Indian Parties Can Opt For A Foreign Seated Arbitration

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Introduction:

The Hon'ble Supreme Court of India in one of its most recent judgment has laid down that two Indian parties are entitled to select a foreign seat of arbitration. An arbitral award arising from such arbitration would be a foreign award. In the case of PASL Wind Solutions Pvt. Ltd. V. G.E Power Conversion India Pvt. Ltd[1], the Apex Court emphasized the significance of party autonomy in designating the seat of arbitration outside India even when both the parties happen to be Indian nationals. The party autonomy has been held to be the brooding and guiding spirit of arbitration. The Apex Court was faced with a situation where a settlement agreement dated 23.12.2014 was executed between the parties contained the dispute resolution clause, which reads as follows:

> ***"6. Governing Law and Settlement of Dispute***
>
> *6.1…….*
>
> *6.2 In case no settlement can be reached through negotiations, all disputes, controversies or differences shall be referred to and finally resolved by Arbitration in Zurich, in the English language in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, which rules are deemed to be incorporated by reference into this clause. The Arbitration Award shall be final and binding on both the Parties.*
>
> *6.3……"*

Dispute arose between the parties pursuant to the settlement agreement and on 03.07.2017 Appellant issued a request for arbitration to the International Chamber of commerce **("ICC").** On 18.08.2017 the parties agreed to regulation of disputes by the sole arbitrator appointed by the ICC. It was agreed between the parties that the substantive law applicable to the dispute would be Indian Law.

Before the arbitrator, a preliminary objection was raised by the Respondent that two Indian parties cannot agree for a foreign seated arbitration. This was objected by the appellant on the

[1] 2021 SCC Online SC 331

ground that there was no such bar in Indian law. The arbitrator decided the preliminary objection holding the arbitration clause to be valid. The Tribunal held that as the seat of arbitration was Zurich, Switzerland and hence Swiss Act would apply. This order was not challenged by either party. However, acceding to the request of the Respondent, Tribunal agreed to hold all hearing at Mumbai India, clearly stating that Zurich shall remain to the seat of arbitration.

The tribunal published the final award dated 18.04.2019 thereby rejecting all the claims of the Claimant and directing the Claimant to pay to the Respondent a sum of INR 25,976,330 and USD 40,0000 towards legal costs plus accumulated interest, if any, in accordance with the Indian Interest Act.

On Appellant's failure to the awarded amount, Respondent initiated enforcement proceedings before the High Court of Gujarat where the assets of Appellants were located. Appellant on the other hand, took a complete volte face and contented that seat of arbitration was Mumbai where all arbitration proceedings took place, and filed Petition under Section 34 of the Arbitration and Conciliation Act, 1996 before the Commercial Court Ahmedabad.

Question before the Hon'ble Supreme Court:

The key issues before the Apex Court were (i) whether Indian law permits two Indian parties to choose a foreign seat for arbitration and (ii) an award made at such forum outside India can be said to be a "foreign award" and be enforceable as such.

PASL argued that the legislative framework under the Arbitration Act precludes two Indian parties from designating a foreign seat of arbitration. In particular, debate focused on section 44 under Part II of the Arbitration Act, which provides that *"In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India* (…)".

PASL contended that a "foreign award" under Part II of the Arbitration Act would necessarily arise from an "international commercial arbitration" as defined under section 2(1)(f) of the Arbitration Act (under Part I), pursuant to which at least one of the parties must be a non-Indian national or resident or a body incorporated outside India. The present award, involving two Indian companies, would therefore not qualify as a foreign award under section 44.

PASL also argued that two Indian parties designating a foreign seat of arbitration would be contrary to sections 23 and 28 of the Indian Contract Act 1872 (the Contract Act) (read with sections 28(1) (a) and 34(2A) of the Arbitration Act), since by designating a foreign seat, two Indian parties could effectively opt out of Indian substantive law, which would be contrary to Indian public policy.

GE Power contended that Parts I and II of the Arbitration Act are mutually exclusive, and as such there can be no basis to import the definition of "international commercial arbitration" from Part I of the Arbitration Act into Section 44 of Part II. On the contrary, the nationality, domicile or residence of parties is irrelevant for the purposes of section 44. This is consistent with the ethos of the New York Convention,

under which parties from the same state are entitled to agree to have their disputes resolved in a third state and for the resulting award to be enforceable as a foreign award under the Convention.

GE Power highlighted that neither Section 23 nor Section 28 of the Contract Act prescribe the choice of a foreign seat in arbitration, and that contraventions of "public policy" under section 23 must be restricted to clear and incontestable cases of public harm.

Decision of the Hon'ble Supreme Court of India

At the outset the Apex court found that parties have clearly designated Zurich as the seat of arbitration.

The Court reinstated that Part I and Part II of the Arbitration Act must be regarded as mutually exclusive (following the landmark decision in *Bharat Aluminum Co v Kaiser Aluminum Technical Services Inc.)*. Part I is a "complete code" in relation to India-seated arbitration with no application to foreign-seated arbitrations and Part II is concerned solely with the enforcement of foreign awards. PASL's attempt to breach the wall between Part I and Part II of the Arbitration Act through statutory interpretation was held to be invalid. The Court did not find any basis to import the Part I definition of "international commercial arbitration" or impose any nationality requirement in relation to Section 44 of the Arbitration Act. It noted that for an award to be designated as a "foreign award" under section 44, there are four simple elements:

(i) the dispute must be considered to be a commercial dispute under Indian law,

(ii) the award must be made pursuant to an agreement in writing for arbitration;

(iii) the dispute must arise between "persons" (*without* regard to nationality, residence or domicile); and

(iv) The arbitration must be conducted in a country which is a signatory to the New York Convention.

The Apex Court found that all four elements were clearly satisfied in this case.

The Court also observed that Indian Arbitration act does not specify any need of foreign connection for an award to fall within the scope of New York convention unlike other certain jurisdictions (such as the US).

The Court held that there is nothing in Sections 23 and 28 of the Contract Act which prohibits two Indian parties from referring their disputes to arbitration outside India, and even found PASL's arguments based on Section 28(1)(a) and 34(2A) of the Arbitration Act to be not acceptable. As to PASL's argument that Indian parties could utilize the choice of a foreign seat to circumvent substantive rules of Indian law, the Court held that *firstly* Section 28(1)(a) clearly applies to arbitrations taking place in India between two Indian parties. Therefore, Section 28(1)(a) would not apply if the place of arbitration is outside India. Secondly, the court held that where the law of India prohibits a certain act, the conflict of law rules as set down in Dicey's authoritative treaties[2] will take care of this situation in most of the cases as the

[2] **Dicey, Morris and Collins on the Conflict of Laws (Sweet & Maxwell, 15th Edn.)**

arbitrators would then apply these rules on the ground of international comity between nations in cases which arise between two Indian nationals in an award made outside India, which would fall withing the definition of foreign award under Section 44 of the Act.

Further, the court held that the aggrieved party will always have an opportunity to challenge enforcement of a foreign award under Section 48(2) (b) of the Arbitration Act and, if the foreign award is contrary to the fundamental policy of Indian law, then it will not be enforced in India.

The Court acknowledged the need of balancing act between freedom of contract and party autonomy on the one hand, and clear and undeniable harm to the public on the other. However, the Court denied existence of any harm to the public in permitting two Indian nationals to choose a foreign seat of arbitration in circumstances where enforcement of foreign award can still be resisted in India on the grounds contained in section 48 of the Arbitration Act, which include the foreign award being contrary to the public policy of India.

Availability of Interim Relief

The Court noted that as per the *proviso* to Section 2(2) of the Arbitration Act, Section 9 providing interim relief would apply to 'international commercial arbitration' even if they were seated outside India and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II.

The Court concluded that parties to foreign seated arbitration proceedings involving exclusively Indian companies are *not* precluded from seeking interim relief in the Indian courts. The apex court has pointed out that in an arbitration which takes place outside India, assets of one of the parties is likely to be situated in India. And if interim orders or reliefs are required against such assets, including for preservation purposes, the courts in India may pass such orders.

Conclusion:

The Apex Court has finally resolved the long-term uncertainty by ruling that nothing stands in the way of party autonomy in designating a seat of arbitration outside India, even if both parties are Indian nationals. The court has also addressed the concern expressed by many that if such an approach is permitted, it will enable Indian parties to opt out of substantive law of India by holding that such concerns would be addressed by application of conflict of law rules prevalent at the seat of arbitration coupled with remedies under at the time of enforcement of foreign award in India.

"Rule 224-(1)(a) where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose aw has been chosen the choice of the parties shall not prejudice the application of the provisions of the law of that other country which cannot be derogated from by agreement."