Highlights:

Corporate

- MCA circular on Board Meetings under Companies Act, 2013 on account of outbreak of the coronavirus (COVID-19);
- MCA clarifies the procedure of filing of forms in the Registry (MCA-21) by the Insolvency Professional (Interim Resolution Professional) or Resolution Professional (RP) or Liquidator appointed under Insolvency Bankruptcy Code, 2016 (IBC, 2016);
- Securities and Exchange Board of India ("SEBI") issues guidelines for Portfolio Managers registered with SEBI under SEBI (Portfolio Managers) Regulations, 2020 ("PMS Regulations");
- MCA issues clarification on prosecutions filed or internal adjudication proceedings initiated for taking action against Independent Directors, non-promoters and non-KMP non-executive directors; and
- MCA enforces the provisions of sub-section (11) and (12) of Section 230 of the companies act, 2013.

Real Estate Brief

- Punjab RERA: Judgment dated 04.03.2020 redressing complaint filed under section 18 of the RERA Act, 2016.
- Maharashtra Real Estate Appellate Tribunal issued an order towards delay of handing over of possession
- Punjab RERA issues an Order dated 02/03/2020 in suspension of an earlier order dated 31/08/2018 regarding Composite Web Maintenance Fee.

Litigation Brief

- The Place, Seat & Venue Conundrum: Picture Abhi Baki Hai

Corporate Brief

➲ MCA circular on Board Meetings under Companies Act, 2013 on account of outbreak of the coronavirus (COVID-19):

Considering the need to take precautionary steps to overcome the outbreak of the coronavirus (COVID-19), the Government has in-principle decided to relax the requirement of holding Board Meetings with physical presence of directors under Section 173 (2) read with rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 for approval of the annual financial statements, Board's report etc. Such meetings may till 30th June 2020 be held through video conferencing or other audio visual means by duly ensuring compliance of rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014. The necessary changes in the rules are not yet notified.

➲ MCA vide its General Circular No. 04/2020 clarified the procedure of filing of forms in the Registry (MCA-21) by the Insolvency Professional (Interim Resolution Professional) or Resolution Professional (RP) or Liquidator appointed under Insolvency Bankruptcy Code, 2016 (IBC, 2016):

Keeping in view of requirements of statutory compliances under the Companies Act, 2013, and to enable complaince by Resolution Professionals, MCA has clarified the procedure for filing of forms in the Registry (MCA-21), where an Insolvency Professional (Interim Resolution Professional) or Resolution Professional (RP) or Liquidator has been appointed under IBC, 2016 in respect of a company. The following procedre shall be followed in such cases:

- The IRP/RP/Liquidator would have to first file the NCLT order approving him as the IRP/RP/Liquidator in form INC-28 on the MCA 21 portal. After filing in the form, the IPR/RP/Liquidator while affixing his DSC, shall choose his designation as "Others" in the declaration box.
- The Jurisdictional ROC, would therafter examine and approve the INC-28 form filed if the same is found to be in order. If the Form is not in order Jurisdictional ROC, shall mark the form as under Re-submission/ Rejected category as applicable. Once INC-28 if approved, only the IRP/RP/Liquidator shall thereafter be allowed to file any form on behalf of the company.
- For all subsequent filings, the IP shall choose his designation as "Chief Executive Officer" (CEO), for the purpose of filing e-forms.
- The Master Data for the company shall, after the approval of Form No. INC-28 shall clearly display that the said company is under CIRP or Liquidation, as the case may be, and the name of the IP so appointed shall be displayed in the CEO coloumn.
- The IP shall be responsible and will be able to file all necessary documents/ disclosures/ returns for the purpose of compliances under the Companies Act, 2013.
- For filing of e-forms SH-8 and SH-9 and iXBRL, the IP shall be allowed to file the same in his role as CEO instead of being signed by a Director.
- Unless INC-28 e-form is approved, no other forms would be enabled for filing by the IRP/RP/Liquidator in his role of designated CEO.
- The IRP/RP/Liquidaotor in his role as designated CEO shall again file e-form INC-28 upon approval of the resolution plan, initiation of liquidation proceedings or upon wthdrawl of the application for CIRP based on which the status of the company would get suitably reflected in the company master data.
- In case a new Board is required to be appointed in terms of any order passed by the Tribunal or Applellate Tribunal, the details of the first authorised signatory would be inserted by the Judicial Registrar. Consequently the authorisation IRP/RP/Liquidaotor to file documents on behalf of the company shall cease to exist and the new authorised signatory shall take over the responsibility of filing on behalf of the company.
- Also, in case the order of admission of a company (Corporate Debtor) into CIRP or into liquidation is stayed or set aside by the Tribunal or Appellate Tribunal or other courts, such order shall be filed in Form INC-28 by the

concered IP, and the status of the company and the authorisation for filing of forms on behalf of company would then change accordingly.

➲ Securities and Exhange Board of India ("SEBI") issues guidelines for Portfolio Managers registered with SEBI under SEBI (Portfolio Managers) Regulations, 2020 ("PMS Regulations"):

These guidelines will come into effect from May 01,2020. The Guidelines are as follows:

(i) Fees and charges:

- Portfolio Managers ("**PM**" or "**Portfolio Managers**") cannot charge upfront fees, either directly or indirectly, to the clients. Brokerage at actuals shall be charged to clients as expense. Operating expenses excluding brokerage, over and above the fees charged for Portfolio Management Services (PMS) shall not exceed 0.50% per annum of the client's average daily Assets under Management (AUM).
- In case client portfolio is redeemed in part or full, the exit load charged shall be as under:

Year of Investment	Maximum percentage amount redeemed that can be charges
First year of investment	3%
Second year of investment	2%
Third year of investment	1%
After three years	NIL

- Charges for all transactions in a financial year (Broking, Demat, custody etc.) through self or associates shall be capped at 20% by value per associate (including self) per service. Any charges to self/associate shall not beat rates more than that paid to the non-associates providing the same service.

(ii) Direct on-boarding of Clients:

- Portfolio Managers shall provide an option to clients to be on-boarded directly, without intermediation of persons engaged in distribution services and Portfolio Managers can only charge statutory fees for direct on-boarding and no other additional charges.

(iii) Nomenclature 'Investment Approach':

- The information about Investment Approaches offered by Portfolio Managers, shall be uniform across all types of regulatory reporting, client reporting, disclosure document, marketing materials and any such document which refer to services offered by Portfolio Managers.

(iv) Periodic Reporting by Portfolio Managers:

- PMS have to report on the 'Improvement in Corporate Governance' on an annual basis instead of the earlier bi-annual submission, as required under SEBI Circular No. IMD/DOF-1/PMS/Cir-1/2010 dated March 18, 2003. However, with effect from Financial Year 2019-20, Portfolio Managers shall submit the following information to the Board:
  - A certificate from the qualified Chartered Accountant certifying the net-worth as on March 31, every year based on audited account within 6 months from the end of Financial Year. A certificate of compliance with PMS Regulations and circulars issued thereunder, duly signed by the Principal Officer, within 60 days of end of each financial year.
  - Further, details of non-compliance along with the corrective actions, if any, duly approved by Board of the portfolio manager. Further, Portfolio Managers shall submit a monthly report regarding their portfolio management activity, on SEBI Intermediaries Portal within 7 working days of the end of each month. Portfolio Managers are now also required to furnish a performance report in the format to their clients on a quarterly basis.

(v) Reporting of Performance by Portfolio Managers:

- For the purpose of reporting, the PMS shall consider all cash holdings and investments in liquid funds, for calculation of performance and also report performance data net of all fees and all expenses(including taxes). PM to clearly disclose any change in investment approach that may impact the performance of client portfolio, in the marketing material. PM to ensure that performance reported in all marketing material and website of

the Portfolio Manager is the same as that reported to SEBI. Further to ensure that the aggregate performance of the Portfolio Manager (firm-level performance) reported in any document shall be same as the combined performance of all the portfolios managed by the Portfolio Manager. Also to provide a disclaimer in all marketing material that the performance related information provided therein is not verified by SEBI.

- The firm-level performance data of Portfolio Managers shall be audited annually. Confirmation of compliance of reporting of performance by Portfolio Managers shall be reported to SEBI within 60days of end of each financial year.

(vi) Disclosure Documents:

- SEBI has defined material change, which shall include change in control of the Portfolio Manager, Principal Officer, fees charged, charges associated with the services offered, investment approaches offered(along with the impact of such change) and such other changes as specified by SEBI from time to time.

(vii) Supervision of Distributors:

- The Supervision of Distributors have been given to PM. PM can utilise ervices of only such distributors (whether known as Channel Partners, Agents, Referral Interfaces or by any other name) who have a valid AMFI Registration Number or have cleared NISM-Series-V-A exam.PM shall pay fees or commission to distributors onlyon trail-basis. Further, any fees or commission paid shall be only from the fees received byPortfolio Managers. PM shall make ensure that prospective clients are informed about the fees or commission tobe earned by the distributors for on-boarding them to specific investment approaches.PM to also ensure that distributors abide by the Code of Conduct and also have a mechanism to independently verify the compliance of its distributors with the Code of Conduct. PM have also to get a self-certification is also received from distributors with regard to compliance with Code of conduct.

➲ MCA vide its circular No. 01/2020 issues clarification on prosecutions filed or internal adjudication proceedings initiated for taking action against Independent Directors, non-promoters and non-KMP non-executive directors:

- Ordinarily, a whole-time director and a key managerial personnel are associated with the day-to-day functioning of the company and are accordingly would be liable for defaults committed by a company.
- However, Section 149(12) of the Companies Act, 2013 ("**Act**") is a non-obstante clause which provides that the liablity of an independent director (ID) or a non-executive director (NED) not being a promoter or KMP would be only in respect of such acts of omsission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently. In view of this provision IDs and NEDs should not be arrayed in any criminal or civil proocedings under the Act unless the above mentioned criteria is met.
- The nature of default is also crucial for arraigning officers of the company for defaults committed under the Act.
- MCA has issued the following SOP to all Registrars in this respect:
- The Registrar may seek necessary documents at the time of serving notices to the company as to ascertain the involvement of the concerned officers of the company;
- In case, lapses are attributanle to the decisions taken by the Board or its Committees, all care must be taken by the Registrar to ensure that civil or criminal proceedings are not unnecessarily initiated against the IDs or the NDEs, unless sufficient evidence exists to the contrary;
- The Registrar should examine the records available in his office (including Forms DIR-12, DIR-11, annual returns, financial statements etc.) as to ascertain whether particular director or the KMP was serving the company as on date of default;
- In case of any doubt, the Registrar may seek guidane from MCA through the office of Director General of Corporate Affairs. Consequently, such proceedings must be initiated after receiving due sanction from MCA;
- All Registrars are directed to immediately follow this SOP with respect to all ongoing cases; and
- Further, with respect to cases where prosecution may have been already filed but the abovementioned cases criteria is not satisfied, the same to be submitted to the Ministry for necessary examination and further direction thereon.

➲ MCA extends deadline for Indendent Directors for registeration on IICA databank:

The deadline for registration of Independent Directors for registeration on IICA databank has been extended by further 2 months i.e. upto 30th April, 2020. Further, even if Directors have served as Director/KMP for more than 10 years in a Body Corporate listed on a recognized stock exchange will be exempted from online proficency test.

➲ **MCA vide its notification has enforced the provisions of sub-section (11) and (12) of Section 230 of the companies act, 2013:**

- Section 230 of the Companies Act, 2013 relates to takeover of unlisted companies. As a result of enforcement of these provisions under the notification, an amendment has been made in National Company Law Tribunal Rules, 2020 and the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2020.
- Key Highlights of the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2020 are as follows:
  - A member of the Company shall make an application for arrangement, for the purpose of takeover offer, when such member along with any other member holds not less than three-fourth of shares in the company, and such application has been filed for acquiring any part of the remaining shares of the company.
    - Such application shall contain:
      (i) report of a registered valuer disclosing the valuation of the shares proposed to be acquired by the member after taking into account the following factors:
        - the highest price paid by any person or group of persons for acquistion of shares during last 12 months;
        - the fair price of shares of the company to be determined by the registered valuer after taking into account valuation parameters including return on net worth, book value of shares, EPS, price earning multiple vis-à-vis the industry average, and such other parameters as are customary for valuation of shaes of such companies.

      (ii) details of a bank account, to be opened separately by the member wherein a sum of amount not less than one-half of total consideration of the takeover offer is deposited.
- Any aggrieved party may make an application in Form NCLT-1 to NCLT in the event of any grievances with respect to the takeover offer of unlisted company with the fee of Rs. 5,000 (Rupees Five Thousand) only with the following docments:
  - Affidavit verifying the petetion;
  - Memorandum of appearance with copy of the Board's resolution or the executed vakalatnama, as the case may be;
  - Documents in support of the grievance against the takeover; and
  - Any other relevant document.

RERA Brief

➲ **PUNJAB RERA**

In the matter of *Sundar Krishnan ("**Complainant**") vs. ATS Estates Private Limited ("**Respondent**"), the Punjab RERA addressed contentions of the Respondent in favour of the Complainant under Section 18 of the RERA Act, 2016.*

FACTS:

1. The Complainant had filed a complaint under section 31 of the RERA Act, against the Respondent along with documents alleging violation of section 18 of the RERA Act, 2016 seeking refund and interest etc., as per provisions of the Act on delay on handing over of possession of a plot admeasuring 350 square yards in the project namely ATS Golf Meadows.
2. It was the case of the Complainant that he had paid an amount of Rs.25,25000/- ie the Total Sale Price of the plot, but till date, the possession, has not been so far handed over to him though it was to be delivered within two years from the allotment of the plot bearing no. 120 on 03.11.2009 ie by 03.11.2011. Hence, he filed this complaint.

ISSUE:

1) *Whether, rights and liabilities of a person fixed prior to registration of a project with RERA, get affected due to the said Registration?*
2) *Whether there is a compliance of Execution of ATS.*
3) *Whether there is retrospective effect of the RERA Act, 2016.*
4) *Whether the presence of an Arbitration clause can debar a complainant from approaching the RERA Authority first.*
5) *What happens when the time period of completion of project is not mentioned in the Allotment Letter?*

CONTENTIONS:

1. Respondent contended that the project of the case in hand was registered with the RERA in September, 2017 and a period of 9 years was granted for completion of the project which would expire in August, 2026 and this complaint was premature.
2. The second objection of the Respondent was that no agreement for sale had been executed between the

parties and therefore, the complainant could not seek relief under RERA.

3. The Respondent contended that the present complaint pertained to allotment letter dated 03.11.2009 i.e., prior to coming into force of the Act, and therefore the provisions of this Act were not applicable in this case.
4. The Respondent contended that there was an arbitration clause, according to which the parties had to go to arbitration in case of any dispute and this bench had no jurisdiction to adjudicate this controversy between the parties.
5. The Respondent contended that no time limit had been specified in the Allotment Letter issued to the Complainant, hence the Complainant could not contend the same.

HELD:

- **Issue 1**: The RERA Authority observed that the contention of the Respondent was without merit in as much as the present ongoing project, which was subsequently registered with RERA Authority, will not be automatically extended, in respect of the present complainant, whose rights and liabilities were fixed prior to the registration of this project. Only the subsequent agreements after registration, the period of completion of project will be taken as 9 years from date of its registration.
- **Issue 2**: The RERA Authority said that the Complainant had paid an initial booking Amount and subsequent amounts were also paid and as the project has been registered under section 13(1) of the Act, the respondent could not have received the amount on excess of 10% of the total sale consideration, without getting an execution written Agreement for sale in favour of the Complainant, therefore, it was the responsibility of the Respondent to get the Agreement to sell executed from the Complainant because the Respondent has already received more than 10% of the total sale consideration, hence the Respondent cannot derive benefit of this contention.
- **Issue 3:** The RERA Authority held that this is devoid of any force on account of the fact that even though the Allotment Letter is of the year 2009, but the present project was ongoing and had not been completed till date and it is a settled law that the Act would certainly regulate the existing contracts even though, it is prospective in nature, but retrospective to some extent. Reliance had been placed on *Neel Kamal Realtors v. Union of India and Others bearing W.P No. 2737 of 2017, decided on 06.12.2017*, wherein it was held that unilateral contracts of prior period not being in accordance with the provisions of the Act, are not enforceable to that extent and that the provisions of the Act would be applicable to cover up the ongoing projects got registered with RERA.
- **Issue 4:** The RERA Authority held that a conjoint reading of sections 79, 88 and 89 of the Act, gives Complainant the right to approach this bench even though an arbitration clause exists.
- **Issue 5:** The Authority held that even though no time had been specified, the Respondent was still liable to pay an amount on account of default clause no. 2 in the allotment letter. It may be, that the Respondent orally asserted that the project was to be completed within 2 years from issuance of the letter, but the project was not completed for an unreasonable time now, that is more than nine years from issue of allotment, and therefore this conduct of the Respondent amounts to unfair trade practise, and the Respondent was liable under section 18 of the Act.

CONCLUSION:

- The RERA Authority held that the Complainant is entitled to the return of principal amount of Rs.25,25000/- along with an interest at a prescribed rate as per Rule 16 of the Act, i.e., the SBI highest marginal cost of lending rate plus 2% from the respective dates of the payment by the Complainant till realization. Section 72 of the Act shall also be considered in the present case while calculating the amount of compensation that has to be paid by the Respondent to the Complainant to the extent of mental agony of an amount of Rs.1,25,000/- along with the above-mentioned amount within 60 days of this order.

MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL:

In the matter of *Mr. Vinay Jayaram Salian vs. Kneepad Real Estate Pvt. Ltd* :-

FACTS

- The Respondent had launched a residential cum commercial project "Vasant Oasis" at the Makwana Road, Marol, Andheri East, Mumbai. The Appellant agreed to purchase Flat No. 402 measuring 664 square feet. Price of the purchase was Rs. 1,32,20,000/-. The Promoter executed an allotment letter dated 23.12.2012. The Appellant paid Rs.12,44,000/- on 12.06.2013 towards price of flat to Respondent. The Respondent had assured to give the possession within 2 years. The RERA Act, 2016 came into effect on 01.15.2017 and the project was incomplete on that date. The Respondent registered the project with the Maharashtra RERA. The Respondent had initially shown the date of possession as year 2019 and later on, the same got extended to 31.1.2.2022 while registering the project with Maharashtra RERA.

  As the Respondent failed to give the possession to the Appellant within the agreed period of 2 years, the appellant filed a complaint vide complaint no. C006000000054715/18 against the Respondent for refund of the amount along with an interest and compensation on the same. Registration application.

The Maharashtra RERA issued an impugned order dated 10.07.2018 stating that the parties were directed to execute and register the ATS as under section 13 of the RERA Act, 2016 within 30 days of this order.

ISSUES:

1. Whether impugned order is legal, proper and correct,
2. Whether appellant is entitled for refund along with interest and compensation as per Section 18 of RERA Act, 2016?

HELD:

- Appellant waited for more than 5 years for possession of flat. According to appellant while issuing allotment letter in the year 2012, respondent assured him to give possession of flat within two years. The allotment letter dated 28.12.2012 is silent on the point of date of possession of flat. However, in ordinary course nature, no appellant will book the flat without knowing the date of possession. It is settled position of law to consider the reasonable period in handing over possession as 3 years whenever the date of possession is not mentioned in allotment letter or agreement or in any document.
- The Hon'ble Apex Court have laid down in Civil Appeal 353313412017 dated 12.03.2018 in M. S. Fortune Infrastructure vs. Trevor D, Lima that, "*a person cannot be made wait indefinitely for possession of flats allotted to them and they are entitled to seek refund of the amount paid by them along with compensation. When there was no delivery period stipulated in the agreement, reasonable time has to be taken into consideration*." In the facts and circumstances of the case, period of 3 years would have been reasonable to handover the possession. Thus, respondent initially failed to handover possession of flat within two years as assured and thereafter failed to handover possession at least on or before 2019 as per the date of proposed possession which is duly mentioned at the time of registration of its project. In such circumstances, promoter failed to give possession of flat to appellant as per the agreement between them. Transaction between appellant and respondent is not disputed. The allotment letter itself is sufficient to show that such transaction took place between the parties. Moreover, allotment letter is quite evident on the points of nature of transaction, total price of flat, schedule of payment of price, interest to be paid for delayed period of payment etc. Clause 8 of allotment letter specifically speaks about terms and conditions which were discussed and agreed between parties and were to be set out in agreement to be executed under MOF Act. So, terms and conditions were duly discussed and agreed and were to be set out in agreement under MOF Act. The definition of "agreement for sale" is given in Section 2(c) of RER Act, 2016. It is an agreement entered into between the promoter and allottee. Since above mentioned details of transaction between the parties are sufficient to show that parties had agreed to sale and purchase the flat on certain terms and conditions, we are of the opinion that above transaction can be treated as sale agreement as per Section 18 of RERA Act. As respondent failed to give possession to appellant within assured period of 2 years and thereafter within the period as mentioned at the time of registration of the project with Maha RERA and thus total period of more than 5 years has lapsed since the transaction in the year 2012, appellant is entitled to claim the relief for refund of amount paid to promoter along with interest and compensation as per Sec. 18 of RERA Act, 2016 by withdrawing from project. For the reasons as stated above, the Maha REAT answer point accordingly and pass the following order. The impugned order is not just, proper and correct. The reliefs sought in Complaint were neither granted nor rejected. Though it is mentioned in impugned order that Learned Counsel for appellant submitted that appellant is ready to continue in the project and promoter be directed to execute an agreement. Learned Counsel for appellant denied that he made such submission. It is pertinent to note that once impugned order was passed, appellant immediately approached Maha RERA by filing petition for rectification of said order. The petition for rectification remained undecided and appellant had to apply under RTI Act for obtaining the information regarding status and progress of petition for rectification. Since, prompt and immediate step was duly taken by appellant and moreover, the petition for rectification is filed by appellant was duly accompanied by an affidavit of Counsel for appellant, the authority is of the opinion that impugned order denying the claim of appellant to withdraw from project and rejecting the relief of refund along with interest and compensation is not legal, correct and proper. The respondent shall refund the entire amount paid by appellant along with interest from the date of payment of such amount ti its realization. The rate of interest as per Rule 18 of The Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of Interest and Disclosures on Website) Rules, 2017 from the date of payment of the said amount till its realization. The promoter to pay Rs.20,000/- as cost of appeal to allottee and shall bear its own cost.

PUNJAB RERA

➲ PUNJAB RERA issues an Order dated 02/03/2020 in suspension of an earlier order dated 31/08/2018 regarding Composite Web Maintenance Fee

The Government of Punjab has made the Punjab RERA in order for regulation and promotion of real estate sector in the

state of Punjab. The Authority has already operationalized a web based online system for various purposes regarding the smooth functioning of projects in the real estate sector under the Punjab RERA. For the smooth functioning of this web portal, user charges needed to be levied, which were known as the Convenience charges, which were levied upon, under the powers vested to the Punjab RERA under the Punjab Regulatory Authority (General) Regulations, 2017, para 33. This order had been issued vide order no. RERA-2018/4958 published on 31/08/2018.

The matter above, has been reviewed further considering practical convenience to the Promoters and Agents and it has been decided by the Authority that instead of taking the said Fee annually at the beginning of each financial year, it will now be taken for the entire duration of validity of the Registration for the entire duration of validity of the Registration Certificate at the time of registration as tabulated below:-

S. No.	Type of Transaction	Duration for chargeability of fee at the time of the registration	Composite Web Maintenance Fee
1.	Real estate agents at the time of application for registration of renewal	5 years	Rs. 5000 for 5 years (@1000 p.a.)
2.	Promoter of New/ Ongoing projects at the time of application for registration of extension	From date of registration to date of completion of project	Rs. 5000 for each financial year or part thereof.

All projects and real estate agents have already been registered with the Authority as on date, shall be liable to pay the Composite Web Maintenance Fee for entire period of validity of the Registration Certificate as above, and excluding the Web Maintenance Fee already paid by the Promoter / Real Estate Agent. The above fee will be payable in the same mode as the payment of Registration Fee payable under the Rules, under the heading Composite Web Maintenance Fee.

The Authority calls upon Promoters and Real Estate Agents to pay the said fees on or before 31/03/2020 and avoid any primitive action under law.

This order is issued vide Edstt. No. RERA/Pb/FIN/2020/1641-1666 dated 02/03/2020.

Litigation Brief

➲ The Place, Seat & Venue Conundrum: Picture Abhi Baki Hai

With the Alternate Dispute Resolution (ADR) changing the course of how litigants, especially the companies pursue their rights, the first question that has to be answered is where the arbitration will take place and what law would govern the proceedings (both substantive and procedural).

A Five Judge Bench of the Supreme Court in its landmark judgement in Bharat Aluminium Co. (BALCO) v. Kaiser Aluminium Technical Service, Inc. (2012) 9 SCC 552 ("BALCO") elucidated that the seat of the arbitration, once chosen, assumes a permanent character which subsequently determines the court that will have the supervisory jurisdiction over such arbitration proceedings i.e. the court that will have the jurisdiction to hear all the Applications/ Petitions arising out of such dispute under the Arbitration and Conciliation Act, 1996 ('the Act'). On the other hand, the venue is described to be provisional in nature and is merely for administrative convenience.

BALCO also acknowledges that the terms 'seat' and 'place' are used interchangeably consolidating the doctrine of seat and venue under the 1996 Act, the court clarified that the term "place" used in Sections 20(1) and (2) would connote "*seat*" and the term "place" used in Section 20(3) would connote "*venue*".

Subsequent to various conflicting decisions, the Hon'ble Supreme Court finally laid to rest the conundrum of seat, place and venue (or we thought so) on September 25, 2018 by a three judge bench judgement in Union of India vs. Hardy Exploration and Production (India) INC, (2018) 7 SCC 374 held the following;

"Thus, the word "place" cannot be used as seat. To elaborate, a venue can become a seat if something else is added to it as a concomitant. But a place unlike seat, at least as is seen in the contract, can become a seat if one of the conditions precedent is satisfied. It does not ipso facto assume the status of seat. Thus understood, Kuala Lumpur is not the seat or place of arbitration and the interchangeable use will not apply in stricto sensu."

The Court digressed from the earlier position of law, and in effect diluted the meaning of "seat", "place" and "venue". The court opined that in the absence of any determination of the "seat" under the Arbitration Agreement, the same would have to be determined by the Arbitral Tribunal. Since, seat was not determined by the Arbitral Tribunal, the Hon'ble Court concluded that the designation of 'place' will not ipso facto make it a 'seat' under the Act. Thus, a 'venue' can become seat if it is added as a concomitant. But a 'place' unlike 'seat' can become a seat if one of the condition precedents is satisfied and it does not ipso facto take up the status of seat.

A Co-ordinate Bench of the Supreme Court once again on December 10, 2019 in the case of BGS SGS Soma JV v. NHPC Ltd, [2019 SCC Online SC 1585] (, effectively overruled the above-mentioned view of the Supreme Court, and upheld the ratio in the BALCO judgement.

The judgment delved into various different aspects, but for the purposes of the article the author will limit it to the issue at hand, the conundrum of seat, venue and place. The Supreme Court observed that;

"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"

The Court was further of the opinion that whenever the parties agrees for the arbitral proceedings "shall be held" at a particular place, it signifies the intention of the parties to declare it as a 'seat'. Further, if there does not arise any contrary intention whereby the 'venue' is merely a venue and not the seat, then the place would automatically conclusively assume the meaning of 'seat' of the arbitral proceedings.

The Hon'ble Bench further went on to distinguish the inconsistencies made in the Hardy Judgement. The Court held that the judgement did not apply the Shashoua principle, which essentially elucidates an exclusive jurisdiction. The principle observes that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings.

The Supreme Court vide its last judgement has gone back to the earlier position as elucidated in the BALCO and Roger Shashoua judgements, which in turn conclusively show that 'venue' and 'place' are synonymous with a 'seat' as long as there is no contrary intention of the parties. Unless an arbitration agreement specifies the seat and venue separately, the venue will be understood to be the juridical seat of arbitration.

The controversy does not come to an end here. Both Hardy and BGS judgements are delivered by a three- judge bench of the Supreme Court. Thus, the latter cannot effectively overrule a judgement of a co-ordinate bench. This issue has to be now referred to a full bench of the Supreme Court to finally and conclusively determine the issue.

The same issue once again recently presented itself before a three-judge bench of the Apex Court in Mankastu Impex Private Limited v Airvisual Ltd (Arbitration Petition No. 32 of 2018). The Court once again had to decide on the controversy, albeit without the required bench strength to finally decide the controversy. The Court decided not to delve into the correctness of the BGS Soma judgement or otherwise, leaving the issue in complete ambiguity again. Hopefully, the Hon'ble Supreme Court will clear the air soon enough and put this conundrum to rest once and for all.

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