internacional de Seguros del Peru, [1988] 1 Lloyd's Rep 116; NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 3.39, at .For an Indian law perspective on the seat and venue distinction, *see* Enercon (India) Ltd. v. Enercon Gmbh, (2014) 5 SCC 1, ¶¶ 103, 107, 113 [*"***Enercon***"*] and Eitzen Bulk A/S v. Ashapura Minechem Limited., (2016) 11 SCC 508 [*"***Eitzen**"].

[17] UNCITRAL Model Law, art. 20(2).

[18] This would be clear from the semantic distinction between the words 'seat' and 'venue'. *See e.g.,* Judgment of 3 February 2010, [2010] SchiedsVZ 336, 336 (Oberlandesgericht München). However note that Gary Born cites several cases where courts have interpreted references to "venue", "forum" and "situs" to mean arbitral seat on the basis that "*these interpretations rest on the (correct) theory that parties do not ordinarily specify in advance, in their arbitration agreement, the logistical matter of hearing location, which often depends on matters such as the domiciles of the arbitrators, counsel and witnesses, which are not likely to be known when the arbitration agreement is drafted. Instead, references to "venue," "forum" or "situs" are more likely to be intended to address the more important subject of the arbitral seat.*" These cases include Shagang South-Asia (H.K.) Trading Co. Ltd v. Daewoo Logistics [2015] EWHC 194, ¶¶35-38 (Comm); Enercon GmbH v. Enercon (India) Ltd [2012] EWHC 689, ¶¶ 56-59 (Comm) and Shashoua v. Sharma [2009] EWHC 957 (Comm) ¶34, [*"**Shashoua**"*]. *See generally, Supra* note 13 at 2226-2227. This position has also been advocated by the Supreme Court in BGS.

[19] The Act, §2(2) provides: *"(2) This Part shall apply where the place of arbitration is in India.*

international arbitration may be determined by the parties by agreement (either explicitly or by default through choice of institutional arbitration rules)[20] and such choice solely determines the jurisdiction of courts under territorial national arbitration legislations.

B. Jurisdiction under the Act

In the backdrop of the drive to reduce judicial intervention in arbitration, the jurisdiction of Indian courts over arbitrations has been a subject of intense scrutiny by practitioners and academics alike.[21] The structure of the Act is unique and is a major reason for the debate surrounding jurisdiction. The Act is divided into four parts, two of which deal with arbitration; Part I provides the legal framework for domestic arbitrations and international commercial arbitrations seated in India [*"***Part I arbitrations***"*], Part II provides for enforcement of foreign awards i.e., awards made in foreign seated arbitrations. For the purposes of this article, the focus is jurisdiction under Part I of the Act. There are three critical provisions that form the basis of the controversy and are analysed below:

i. Section 2(1)(e)

Under Part I of the Act, the extent of judicial intervention is limited by the provisions therein.[22] There are two types of authorities that may exercise jurisdiction, namely, judicial authority (not defined; includes tribunals such as the National Company Law Tribunal) and "Court" as defined under Section 2(1)(e).[23] The definition of "Court" has been held to be exhaustive due to the use of the word "means" immediately succeeding it as well as the absence of "includes".[24] The rule for determining the court of competent jurisdiction therefore is one which *has the jurisdiction to decide the questions forming the subject-matter of arbitration if the same had been the subject matter of a suit* (i.e.,

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Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act."

[20] *See* e.g., Rule 23, MCIA Rules 2016, https://mcia.org.in/mcia-rules/english-pdf/.

[21] Pratyush Panjwani & Harshad Pathak, *Assimilating the Negative Effect of Kompetenz-Kompetenz in India: Need to Revisit the Question of Judicial Intervention,* 2 INDIAN J. ARB. L. 24 (2013); Ajay Kumar Sharma, *Judicial Intervention in International Commercial Arbitration: Critiquing the Indian Supreme Court's Interpretation of the Arbitration and Conciliation Act, 1996*, 3 INDIAN J. ARB L. 6 (2014)

[22] The Act, § 5.

[23] *Id*., § 2(1)(e) provides: *"(1)In this Part, unless the context otherwise requires, –*
"Court" means— (i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;
(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;" (emphasis supplied).

[24] State of West Bengal v. Associated Contractors, (2015) 1 SCC 32. [*"***Associated Contractors**"].

court having jurisdiction because of the situs of the cause of action). The provision uses the rules of jurisdiction for suits under the Code of Civil Procedure, 1908 [*"**the CPC**"*], as an analogy of fixing jurisdiction under the Act. Therefore, the jurisdiction of the "Court" is determined by statute *on the basis of where the cause of action arises* and not the choice of parties under the arbitration agreement.

ii. Section 20

Parties may by agreement choose the place of arbitration under Section 20 of the Act. Although the distinction between "seat" and "venue" is clear by implication, Indian courts have struggled with these concepts. Recently, the Supreme Court has laid down law to distinguish between these terms in the context of arbitration agreements.[25] It has also applied the *Shashoua* principle to domestic arbitrations where "venue" should be interpreted to mean "seat" of arbitration, provided there is no indication to the contrary.[26] It is pertinent to note that although the parties may designate the place of arbitration, this does not affect the jurisdiction of courts under Section 2(1)(e) under the scheme of the Act.

iii. Section 42

In order to limit multiple proceedings before different courts, Section 42 provides that where any application has been made under Part I in a Court, that Court *alone* would have jurisdiction over the arbitral proceedings. It must be noted that such application should have been validly made before a court of competent jurisdiction. Section 42 does not apply to petitions for appointment of arbitrators.[27]

It is, therefore, clear that jurisdiction under the Act is not contingent on consent and is dependent on the statutory determination under Section 2(1)(e). The parties' choice of place of arbitration has no implication on jurisdiction.

C. Historical Error in BALCO

In the landmark case of *BALCO,*[28] the SCI overruled the much-criticised judgment of *Bhatia International* v. *Bulk Trading SA*[29]. The SCI ruled on the inapplicability of Part I of the Act to foreign seated arbitrations. However, in the course of its judgment, the SCI erroneously interpreted Section 2(1)(e) and altered the meaning of "Court" for Part I arbitrations.[30] The root of this error goes to

[25] Enercon; Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 ["**Reliance**"].

[26] BGS ¶ 63: "*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*."

[27] Associated Contractors; Pandey and Co. Builders (P) Ltd. v. State of Bihar, (2007) 1 SCC 467.

[28] *Supra* note 3.

[29] Bhatia International v. Bulk Trading SA, (2002) 4 SCC 105.

[30] For an excellent debate on this issue, *see* V. Niranjan & Shantanu Naravane, *Bhatia International Rightly Overruled: The Consequences of Three Errors in BALCO,* 9 SCC J-26 (2012) ["**Niranjan & Naravane***"*]*;* S.K.

superimposing the concept of seat, reserved until then for international commercial arbitrations to domestic arbitrations. The SCI held (incorrectly) that Section 2(1)(e) refers to two distinct courts: "court of the subject matter of the arbitration" (seat court) and the "court of the subject matter of the suit" (cause of action court).[31] It further held that both courts will have jurisdiction concurrently, contrary to the jurisdictional test under Section 2(1)(e) (examined in section II.B of this article above and is pegged to cause of action).

The conferment of jurisdiction under Indian law is a legislative act, and not a judicial one.[32] The alteration of the jurisdictional test in *BALCO* is a result of the erroneous import of the concept of arbitral seat into domestic arbitration. The legal framework for a domestic arbitration is solely the national law. In importing the concept of arbitral seat on the pretext of neutrality, the SCI did not take into consideration either the language of the statute, nor its well settled principle that parties may not confer jurisdiction on courts where none exists.

In practice, this historical error in *BALCO* has wide ramifications. In a domestic arbitration agreement, parties may confer jurisdiction on a court outside the scope of "Court" under Section 2(1)(e). Therefore, contracting parties in Chennai and Bangalore (or indeed elsewhere) may confer jurisdiction on the courts of Mumbai or Delhi even if no part of the performance of the contract or cause of action of a dispute may arise there. This is not support by the legislative scheme and is arguably a result of judicial conflation of arbitral concepts.

Post-*BALCO*, the SCI had the opportunity to examine Section 42 of the Act in *Associated Contractors*. The SCI held that, "*The context of Section 42 does not in any manner lead to a conclusion that the word "court" in Section 42 should be construed otherwise than as defined.*"[33] In the case, the SCI failed to take into consideration the notion of "seat court" invented by *BALCO*. As examined later, the SCI in *Indus Mobile* alters the already ambiguous *BALCO* dictum from concurrent jurisdiction to exclusive jurisdiction of "seat court".

III. SURVEYING EXCLUSIVE JURISDICTION CLAUSES

Exclusive jurisdiction clauses have always been somewhat of an enigma in Indian law – fraught with conflicting precedent and incoherence. Traditionally, an exclusive jurisdiction clause is the clearest exposition of the intention of the parties to oust the jurisdiction of any particular court. Such ouster

Dholakia & Aarthi Ranjan, *Not Three But Half An Error In BALCO: Bhatia International Rightly Overruled,* 1 SCC J-81 (2013); V. Niranjan & Shantanu Naravane, *Three Errors in BALCO Revisited,* 4 SCC J-1 (2013).

[31] BALCO, ¶ 96.

[32] Natraj Studios (P) Ltd v. Navrang Studios & Anr., (1981) 1 SCC 523; Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722; Jagmittar Sain Bhagat v. Health Services, Haryana, (2013) 10 SCC 136.

[33] Associated Contractors, ¶ 20.

of jurisdiction of a court is permissible by agreement of the parties and is not hit by public policy considerations in the Indian Contract Act, 1872.[34]

Equally important is the consideration that under Indian law, parties by agreement cannot confer jurisdiction on a court which it does not possess under the CPC, but only designate one among the multiple courts that possess jurisdiction.[35] The dictum of the SCI in *A.B.C. Laminart (P) Ltd.* v. *A.P. Agencies* [*"***A.B.C. Laminart***"*], proved to be ambiguous where it held that exclusive jurisdiction can be conferred to any court which has "proper jurisdiction". The "proper jurisdiction" of the court in a matter relating to a contract depends on the cause of action arising through connecting factors such as place of execution, and place of performance, place of payment and place where defendant resides.[36]

In the seminal case of *Swastik Gases,* a 3-judge bench of the SCI clarified the position on exclusive jurisdiction clauses in India.[37] The SCI, while deciding the territorial jurisdiction in a petition for appointment of an arbitrator, held that the use of words like "alone", "only", "exclusive" or "exclusive jurisdiction" is not decisive and does not make any material difference in determining the question of ouster of jurisdiction.[38] The intention of the parties was said to be clear and unambiguous by the mere existence of a jurisdiction clause.[39]

A. Exclusive Jurisdiction Clauses & the Act

The concept of jurisdiction under the Act is complex. As mentioned earlier, the conferment of jurisdiction to a court is a legislative act. Under the Act, the jurisdiction is determined by the exhaustive definition of "Court" in Section 2(1)(e). Section 2(1)(e) determines jurisdiction of courts

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[34] Hakam Singh v. Gammon (India) Ltd., (1971) 1 SCC 286, ¶ 4 […*But where two courts or more have under the Code of Civil Procedure jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in one of such Courts is not contrary to public policy. Such an agreement does not contravene Section 28 of the Contract Act.*]

[35] *Id.* at ¶ 4; Globe Transport Corpn. v. Triveni Engg. Works, (1983) 4 SCC 707; A.B.C. Laminart (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163; Patel Roadways Ltd. v. Prasad Trading Co., (1991) 4 SCC 270; R.S.D.V. Finance Co. (P) Ltd. v. Shree Vallabh Glass Works Ltd., (1993) 2 SCC 130; Angile Insulations v. Davy Ashmore India Ltd., (1995) 4 SCC 153; Shriram City Union Finance Corpn. Ltd. v. Rama Mishra, (2002) 9 SCC 613; New Moga Transport Co. v. United India Insurance Co. Ltd., (2004) 4 SCC 677.

[36] A.B.C. Laminart, ¶¶ 10-11.

[37] Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32 [*"***Swastik Gases***"*], (where the exclusive jurisdiction was in favour of Kolkata and no place of arbitration specified by the parties).

[38] Swastik Gases, ¶ 32 ("…*Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner."*)

[39] Swastik Gases, ¶¶ 32, 57.

independent of the intention of the parties. The test for exclusive jurisdiction under the Act is limited to Section 42, i.e., if any application has been made in a particular Court, that Court alone shall have jurisdiction to entertain subsequent applications.

In *Associated Contractors,* the SCI relying on cases decided on the 1940 Act[40] and the Act[41], held that Section 42 shall not bar an exclusive jurisdiction clause in a contract merely due to the absence of a non obstante clause wiping out a contrary agreement between the parties.[42] Therefore, any applications made to a court, not being the court mentioned in the exclusive jurisdiction clause, were rendered to be without jurisdiction. In a contrary vein, it also held that in order to attract exclusivity of jurisdiction under Section 42 of the Act, the application should have been made[43] validly to a court of competent jurisdiction within the meaning of Section 2(1)(e).[44] Therefore, in order for an exclusive jurisdiction clause to be valid in an arbitration agreement, the parties need to confer jurisdiction to a "cause of action court" [being the "Court" under Section 2(1)(e)]. Prior to *BALCO,* various High Courts including Andhra Pradesh[45] & Delhi[46] and the SCI[47] held in a catena of cases that the "seat court" shall have exclusive jurisdiction in domestic arbitrations. It is important to note that a part of the cause of action arose within the jurisdiction of the "seat court" in these judgments. It seems that these cases were impliedly overruled by *BALCO.*[48]

[40] Jatinder Nath v. Chopra Land Developers (P) Ltd., (2007) 11 SCC 453, ¶ 9; Rajasthan SEB v. Universal Petro Chemicals Ltd., (2009) 3 SCC 107, ¶¶ 33-36.

[41] Swastik Gases, ¶ 32.

[42] Associated Contractors, ¶ 22. For a misapplication of Associated Contractors, *see* Bhandari Udyog Ltd. v. Industrial Facilitation Council, (2015) 14 SCC 515 (where arbitration was conducted in Raichur jurisdiction, "cause of action court" was denied jurisdiction).

[43] For an interesting discussion on the phrase 'has been made' in §42 of the Act, *see* Priya Hiranandani Vandervala v. Niranjan Hiranandani, 2016 SCC OnLine Del 3435 (DB) ["**Priya Hiranandani Vandervala***"*]; Surya Pharmaceuticals v. First Leasing Company of India, 2013 SCC OnLine Mad 3384, ¶ 7; ONGC v. Jagson Intl. Ltd., 2005 SCC OnLine Bom 814 (the first application "must be a competent application and not just any application"); H.K.A. Agencies v. Actia India Pvt. Ltd., 2011 (1) ILR Ker 378, ¶ 15.

[44] Sasken Communications Technologies Ltd. v. Prime Telesystems Ltd., 2002 SCC OnLine Del 823; Engineering Project (India) Ltd. v. Indiana Engineering Works, 2004 SCC OnLine Del 517; Sarovar Park Plaza Hotels & Resorts Pvt. Ltd. v. World Park Hotels India Ltd., 2005 SCC OnLine Del 1040.

[45] Paramita Constructions Pvt. Ltd. v. UE Development (P) Ltd., 2008 SCC OnLine AP 822 (Bangalore was place of arbitration and cause of action arose in Bangalore); Salarjung Museum v. Design Team Consultants Pvt. Ltd., 2009 SCC OnLine AP 804 (Delhi was seat of arbitration); Jyothi Turbopower Services Pvt. Ltd. v. Shenzhen Shandong Nuclear Power Construction Company Ltd., 2011 SCC OnLine AP 163 (where jurisdiction was denied in favour of Odisha courts).

[46] Geo Miller & Co Ltd. v. United Bank of India, 1997 SCC OnLine Del 345.

[47] Balaji Coke Industry Pvt. Ltd. v. Maa Bhagwati Coke Pvt. Ltd., (2009) 9 SCC 403.

[48] Niranjan & Naravane at 32.

Following *BALCO,* the jurisdiction was assumed as the "seat court"[49] by the Delhi High Court in petitions for grant of interim measures,[50] and appointment of arbitrators[51] irrespective of that fact that it may not possess jurisdiction otherwise under Section 2(1)(e) i.e. through cause of action. The Delhi High Court has maintained that both the "seat court" and "cause of action court" have concurrent jurisdiction.[52] The Delhi High Court has also applied Section 42 to exclude its jurisdiction applying the principle of concurrent jurisdiction.[53] The presence of an exclusive jurisdiction clause was imperative to curtail the jurisdiction of either the "seat court" or the "cause of action court" and mere stipulation of seat was not enough to exclude jurisdiction.[54] Interestingly, in *PCP International Ltd.* v. *Lanco Infratech Ltd.*[55] [*"***PCP International***"*], the Delhi High Court declined jurisdiction even when it was designated the "venue" of arbitration relying on the difference between "seat" and "venue" of arbitration.

In *M/s R.B. Saxena & Sons* v. *Mahindra Logistics Ltd.*, the Delhi High Court denied jurisdiction in a petition for appointment of arbitrator where the venue was Mumbai and an exclusive jurisdiction clause in favour of courts in Mumbai.[56] The Delhi Court rightly pointed out that *BALCO* states that both the "seat court" and the "cause of action court" will have concurrent jurisdiction and does not

[49] The "seat court" refers to the courts at the place/seat/venue of arbitration as opposed to "cause of action court" or courts stipulated through an exclusive jurisdiction clause. The terms 'seat' and 'venue' have been distinguished where necessary.

[50] Ion Exchange (India) Ltd. v. Panasonic Electric Works Co. Ltd., 2014 SCC OnLine Del 9731, ¶¶ 12-14 ["**Ion Exchange**"]; NHPC Ltd. v. Hindustan Construction Co. Ltd., 2015 SCC OnLine Del 9804 (appeal from §9) ["**NHPC**"]; SRS Private Investment Powai Ltd. v. Supreme Housing and Hospitality Pvt. Ltd., 2016 SCC OnLine Del 5446 ["**SRS Private Investment**"]; Jyoti Structure Ltd. v. Dakshinanchal Vidyut Vitran Nigam Ltd., 2016 SCC OnLine Del 5035 ["**Jyoti Structure**"]; Adesh Enterprises LLP v. Vinod Kumar Goswami, 2017 SCC OnLine Del 7508 ["**Adesh Enterprises**"].

[51] Rohit Bhasin v. Nandini Hotels, 2013 SCC OnLine Del 2300; Newtech Cinemas Pvt. Ltd. v. OSR Cinemas & Entertainment Pvt. Ltd., 2016 SCC OnLine Del 6155; AIR Liquide North India Pvt. Ltd. v. Shree Shyam Pulp & Board Mils Ltd., 2016 SCC OnLine Del 5254; Overseas Mobile Pvt. Ltd. v. Zte Telecom India Pvt. Ltd., 2016 SCC OnLine Del 1522 (part of cause of action arose in Delhi); Orient Bell Ltd. v. Kaneria Granito Ltd., 2017 SCC OnLine Del 7060 ["**Orient Bell**"].

[52] Devas Multimedia Pvt. Ltd. v. Antrix Corporation Ltd., 2018 SCC OnLine Del 9338 ["**Devas Multimedia**"]; Ion Exchange; NHPC; Priya Hiranandani Vandervala. Note that Devas Multimedia was discussed by the Supreme Court in BGS and held to be erroneous.

[53] Priya Hiranandani Vandervala; Devas Multimedia.

[54] Sravanthi Infratech Pvt. Ltd. v. Tricolite Electrical Industries Ltd., 2016 SCC OnLine Del 6313; ABB Ltd. v. Isolux Corsan India Engineering & Construction, 2016 SCC OnLine Del 3454, ¶¶19-20; Priya Hiranandani Vandervala, ¶ 22-23. Cf. Jyoti Structure (where part of cause of action did not arise in favour of Allahabad, did not enforce exclusive jurisdiction clause) and Orient Bell (where part of cause of action arose in Delhi, did not enforce exclusive jurisdiction clause in favour of Ahmedabad); Jyoti Structure (where an exclusive jurisdiction clause in favour of Mumbai was not enforced).

[55] PCP International Ltd. v. Lanco Infratech Ltd, 2015 SCC Online DEL 10428.

[56] M/s. R.B. Saxena & Sons v. Mahindra Logistics Ltd., 2016 SCC OnLine Del 5462.

address the question of exclusive jurisdiction.[57] In a similar petition, the Delhi High Court relied on *Ion Exchange*[58]and accepted jurisdiction where the agreement in question mentioned Delhi as the venue of arbitration and Delhi courts were given sole and exclusive jurisdiction over all disputes.[59] In addition to the exclusive jurisdiction clause, the Delhi High Court held that the place of arbitration under Section 20 is the place where the arbitration agreement is performed (in this case, Delhi) and hence, it sought to assume jurisdiction under the cause of action route prescribed by *A.B.C. Laminart.*[60]

The Bombay High Court, on the other hand, has consistently held that the "seat court" shall have exclusive jurisdiction, and not the "cause of action court".[61] In *Bhagwandas Auto Finance* v. *Tata Motors Finance Ltd.*, it assumed jurisdiction (place of arbitration and exclusive jurisdiction in Mumbai) even when no part of cause of action arose in Mumbai and application for setting aside the arbitral award was pending before courts in Kolkata.[62] As part of the cause of action of the underlying dispute arose in Kolkata, the application for setting aside the award was made before courts there. Note that this is permissible by the scheme of the Act and is a classic example of the *BALCO* error. Due to the introduction of the concurrent jurisdiction in *BALCO*, the parties to a domestic arbitration are likely to indulge in forum shopping and delay the arbitral proceedings or enforcement of arbitral awards. This forum shopping does not emanate from the Act, but from the importation of the concept of arbitral seat into domestic arbitration.

The Hyderabad High Court recently held in a revision petition from a case concerning the grant of interim measures [where the venue of arbitration was Hyderabad and the exclusive jurisdiction was granted to courts in Ranga Reddy District] that the courts in Ranga Reddy District did not have exclusive jurisdiction as they were devoid of jurisdiction inherently.[63] The *BALCO* dictum was distinguished by the Hyderabad High Court on facts and it opined that Section 20 of the Act adds a facet to the well-settled principles of jurisdiction.

In conclusion, there seemed to be no coherent trend emerging from the various High Courts about the exclusive or concurrent nature of jurisdiction as a result of designation of a seat or venue of

[57] *Id*. at ¶ 8.
[58] Ion Exchange.
[59] Bygging India Ltd. v. Lanco Infratech Ltd., 2016 SCC OnLine Del 5486.
[60] *Id*.
[61] Ansaldo Caldaie Boilers India Pvt. Ltd. v. NAGAI Power Pvt. Ltd., 2015 SCC OnLine Bom 7244 (where the place of arbitration was mentioned as Hyderabad, jurisdiction denied); Reliance Infrastructure Ltd. v. Roadway Solution (I) Pvt. Ltd., 2016 SCC OnLine Bom 16 (where place of arbitration and jurisdiction was Mumbai, assumed jurisdiction even when courts in Pune were seized of applications viz. §42).
[62] Bhagwandas Auto Finance v. Tata Motors Finance Ltd., 2015 SCC OnLine Bom 369.
[63] M/s Sushee Ventures Pvt. Ltd. v. Rahul Agarwal & Ors., 2016 SCC OnLine Hyd 401

arbitration. The enforcement of exclusive jurisdiction clauses is also unclear as courts have tried to reconcile the principle of party autonomy and the jurisdictional tests for "Court" in the Act. The conceptual uncertainty has been settled erroneously in the *Indus Mobile* decision of the SCI and is discussed in the next part.

IV. STATE OF PLAY

The SCI in *Indus Mobile* significantly altered the various decisions of High Courts interpreting the *BALCO* dictum on jurisdiction of courts and exacerbated the internal inconsistency of "seat" and "exclusive jurisdiction" in Part-I arbitrations. The SCI was concerned with an agreement between Indus Mobile [Appellant] and Datawind Innovations [Respondent No.1], based in Amritsar, for the supply of mobile phones, tablets and their accessories. The supply of goods was to take place from New Delhi to Chennai. The agreement contained an arbitration clause that provided as follows:

> **"Dispute Resolution Mechanism**:
>
> Such arbitration shall be conducted at Mumbai, in English language.
>
> …
>
> 19. All disputes & differences of any kind whatever arising out of or in connection with this Agreement shall be subject to the exclusive jurisdiction of courts of Mumbai only."

The petition before the SCI arose from a judgment of the Delhi High Court[64] disposing off an application for interim measures and appointment of an arbitrator. The Delhi High Court denied courts of Mumbai jurisdiction on the basis that no part of the cause of action arose in Mumbai. However, it was held that the arbitration would be conducted in Mumbai.

The SCI appreciated the observations in *BALCO* and *Enercon*[65] to hold that "*the moment seat is designated, it is akin to an exclusive jurisdiction clause*". In addition, the SCI held that reference to "seat" is a concept whereby a neutral venue may be vested with jurisdiction by the parties. As discussed above, the view taken by the SCI lending jurisdiction to the "seat court" does not find basis in either legislatively in the Act [where the "cause of action court" should assume jurisdiction in line with Section 2(1)(e)] or in the jurisprudence of the SCI [where the "seat court" and "cause of action court" have concurrent jurisdiction].

In the subsequent sections, the article acknowledges that the *Indus Mobile* decision endeavours to provides some clarity on the jurisdictional principles applicable to domestic arbitrations within the current legislative wording. However, the central thesis of this article is that the reasoning in *Indus*

[64] Datawind Innovations Pvt. Ltd. v. Indus Mobile Distribution Pvt. Ltd., 2016 SCC OnLine Del 3744.
[65] Enercon, ¶ 38.

Mobile and subsequent judgements of the SCI[66] lack sufficient legislative basis and leaves the question of jurisdiction of courts under the Act open to conflicting interpretation by parties and courts.

A. High Court Decisions post-*Indus Mobile*

Before analysing the current state of play, it is necessary to trace the emerging jurisprudence in courts that are applying the exclusive jurisdiction of "seat court" dictum of *Indus Mobile.* A perfunctory glance on the cases shows the lack of coherence in the development of the body of case law on this question. Broadly, the concepts of "place", "seat" and "venue" of arbitration have been interpreted inconsistently and the effect of exclusive jurisdiction clauses remains undecided.

There are some incongruous and varied trends that appear from the High Court judgments post-*Indus Mobile:*

(1) Generally, courts seem to be giving the "seat court" the exclusive jurisdiction,[67] irrespective of an exclusive jurisdiction clause to the contrary.[68] Where an exclusive jurisdiction clause was present simpliciter without a corresponding arbitration clause, it was enforced.[69]

(2) Courts have also determined courts at the *venue* of arbitration to have exclusive jurisdiction, even when there is an exclusive jurisdiction clause conferring jurisdiction to another court.[70]

(3) In a contradictory vein, courts have also determined jurisdiction in favour of courts mentioned in exclusive jurisdiction clause, as opposed to the "seat court".[71]

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[66] Brahmani River Pellets Ltd. v. Kamachi Industries Ltd. (2020) 5 SCC 462 [where the "venue" of arbitration was specified as Bhubaneswar, the Supreme Court held that jurisdiction for arbitral appointments could be assumed by the Orissa High Court only]; BGS [where the Supreme Court imported the Shashoua principle to domestic arbitrations in India misapplying the BALCO dictum].

[67] Noida Toll Bridge Company Limited v. New Okhla Industrial Development Authority, 2017 SCC OnLine Del 11487; Dipendra Kumar v. The Strategic Outsourcing Services Pvt. Ltd., 2017 SCC OnLine Del 10361; Aseva Limited Liability Corporation v. Superficial Health and Spa Private Limited and Ors., 2017 SCC OnLine Del 11083; Mechon Services v. Predominant Engineers & Contractors (P) Limited, 2017 SCC OnLine Cal 19196; Raheja Developers Ltd. v. Proto Developers and Technologies Ltd., 2018 SCC OnLine Del 6966; NJ Construction v. Ayursundra Health Care Pvt. Ltd., 2018 SCC OnLine Del 7009.

[68] Devyani International Ltd v. Siddhivinayak Builders and Developers, 2017 SCC OnLine Del 11156.

[69] General Instruments Consortium v. Lanco Infratech Limited, 2017 SCC OnLine Bom 7697. *Cf.* Reckon Enterprise v. Nazrul CMDA Employees' Co-operative Housing Society Ltd., 2017 SCC OnLine Cal 16345 where the court refused to accept jurisdiction where no cause of action arose within its jurisdiction.

[70] Green Builders and Promoters Pvt. Ltd. v. Ramesh and Ors., MANU/PH/1243/2017; Raman Deep Singh Taneja v. Crown Realtech Pvt. Ltd., 2017 SCC OnLine Del 11966; PCR Warehousing Limited v. Central Railside Warehouse Company Ltd., MANU/DE/2682/2017 (only venue mentioned in arbitration clause). *Cf.* CVS Insurance and Investments v. Vipul IT Infrasoft Pvt. Ltd., 2017 SCC OnLine Del 12149 (where venue of arbitration was Delhi and exclusive jurisdiction was in favour of Noida courts, the Delhi High Court denied jurisdiction).

[71] Asha Tiwari v. BPTP Limited, 2017 SCC OnLine Del 10179.

(4) The jurisdiction of the "seat court" has been ousted in favour of the "cause of action court", relying on Section 42 of the Act.[72]

(5) The dictum in *Indus Mobile* was also applied to a foreign seated international commercial arbitration.[73] This raises questions of precedent as the facts of *Indus Mobile* are concerned with a purely domestic arbitration.

B. Precedent in Arbitration Cases

The SCI in *Indus Mobile* relied on the cases of *BALCO*[74] [5-judge bench], *Enercon*[75], *Reliance*,[76] and *Eitzen*[77] [all 2-judge benches] among others, in holding that the selection of seat of arbitration is analogous to an exclusive jurisdiction clause. The SCI also emphasized on the importance of arbitral seat by highlighting the difference between "seat" and "venue" of arbitration.

This raises pertinent questions about the application of the doctrine of precedent in arbitration cases and the development of the body of arbitration law in general. *First,* in *BALCO*, the observations of the SCI with respect to jurisdiction of a court for Part I arbitrations are mere *obiter dicta* as it was concerned with the interpretation of Section 2(2) in relation to a foreign-seated international commercial arbitration.[78] *Second,* it is also clear that the SCI in *Enercon, Reliance,* and *Eitzen* dealt with foreign-seated international commercial arbitrations. The principles of jurisdiction in domestic and international arbitration are distinct[79] (as discussed above, domestic arbitration does not confer jurisdiction on the basis of seat, but on the basis of cause of action) and therefore, the application of these cases to a purely domestic arbitration in *Indus Mobile* and subsequent cases seems inappropriate.

In any case, in *BALCO* the SCI did not answer the question of exclusivity of jurisdiction and clearly stated that both the "seat court" and "cause of action court" shall have concurrent supervisory

[72] Municipal Corporation for the City of Kalyan and Dombivli v. Rudranee Infrastructure Ltd., 2017 SCC OnLine Bom 5504.
[73] Percept Live Pvt. Ltd. v. Whitefox Ltd., 2017 SCC OnLine Del 10294.
[74] BALCO, ¶¶ 96-100.
[75] Enercon, ¶¶ 134, 138.
[76] Reliance.
[77] Eitzen, ¶ 34.
[78] In BALCO, ¶ 97, the Supreme Court held that that "*The provisions contained in Section 2(1)(e) being purely jurisdictional in nature can have no relevance to the question whether Part I applies to arbitrations which take place outside India*."
[79] For instance, in Prima Buildwell Pvt. Ltd. v. Lost City Developments, 2011 SCC OnLine Del 3449, ¶¶ 28-30 where the international commercial arbitration was seated in London, the Delhi High Court denied jurisdiction in favour of courts in London.

jurisdiction over a Part I arbitration.[80] The SCI in *Indus Mobile* [2-judge bench] *and BGS* [3-judge bench] has derogated from the dictum of concurrent jurisdiction in *BALCO* and has indeed misapplied it.[81] In line with Indian law on *stare decisis*, the *Indus Mobile* and *BGS* benches cannot overrule *BALCO*, and this might explain some of the rationale [and considerable judicial creativity] in the decisions to provide commercial certainty on the jurisdictional scope under the Act.

C. Application of the CPC

The holding in *Indus Mobile and BGS* departs from the well-settled principle that jurisdiction cannot be bestowed on a court which does not possess it under the CPC. This is supported by the legislative text of Section 2(1)(e) of the A&C Act. Consequently, the courts at the seat of arbitration in a domestic arbitration shall assume jurisdiction even when no part of the cause of action arises in the particular seat.

In the context of the application of the CPC to arbitration, it has been opined that the Act is a self-contained code on arbitration and in light of the generally accepted *lex specialis* principles, the CPC should not have application.[82] This was keeping in mind the curtailment of judicial intervention in arbitration. However, the SCI has held that subject to any inconsistency between the two, the principles of the CPC (and not the provisions themselves) may be applied to arbitration law. The general rules of the CPC have been applied to the special law of arbitration in the context of grant of interim measures under Section 9,[83] and in revision petitions from appeals under Section 37.[84] The principles of the CPC have been held to apply during the arbitral proceedings[85] as well as in post-award proceedings. Notably in *State of Maharashtra* v. *Atlanta Ltd.*,[86] the SCI held that the High

[80] BALCO, ¶ 96.

[81] In BGS, the Supreme Court applied the Shashoua principle to domestic arbitrations. The facts of Shashoua clearly show that the arbitration in question was an international commercial arbitration.

[82] Fuerst Day Lawson v. Jindal Exports Ltd., (2011) 8 SCC 333; *See* G Subba Rao, *Applicability of the Civil Procedure Code to Matters Before the Civil Courts Under the Arbitration and Conciliation Act, 1996*, JUNE PL (Jour) 16 (2004), http://www.ebc-india.com/lawyer/articles/633.htm. *Cf.* Tanuka De, *India: Extent Of Applicability Of The Provisions Of Code Of Civil Procedure, 1908 In Arbitration Proceedings,* MONDAQ (Aug. 29, 2017), http://www.mondaq.com/india/x/623960/Arbitration+Dispute+Resolution/Extent+Of+Applicability+Of+The+Provisions+Of+Code+Of+Civil+Procedure+1908+In+Arbitration+Proceedings

[83] Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corporation, (2007) 6 SCC 798; Adhunik Steels Ltd. v. Orissa Manganese & Minerals (P) Ltd., (2007) 7 SCC 125.

[84] I.T.I. Ltd. v. Siemens Public Communications Network Ltd., (2002) 5 SCC 510. This judgment is under re-consideration by a larger bench of the Supreme Court due to a contradictory order in Mahanagar Telephone Nigam Ltd. v. Applied Electronics Ltd., (2017) 2 SCC 37.

[85] Sahyadri Earthmovers v. L and T Finance Limited and Anr., 2011 SCC OnLine Bom 434.

[86] State of Maharashtra v. Atlanta Ltd., (2014) 11 SCC 619.

Court shall supersede the principal Civil Court in exercise of jurisdiction, and thereby derogated from Section 15 of the CPC.[87]

It is clear that the CPC applies to arbitration law, subject to any conflict between the two. While interpreting questions of jurisdiction under Section 2(1)(e), it is imperative to bear in mind that the language of the Act itself explicitly links territorial jurisdiction to the CPC. Therefore, principles of CPC as regards exclusive jurisdiction should be applied under arbitration law as well due to the wording of the provision in the Act.

In *Indus Mobile,* the SCI was presented with a plain vanilla clause where the place of arbitration and exclusive jurisdiction were the same place, i.e., Mumbai.[88] However, in cases where the seat and exclusive jurisdiction clause are different, there are contrary decisions of the High Court's post-*Indus Mobile.*[89] Therefore, following the facts of *Indus Mobile,* mere stipulation of seat by the parties may not suffice to confer jurisdiction.

While this may intuitively indicate that the party autonomy is diluted under the current legislative framework, harmonious construction of statute and party autonomy cannot lead to absurd results. It is not suggested by the author that party autonomy should not be given primacy. However, such choice of parties should be supported in rules of jurisdiction contained in the Act. It was required that amendments to Section 2(1)(e) and Section 20 of the Act and align statutory principles of jurisdiction with arbitration practice.

D. Effect of 246th Law Commission Report & 2015 Amendment Act

The 2015 Amendment Act was based on the 246thReport on "the Amendments to the Arbitration and Conciliation Act 1996" by the Law Commission of India.[90] The Law Commission Report suggested extensive amendments to the Act in order to legislatively amend the distinction between "seat" and "venue" of arbitration as well as revise the extent of jurisdiction of Indian courts on foreign seated arbitrations.[91]

The legislature, in its wisdom, accepted some of these amendments; while notably not making amendments to change the phraseology of "place of arbitration" to "seat" or "venue" where

[87] § 15, CPC reads - *15. Court in which suits to be instituted.- Every suit shall be instituted in the court of the lowest grade competent to try it.*
[88] Indus Mobile, ¶ 3. For other such plain vanilla cases, *see* Ion Exchange and SRS Private Investment.
[89] Green Builders and Promoters Pvt. Ltd. v. Ramesh and Ors., 2017 SCC OnLine P&H 4353 (seat); Asha Tiwari v. BPTP Limited, 2017 SCC OnLine Del 10179 (exclusive jurisdiction).
[90] Law Commission of India, *Report No. 246 on Amendments to the Arbitration and Conciliation Act 1996* (Aug. 2014).
[91] *Id.* at pp. 23-25, 39, 52.

appropriate. There were no significant changes made to the territorial jurisdiction test under Section 2(1)(e) as well. The SCI in *Indus Mobile* quoted the observations in the Law Commission Report to buttress the importance of seat of arbitration.[92] Interestingly, even though the amendments thereunder were not accepted by the legislature, the SCI rationalised such omission by referring to the dictum in in *BALCO*.[93]

The reliance on the Law Commission Report, in absence of suggested amendments being included in the 2015 Amendment Act was misplaced and rather ironical. As discussed above, the principle of territoriality and jurisdiction are creatures of statute and cannot be conferred either by courts or by parties. Therefore, insofar as the amendments to Section 20 are concerned, the legislature has applied its mind and chosen not to accept them. Further, the High Courts have not achieved clarity with regards to the difference between seat and venue as is clear in the cases post-*Indus Mobile*. The imputation of legislative intention, in the backdrop of evidence to the contrary, seems to be without foundation.[94]

V. CONCLUSION

Despite pro-arbitration changes being brought in legislatively as well as judicially, India is not favoured as an arbitral seat.[95] The reasons are not far to see. The debate around the scope and limitations to international commercial arbitration is a direct output of the lack of judicial appreciation of the basic principles of international commercial arbitration and misreading of the dicta laid down by the higher judiciary. There is a need to effectively balance exclusive jurisdiction clauses and arbitral seat, which the SCI has tried to achieve within the constraints of the Act. However, as courts have given conflicting decisions on the meaning of "seat" and "venue" of arbitration,[96] due to lack of

[92] Indus Mobile, *¶¶ 17-18.*

[93] *Id.* at ¶ 19.

[94] For a brief analysis of legislative intention, *see* Sagar Gupta, *One Step Forward, Two Steps Back? Application of the Arbitration & Conciliation Act, 1996 to Foreign Seated Arbitrations,* ARBITER DICTUM BLOG (Feb. 25, 2016), https://arbiterdictum.wordpress.com/2016/02/25/one-step-forward-two-steps-back/; Rajendra Barot & Sonali Mathur, *Laying Old Ghosts to rest, or not? – The Section 9 Enigma continues...* 5 INDIAN J. ARB. L. 168 (2016).

[95] GARY B. BORN, *INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING* 74 (5th ed. 2016). (*India has also historically been disfavored as an arbitral seat, owing to a tradition of interventionist judicial supervision and inefficient local courts*.) In the 2018 International Arbitration Survey: The Evolution of International Arbitration conducted by White & Case LLP and Queen Mary University of London, the five most preferred seats of arbitration are London, Paris, Singapore, Hong Kong and Geneva. Note that seats in India were nominated "twenty times or more" among 992 responses which is a welcome change after the 2015 amendments to the Act. *See* Stavros Brekoulakis & Adrian Hodiș, *Arbitral Seats – An Empirical Overview,* KLUWER ARB. BLOG (May 17, 2018), http://arbitrationblog.kluwerarbitration.com/2018/05/17/tbc/.

[96] In cases such as PCP International, the Delhi High Court declined jurisdiction on the basis of the distinction seat and venue. For cases where the courts have equated 'venue' to 'seat' in absence of a contrary stipulation, *see* Jyoti Structure and Adesh Enterprises.

clarity in legislative text, there is a need to bring amendments to this effect. The phrase "place of arbitration" – borrowed from the UNCITRAL Model Law – should be substituted with "seat" and "venue" as applicable. The definition of "seat of arbitration" should be included, with a specific limitation on its scope. The simplest and most elegant solution to harmonise the judicial interpretation and commercial practice would be to modify the jurisdictional test under Section 2(1)(e) of the Act to include party autonomy (i.e. if the parties have chosen a seat of arbitration in the arbitration agreement) and remove the cause of action route to confer jurisdiction in arbitration matters.[97] This legislative amendment would overcome the concurrent jurisdiction conundrum in *BALCO* and provide basis for the exclusive jurisdiction to the "seat court" in domestic arbitrations in line with the position of the SCI in *Indus Mobile and BGS*. In current practice, it would be advisable for parties to include an arbitral seat in domestic arbitrations to minimise the possibility of a "cause of action court" assuming jurisdiction.

Professor Martin Hunter, in a 2014 article questioned whether a single legislation served the purpose for domestic arbitrations and international commercial arbitrations (whether seated in India or elsewhere) in the Indian context.[98] When answered from the standpoint of jurisdiction, the answer is sadly negative. It will be in India's best interests to bifurcate its arbitration legislations into two – one governing purely domestic arbitrations and another governing international commercial arbitrations. A successful example for this model is Singapore where domestic arbitrations are governed by the Arbitration Act and international commercial arbitrations are governed by the International Arbitration Act (based on the UNCITRAL Model Law). In the domestic sphere, the bifurcation will aid in clarifying several policy positions such as jurisdiction, scope of judicial support and grounds of setting aside.

In the White & Case – QMUL 2018 International Arbitration Survey, preferences for a given seat were primarily determined by its "general reputation and recognition," followed by users' perception of its 'formal legal infrastructure': the neutrality and impartiality of its legal system; the national arbitration law; and its track record in enforcing agreements to arbitrate and arbitral awards. India is at the crossroads of being recognised as an emerging arbitral seat. The bifurcation of arbitration legislation shall significantly help in achieving conceptual clarity between the two distinct systems of domestic and international arbitrations and fostering a certain and predictable national arbitration

[97] On the question of harmonious interpretation undertaken in *Indus Mobile, see* Payal Chawla & Hina Shaheen, *In defence of Indus Mobile v. Datawind Innovations and the Doctrine of Ouster,* BAR & BENCH (Mar. 24, 2018), https://barandbench.com/indus-mobile-doctrine-of-ouster/.

[98] J Martin Hunter, *India's Arbitration Legislation: Does the Single Act Serve the Purpose,* 2 INDIAN J. ARB. L. 4 (2014).

law. In providing a separate regime, Indian courts will be equipped to increase the speed and accuracy in deciding applications relating to international commercial arbitrations. Whilst this may seem a radical solution, it is a viable opportunity for India to address broader concerns in its enforcement regime as well.