PSL Advocates & Solicitors

Two Indian Parties can agree to a foreign seat of arbitration

PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd.

Citation	2021 SCC OnLine SC 331
Date	April 20, 2021
Court	Supreme Court of India
Coram	Hon'ble Mr. Justice R.F. Nariman, Hon'ble Mr. Justice B.R. Gavai & Hon'ble Mr. Justice Hrishikesh Roy

1. FACTUAL MATRIX

1.1 The dispute arose out of the Settlement Agreement dated 23 December 2014 ("**Agreement**") that had resolved earlier disputes between PASL Wind Solutions Pvt. Ltd. ("**Appellant**") and GE Power Conversion India Pvt. Ltd. ("**Respondent**"). Significantly, the arbitration clause in the Agreement provided for arbitration in accordance with the Rules of the International Chamber of Commerce ("**ICC Rules**") with the seat in Zurich, Switzerland. Conversely, the substantive law governing the Agreement was Indian law.

1.2 The Appellant referred the disputes that arose out of the Agreement to arbitration as per the ICC Rules. The Respondent challenged the jurisdiction of the learned Sole Arbitrator (**"Arbitrator"**) on the ground that two Indian parties could not chose a foreign seat of arbitration. The Arbitrator held that there was no bar in Indian law apropos two Indian parties agreeing to a foreign seat. Accordingly, it was also decided by the Arbitrator that all the hearings would be conducted in Mumbai. On 18 April 2019 the Arbitrator passed the Final Award ("**Award**") dismissing the Appellant's claims and awarded damages and costs in favor of the Respondent.

1.3 Thereafter, since the Appellant failed to oblige the Award, the Respondent initiated enforcement proceedings under Sections 47 and 49 of the Indian Arbitration and Conciliation Act 1996 ("**Act**") before the Gujarat High Court, wherein assets of the Respondent were located. The Respondent also sought interim relief from the Court under Section 9 of the Act to prevent Appellant from dissipating its assets to avoid complying with the award.

1.4 At this stage, the Appellant did a complete volte-face and asserted that the seat of arbitration was really Mumbai, wherein all the hearings of the arbitral proceedings took place. Against this, an application was filed by the Respondent under Section 34 of the Act for setting aside the award.

1.5 Meanwhile, the Gujarat High Court held that two Indian parties are free to agree on a foreign seat of arbitration. However, it was also held that once two Indian parties agree to a foreign seat, they would be precluded from claiming interim measures under Section 9 of the Act. Aggrieved by the decision, the Appellant filed an appeal before the Hon'ble Supreme Court of India (**"Supreme Court"**).

2. ISSUES

2.1 Whether two Indian entities incorporated under the laws of India choose a seat outside India?

2.2 Whether an award made at such a forum outside India between Indian parties can be said to be a "foreign award" under Part II of the Act be enforceable as such?

2.3 Whether an application made under Section 9 of the Act for interim reliefs by Indian parties with a foreign seat of arbitration be maintainable?

3. CONTENTIONS OF THE APPELLANT

3.1 Firstly, the Appellant contended that the award was not a foreign award capable of enforcement under Sections 47 and 49 of the Act as the same would be contrary to Section 23 of the Contract Act, 1872 ("**Contract Act**") read with Sections 28(1)(a) and 34(2-A) of the Arbitration Act.

3.2 The Appellant then argued that by designating a foreign seat, parties would be able to opt out of substantive law of India, which would be contrary to the public policy of the country.

3.3 That foreign awards as contemplated under Part II of the Act can arise only from international commercial arbitrations. As per the definition of international commercial arbitration contained in Section 2(1)(f) of the Arbitration Act (Part I), at least one of the parties to the arbitration is a foreign national or a company incorporated in a country other than India, or an association whose central management or control is outside India or is a government of a foreign country.

3.4 Since there was no foreign element involved between the two Indian parties, by applying the closest connection test, which the Supreme Court applied in prior cases to determine the arbitral seat,[1] the seat of the arbitration would necessarily be Mumbai and not Zurich.

4. CONTENTIONS OF THE RESPONDENT

4.1 The Respondent argued that it is a settled position of law[2] that Parts I and II of the Act are mutually exclusive and hence, the definition of international commercial arbitration cannot be imported from Part I of the Act into Section 44 of the Act via the expression "unless the context otherwise requires" contained in Section 44 of the Act.

4.2 That unlike the definition of "international commercial arbitration" contained in Section 2(1)(f) in Part I of the Act, nationality, domicile or residence of parties is irrelevant for the purpose of applicability of Section 44 of the Act. This is attributable to the fact that Part II is modelled on the New York Convention which only requires "persons", both of whom can be Indian, having disputes arising out of commercial legal relationships, which are to be decided in the territory of a State outside India, which State is a signatory to the New York Convention.

4.3 Neither Section 23 nor Section 28 of the Contract Act prescribe the choice of a foreign seat in arbitration. In fact, the exception to Section 28 of the Contract Act expressly excepts arbitration from the clutches of Section 28, which is an express approval to party autonomy which forms the basis of the Act.

4.4 Lastly, the arbitration clause in the Settlement Agreement, together with the procedural orders passed by the arbitrator, designated Zurich as the seat and Mumbai only as a convenient venue, which has been accepted by both parties, and must govern the arbitral proceedings in this case.

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[1] Enercon (India) Ltd. v. Enercon GmbH (2014) 5 SCC 1.

[2] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.

5. JUDGMENT OF THE SUPREME COURT

A. Party autonomy & the choice of foreign seat

5.1 At the outset, the Supreme Court unequivocally held that two Indian parties could choose a foreign seat of arbitration. It stated that there is nothing in the Contract Act which bars two Indian parties from adopting a foreign seat. It was reiterated that freedom of contract must be balanced with public policy. It was also held that public policy needs to be expounded and not expanded.

5.2 The Hon'ble Supreme Court heavily relied on the reasoning adopted by the Court previously in *Atlas Export*[3]. It considered the contrary view taken by a Single Judge Bench of the Supreme Court in *TDM Infrastructure*[4] and affirmed that it cannot be a binding precedent and thereby overruled all cases that relied on *TDM Infrastructure*[5].

5.3 The Supreme Court then observed that Section 28(1)(a) of the Act, when read with Section 2(2), Section 2(6) and Section 4 of the Act, makes it clear that where the place of arbitration is situated in India, in an arbitration other than an international commercial arbitration (with arbitration having no foreign element), the dispute is decided in accordance with the substantive law for the time being in force in India. Therefore, it cannot in anyway be reasoned to interdict two Indian parties from resolving their disputes at a neutral forum in a country other than India.

5.4 The Supreme Court thus held that for an award to be a 'foreign award' under Section 44 of the Act, there is no mandatory stipulation that one of the parties must be a foreign entity. Imperatively, Section 44 of the Act does not accord any nationality, residence or domicile. Therefore, the Supreme Court opined that Section 44 of the Act is essentially a party-neutral but seat-centric provision.

B. On the Choice of Foreign Law

5.5 Section 28(1)(a) read with Section 2(2), Section 2(6), and Section 4 of the Act prescribes that except in an international commercial arbitration, primarily when the place of arbitration is situated in India, the arbitral tribunal shall decide the dispute in accordance with the substantive law for the time being in India. Pertinently, the apex court observed that the Indian law would apply in such circumstances, however, if two Indian parties choose a foreign law, then such a choice can be evaluated while enforcing the award in India. The award will not be enforced in India if found the choice of foreign law was contrary to the public policy of India or in violation of the fundamental policy of Indian law.

C. On Availability of Interim Relief

5.6 The Supreme Court stated that the proviso to Section 2(2) of the Act makes specific sections of Part I, for instance, Section 9 of the Act, that are usually applicable to only

[3] Atlas Export Industries v. Kotak & Company (1999) 7 SCC.
[4] TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd. (2008) 14 SCC 271.
[5] *Ibid.*

domestic arbitrations, applicable even to international commercial arbitration, even if the place of arbitration is outside India. Thus, the Supreme Court overruled the judgment of the Gujarat High Court till the extent that it rejected the grant of interim relief to the Respondent despite the existence of the proviso to Section 2(2). The Supreme Court held that Section 9 application for interim reliefs under the Act will be available to Indian parties who choose to adopt a foreign seat of arbitration.

5.7 The Supreme Court concluded by observing that two Indian parties with no foreign element in their arbitration agreement can choose a seat outside of India. The parties also possess the autonomy to choose the choice of law as they deem fit, provided the choice of law is not contrary to the public policy of India.

6. PSL OPINION

6.1 Given the primary objective of the Act to promote arbitration for resolving disputes there is also a need to materialize this goal. To achieve the same, party autonomy must be the guiding force. Party autonomy being a fundamental element allows the concerned parties to choose their seat and law. The Supreme Court, through this judgment, reinforced this idea by carefully balancing party autonomy with public policy concerns. It also acknowledged the legitimate commercial interests of parties. This will be particularly beneficial for Indian subsidiaries of multinational corporations who will now have the freedom to choose a seat outside India at neutral forums.

6.2 Given the uncertain nature of the proposition of law on two Indian parties agreeing to a foreign seat, High Courts in India had taken a pro-arbitration approach on this issue and enforced the parties' choice of a foreign arbitral seat, while others had not. For instance, in *Addhar Mercantile Private Limited*[6] the Bombay High Court had held that two Indian parties could not choose a foreign seat because "the intention of the legislature is clear that Indian nationals should not be permitted to derogate from Indian law."[7] The Bombay High Court relied on the TDM,[8] to support its findings. In contrast, the Madhya Pradesh High Court in *Sasan Power*[9] had concluded that "two Indian Companies are permitted to arbitrate their dispute in a foreign country." To support its conclusion, the Madhya Pradesh High Court had relied on judgment in *Atlas Exports Industries*[10] where the Supreme Court held that "merely because the arbitrators were situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open, willingly entered into the agreement." This approach was also taken by the Delhi High Court in *GMR Energy Limited*[11].

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[6] Addhar Mercantile Private v Shree Jagdamba Agrico Exports (2015) SCC OnLine Bom 7752.
[7] *Ibid.*
[8] TDM Infrastructure v. UE Development India Private Limited (2008) 14 SCC 271.
[9] Sasan Power v North American Coal Corporation *(2016) (2) ArbLR 179 (MP)*.
[10] *Supra* note 3.
[11] GMR Energy Limited v. Doosan Power Systems India Private Limited (2017) SCC OnLine Del 11625.

6.3 Over the past few decades, international arbitration has experienced tremendous growth, becoming the most preferred mechanism of dispute resolution for international commercial transactions. The Supreme Court's decision is welcomed since it settles a vexed position of law and is in harmony with the international developments in the arbitration paradigm.