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Supreme Court of India allows Indian parties to choose foreign seat of arbitration (PASL v GE Power)

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Arbitration analysis: In a landmark ruling, the Supreme Court of India held that two Indian parties are entitled to agree a foreign seat of arbitration. The Supreme Court further clarified that the arbitral award issued in such cases would be considered a foreign award enforceable under the provisions of Part II of the Arbitration and Conciliation Act 1996 (Arbitration Act). The court also held that two Indian parties are entitled to interim reliefs from Indian courts in support of arbitration, even if their arbitration is seated outside India. Although it has not been expressly ruled by the Supreme Court, a careful review of the judgment suggests that there may not be any prohibition on two Indian parties electing a foreign law as the substantive law of the contract, provided the seat of arbitration is outside India. Aparimita Pratap, Aipak Banerjee, Kshama A Loya, member and leaders respectively in the International Litigation & Dispute Resolution Team at Nishith Desai Associates, consider the court's judgment.

PASL Wind Solutions Private Ltd v GE Power Conversion India Private Ltd, Supreme Court of India (not reported by LexisNexis® UK)

What are the practical implications of this judgment?

This judgment paves a way for Indian parties to choose a foreign seat of arbitration. As a result, unsuccessful and unhappy parties in such arbitrations will have the opportunity to take 'two bites at the cherry' post-award, ie to challenge the award before courts at the foreign seat of arbitration in accordance with the curial law, and to resist the enforcement of the resultant foreign award in India. Additionally, reliefs under section 9 of the Arbitration Act will continue to be available in such foreign-seated arbitrations between the Indian parties. The permissibility of Indian parties choosing a foreign seat is critical for foreign companies having subsidiaries in India. Such companies prefer to adjudicate disputes with other Indian parties outside India for several commercial reasons such as neutrality, efficiency in supervision of arbitration proceedings by courts at the seat, and speed of disposal in courts at the seat should a challenge arise to the arbitration award.

What was the background to the case?

The arbitration proceedings

Certain disputes arose between two companies incorporated in India, namely PASL Wind Solutions Private Ltd (Appellant) and GE Power Conversion India Private Ltd (Respondent), in relation to purchase of convertors. The Respondent was a 99% subsidiary of General Electric Conversion International SAS, France, which in turn was a subsidiary of the General Electric Company, US.

A settlement agreement was executed between the parties on 23 December 2014 (Settlement Agreement). The dispute resolution clause therein provided for arbitration in accordance with the International Chamber of Commerce (ICC) Arbitration Rules with Zurich as the seat of arbitration.

Disputes arose between the parties under the Settlement Agreement. The Appellant issued a request for arbitration before the ICC. The Respondent challenged the jurisdiction of the tribunal on the ground that two Indian parties cannot choose a foreign seat of arbitration. Notably, the Appellant opposed the Respondent's objection on the ground that Indian law did not bar Indian parties from electing a foreign seat of arbitration.

The tribunal dismissed the Respondent's objection. However, on Respondent's application, the venue of the arbitration was decided as Mumbai in order to save costs. Subsequently, an arbitral award was issued against the Appellant.

Enforcement proceedings before Gujrat High Court

The Respondent filed for enforcement of the award under sections 47 and 49 of the Arbitration Act before the Gujarat High Court (petitions under Arbitration Act No 131 and 134 of 2019 (Gujarat High Court), paras [84] and [85]). The Appellant resisted the enforcement proceedings on the premise that the seat of arbitration was at Mumbai, and that choice of foreign seat by two Indian parties is against public policy of India (contrary to their previous stand in the arbitration proceedings).

The Gujarat High Court upheld the enforcement of the arbitral award. However, it denied the availability of interim relief to the Respondent under section 9 of the Arbitration Act on the ground that the term 'international commercial arbitration' in the proviso to section 2(2) has the meaning ascribed by section 2(1)(f) of the Arbitration Act, ie in the context of such arbitration taking place in India.

The Appellant preferred the present appeal before the Supreme Court, while the Respondent filed cross-objections challenging the finding of the Gujarat High Court on the maintainability of petition under section 9 of the Arbitration Act.

What did the court decide?

Seat of arbitration

The Appellant raised an objection on the maintainability of the enforcement proceedings filed under Part II of the Arbitration Act and contended that by applying the 'closest connection test', the seat of arbitration was Mumbai. The Supreme Court disagreed and observed that the tribunal had explicitly recorded in the Procedural Order that the seat of arbitration was Zurich, and the venue was shifted to Mumbai only to save costs to the parties.

The Supreme Court also noted that parties had not challenged the Procedural Order. On this basis, the Supreme Court clarified that the closest connection test applies where the designation of the seat of arbitration is unclear, which is not applicable in the facts of the case (para [9[).

International Commercial Arbitration and Foreign Awards

The Respondent asserted that the arbitral award was a 'foreign award' and accordingly filed for enforcement of the award under Part II of the Arbitration Act. However, the Appellant contended that the expression 'unless the context otherwise requires' appearing in section 44 permitted it to import the context of section 2(1)(f) of the Arbitration Act into section 44. Simply put, section 44 of the Arbitration Act applied only when the arbitration involved '(i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country' as defined in section 2(1)(f) in Part I of the Arbitration Act. To substantiate the above submission, the Appellant also submitted that the proviso to section 2(2) of the Arbitration Act acted as a bridge that connected Part I and Part II of the Arbitration Act. Hence, definition of international commercial arbitration under section 2(1)(f) from Part I could be imported into section 44 of Part II by virtue of this connection.

The Supreme Court held that Part I is a completed code that dealt with arbitrations seated in India, including appointment of arbitrators, commencement of arbitration, making of an award, challenges and execution of the award. Therefore, it had no application to a foreign-seated arbitration. Similarly, Part II only prescribes for the enforcement of a foreign award, with the only exception being section 45 that deals with referring the parties to arbitration. Accordingly, the Supreme Court concluded that Part I and II of the Arbitration Act are mutually exclusive (para [11]).

The Supreme Court further held that the context of the term 'International Commercial Arbitration' as used in Part I, ie, section 2(1)(f)) of the Arbitration Act is different from Part II ie, section 44. Under section 2(1)(f), the

definition of the expression 'International Commercial Arbitration' is party-centric wherein at least one of the parties to the arbitration agreement should be a person who is a national of or habitually resident in any country other than India. However, the term 'International Commercial Arbitration' under section 44 signifies a place-centric approach. Thus, if an arbitration is convened between any two parties in a territory outside India, the New York Convention would apply, and the arbitration will get classified as an 'International Commercial Arbitration' (para [26]). Accordingly, an arbitral award made in such arbitrations would be considered to be 'foreign awards' which are enforceable and recognised under Part II of the Arbitration Act.

Contract Act and Public Policy

Contrary to their previous stand, the Appellant submitted that two Indian parties electing a foreign seat of arbitration would be contrary to sections 23 and 28 of the Indian Contract Act, 1872 (Contract Act).

With respect to section 28 of the Contract Act, exception 1 expressly exempts an arbitration agreement from being in restraint of legal proceedings. The court relied on the Supreme Court's ruling in *Atlas Exports Industries v Kotak & Company* (1997) 7 SCC 61 (not reported by LexisNexis® UK) (Atlas) under the Arbitration Act 1940 to the effect that exception 1 to section 28 of the Contract Act specifically saves the arbitration of disputes between two persons, without reference to the nationality of persons who may resort to arbitration.

With respect to section 23 of the Contract Act, the question framed by the court was whether the public policy of India interdicts the party autonomy of two Indian persons referring their disputes to arbitration at a neutral forum outside India. The Supreme Court held that for 'public policy' under section 23 of the Contract Act to be triggered, explicit harm to the public has to be proved (para [49]).

Additionally, the Supreme Court held that the freedom of contract had to be balanced with a clear and undeniable harm to the public, and that there was no public harm in permitting two Indian parties from getting their disputes arbitrated at a neutral forum outside India.

Section 28(1)(a) of the Arbitration Act

The Appellant submitted that two Indian parties electing a foreign seat of arbitration would be contrary to sections 28(1)(a) of the Arbitration Act. The Supreme Court held that section 28(1)(a), when read with sections 2(2), 2(6) and 4 of the Arbitration Act, made it clear that the restriction to adjudicate the dispute in accordance with the substantive law of India was only for cases where the arbitration was situated in India. The court observed that section 28(1)(a) of the Arbitration Act makes no reference to an arbitration being conducted between two Indian parties in a country other than India, and cannot be held, by some tortuous process of reasoning, to interdict two Indian parties from resolving their disputes at a neutral forum in a country other than India (paras [50] and [52})

The Supreme Court observed that '…nothing stands in the way of party autonomy in designating a seat of arbitration outside India even when both parties happen to be Indian nationals' (para [61]).

Section 10 of Commercial Courts Act 2015

The Appellant placed reliance on section 10(3) of the Commercial Courts Act 2015 (CC Act) which states that in all applications or appeals that arise out of arbitrations other than International Commercial Arbitrations, the principal civil court of original jurisdiction in a district would have the jurisdiction. Since, two Indian parties electing a foreign seat of arbitration cannot be termed as an International Commercial Arbitration, section 10(3) would apply, consequently, the Gujarat High Court did not have the requisite jurisdiction to adjudicate the case.

However, the Supreme Court rejected the contention and noted that since the arbitral award is a foreign award, it has to be enforced under Part II of the Arbitration Act. The explanation to section 47 of the Arbitration Act provides that only the High Court would have jurisdiction to enforce a foreign award (para [66]).

Ability to secure interim reliefs under section 9 of the Arbitration Act

The Supreme Court categorically observed that when two Indian parties elect a foreign seat of arbitration, it would be classified as an international commercial arbitration by relying on the place-centric approach. Accordingly, it ruled that the interim application under section 9 should be heard in terms of section 2(e)(ii) of the Arbitration Act, and was therefore maintainable before the Gujrat High Court (para [71]).

Analysis and way forward

The decision of the Supreme Court is important on several fronts. First, it accords recognition to the principle of party autonomy and emphasises the fact that there is no bar under Indian law to permit two India domiciled parties to choose a foreign seat of arbitration.

Second, it also puts to rest several conflicting decisions of High Courts as well as the Supreme Court on the issue. In the past, this issue was properly considered for the first time by the Madhya Pradesh High Court in *Sasan Power Ltd v North American Coal Corpn (India) (P) Ltd* 2015 SCC OnLine MP 7417, paras [52], [54], [57] and [70] (not reported by LexisNexis® UK) (Sasan Power), wherein it was held that Indian parties are free to choose a foreign seat of arbitration. While arriving at its decision, the Madhya Pradesh High Court considered the case of *Atlas*, in which the Supreme Court under the Arbitration and Conciliation Act 1940 had held that merely because the arbitration is situated in a foreign country, it would not by itself be enough to nullify the arbitration agreement that the parties had entered into on their own volition. Further, arbitration is covered under exception 1 to section 28 of the Contract Act and right of the parties to legal recourse is not excluded by arbitration which is also a form of legal adjudication. Similar conclusions were arrived at in other cases such as the Delhi High Court's decision in *GMR Energy Ltd v Doosan Power Systems India Private Ltd* (2017 SCC OnLine Del 11625 (Delhi High Court), paras [29] and [30] (not reported by LexisNexis® UK)).

On the contrary, in *Addhar Mercantile Private Ltd v Shree Jagdamba Agrico Exports Pvt Ltd* 2015 SCC OnLine Bom 7752 (not reported by LexisNexis® UK), the Bombay High Court took an opposite position. It placed reliance on *TDM Infrastructure Pvt Ltd v UE Development India Ltd* (2008) 14 SCC 271 (not reported by LexisNexis® UK), (TDM Infrastructure) and held that two Indian parties could not agree on a foreign seat of arbitration. On the other hand, the Madhya Pradesh High Court in *Sasan Power,* had explicitly held that the *Atlas* judgment was a binding precedent over *TDM Infrastructure* as it was a larger bench decision. Owing to these conflicting decisions, there was no clarity on the applicability of *Atlas* or *TDM Infrastructure* on this question of law. The Supreme Court, in the present case, held that reliance could not be placed on *TDM Infrastructure* because the judgment was rendered under section 11 of the Arbitration Act and did not have binding force. Additionally, the Supreme Court relied upon *Atlas*, affirming that *Atlas* is a binding precedent.

It might be of interest to note that in *Reliance Industries Ltd v Union of India* (2014) 7 SCC 603 (not reported by LexisNexis® UK), a Division Bench of the Supreme Court had dismissed a challenge to the arbitral award arising from a foreign-seated arbitration between two Indian parties. While the Supreme Court did not discuss whether two Indian parties could elect a foreign seat of arbitration, however, it decided the challenge to the arbitral award on the basis that the arbitral award was valid under Indian law.

Third, it is possible to cull out from the judgment that there may not be any impediment in two Indian parties electing a foreign substantive law to govern their contract, so long as the arbitration seated outside India (para [51]). In this context, it is pertinent to mention the recent decision of Delhi High Court in *Dholi Spintex Pvt Ltd v Louis Dreyfus Company India Pvt Ltd* (2020 SCC OnLine Del 1476, paras [43] and [47] (not reported by LexisNexis® UK)), which held that two Indian parties may normally choose foreign law to govern arbitration proceedings. The court relied on the three-judge bench decision of the Supreme Court in *Centrotrade Minerals and Metal Inc v Hindustan Copper Ltd* that emphasised on the principle of party autonomy in arbitration and held that it permits parties to adopt the foreign law as the proper law of arbitration. The Delhi High Court accordingly held that to discard a foreign law only because it is contrary to an Indian statute would defeat the basis of private international law to which India undisputedly subscribes.

The present judgment offers autonomy to parties to negotiate agreements to choose a foreign seat of arbitration, and enforce such agreements under Indian law. Indeed, as the Court has remarked, 'the decks have now been cleared to give effect to party autonomy in arbitration. Party autonomy has been held to be the brooding and guiding spirit of arbitration' (para [60]).