GRAVITAS LEGAL

Overseas arbitration opens for India

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Supreme Court de-clutters the Implications of Two Indian Parties choosing a Foreign Law and a Foreign Seated Arbitration Mechanism.

Introduction

In what can be seen as a big push to party autonomy in Arbitration agreements, a three-Judge Bench of the Supreme Court of India, speaking through Justice R.F. Nariman in ***PASL Wind Solutions vs. GE Power Conversion India***[i], has once and for all, settled the vexed issue of; whether two Indian Companies/Nationals can have a juridical seat/place/venue of arbitration outside India and choose a foreign law to have their disputes adjudicated through arbitration. The said ruling by the Apex Court further reinforces the existing judicial view of 'minimal interference' by courts, in matters of arbitration.

Factual Score

The dispute arose with respect to a settlement agreement between two companies; both incorporated and registered in India, namely, PASL Wind Solutions (Appellant before the Supreme Court) and GE Power Conversion (Respondent before the Supreme Court). The said settlement agreement stipulated the juridical seat/place/venue of arbitration as Zurich, under the ICC rules of arbitration.

When the Appellant-PASL referred certain disputes under the settlement agreement to arbitration, a preliminary objection was raised on behalf of the Respondent-GE that since both the parties are incorporated and registered in India, the choice of a juridical seat/place/venue other than India, was invalid. The Sole arbitrator jettisoned the said objection by a procedural order, which was never challenged by the parties. Thereafter, the sole Arbitrator proceeded to make the final award in favour of the Respondent-GE.

While initiating enforcement proceedings before the Gujarat High Court, as a foreign award in India, the Respondent-GE also made an application for interim measures U/s 9 of the Arbitration Act, seeking security from PASL, pending the enforcement of the award.

Arguments on behalf of Appellant

It was put forth on behalf of the Appellant that two Indian parties cannot designate a seat of arbitration outside India, as doing so would be contrary to Section 23 of the Indian Contract Act, 1872 ["Contract Act"] read with Section 28(1)(a) and Section 34(2A) of the Arbitration Act. Designating a seat outside India, tantamount to, two Indian parties opting out of the substantive law of India, which itself would be contrary to the public policy of India.

Relying upon the decision in ***TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.***[ii], the Appellant submitted that foreign awards, as contemplated under Part II of the Arbitration Act arise only from 'international commercial arbitrations', as defined in Section 2(1)(f) of the Arbitration Act, which makes it clear that at least one of the parties has to be, *inter alia*, a national of a country other than India, or habitually resident in a country other than India, or a body corporate incorporated outside India. Therefore, the subject award cannot be said to be foreign award under Part II of the Arbitration Act.

Further, it was asserted that since there was no foreign party involved in the subject award made in Zurich, the said award could not be enforced either under Part I or Part II of the Arbitration Act. To buttress this argument reliance was placed on the provisions of Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ["Commercial Courts Act"] which also recognizes only two categories of arbitrations - international commercial arbitration and other than international commercial arbitration.

Arguments on behalf of the Respondents

It was argued on behalf of the Respondents that Part I and Part II of the Arbitration Act are mutually exclusive as held in ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.***[iii], ["BALCO"]. Besides, it was contended that Section 44 of the Arbitration Act, 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, where such State is a signatory to the New York Convention.

The Respondents also submitted that unlike the definition of "international commercial arbitration" contained in Section 2(1)(f) in Part I, nationality, domicile, or residence of parties is irrelevant for the purpose of applicability of Section 44 of the Arbitration Act.

As per the Respondent neither Section 23 nor Section 28 of the Contract Act, proscribe the choice of a foreign seat in arbitration. As a matter of fact, the exception to Section 28 of the Contract Act expressly accepts arbitration from the clutches of Section 28, which is an express approval to party autonomy in Arbitration matters.

Issue(s) before the Court

The three main issues, which the Apex Court dealt with, are as follows:

(a) Whether two companies incorporated in India can choose a forum for arbitration outside India;

(b) Whether an award made at such forum outside India, to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ["New York Convention"] applies, can be said to be a "foreign award" under Part II of the Arbitration and Conciliation Act, 1996 ["Arbitration Act"] and be enforceable as such.

(c) Whether GE's application for interim measures under section 9 of the Arbitration Act was maintainable.

Analysis and observations of the Supreme Court

In its analysis and interpretation, the Court has placed reliance on several landmark Supreme Court decisions, which though, did not directly consider the question whether two Indian parties could choose a foreign seat, but contained *obiter dictum* on the same. In the interest of terseness, the said decisions are not being discussed herein, in this Article.

The Court agreed with the contention of the Respondent that the Part I and Part II of the Arbitration Act are mutually exclusive, as Section 2(2) of the Arbitration Act, in clear terms states, that Part I applies only where the place of arbitration is in India and the proviso to Section 2(2), which was added only pursuant to Arbitration and Conciliation (Amendment) Act, 2015, cannot travel beyond the main enacting provision.

Accordingly, the Court held that the expression "international commercial arbitration" employed in Section 2(2) is place-centric, as is provided by Section 44 of the Arbitration Act, meaning thereby that an arbitration which takes place between two parties in a territory outside India, the New York Convention applying to such territory, thus making it an "international" commercial arbitration.

Whereas, the same expression in Section 2(1)(f) of the Arbitration Act, is employed in a party-centric sense, where 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.

The Court after referring to the long march of case laws on the competing principles of freedom of contract and public policy opined 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 and there is nothing in both, Section 23 as well as Section 28 of the Contract Act, which interdicts two Indian parties from getting their disputes arbitrated at a neutral forum outside India.

After so opining, the Court also noted that Section 28(1)(a) of the Arbitration Act, also does not bar an arbitration being conducted between two Indian parties in a country other than India, and thus, ruled that it 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.

In agreeing to a neutral forum outside India, parties agree that instead of one bite at the cherry, two bites at the cherry, namely, the recourse to a court or tribunal in a country outside India for setting aside the arbitral award passed in that country, on grounds available in that country (which may be wider than the grounds available Under Section 34 of the Arbitration Act), and then resisting enforcement under the grounds mentioned in Section 48 of the Arbitration Act, which includes the foreign award being contrary to the public policy of India.

Coming to the most noteworthy rationale ascribed by the Supreme Court to its decision ***PASL Wind Solutions*** (supra), which is party autonomy. The Court has categorically stated 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……"*

The Court, also rejected the Appellant's argument that Section 10(3) Commercial Courts Act,

would apply to all cases between Indian nationals which result in awards delivered in a country outside India, which in turn ousts the jurisdiction of the High Courts to interfere with such awards. While rejecting the said argument the Court adverted to the three-Judge Bench ruling in ***BGS SGS SOMA JV v. NHPC***[iv], wherein it was held that the substantive law as to appeals and applications is laid down in the Arbitration Act whereas the procedure governing the same is laid down in the Commercial Courts Act.

The Court noted that Section 10(1) applies to international commercial arbitrations, and applications or appeals arising therefrom, under both Parts I and II of the Arbitration Act. When applications or appeals arise out of such arbitrations under Part I, where the place of arbitration is in India, undoubtedly, the definition of "international commercial arbitration" in Section 2(1)(f) of the Arbitration Act, will govern.

However, Section 10(1) when applied to Part II, "international commercial arbitration" has reference to a place of arbitration which is outside India. Thus, the Court concluded that an arbitration resulting in a foreign award, as defined Under Section 44 of the Arbitration Act, will be enforceable only in a High Court Under Section 10(1) of the Commercial Courts Act, and not in a district court Under Section 10(2) or Section 10(3).

Lastly, the Court held that the application filed by the Respondent-GE, for interim measures U/s 9 was maintainable, irrespective of the foreign seat of arbitration at Zurich. Thus, the Supreme Court set aside the impugned decision of the Gujarat High Court only to the limited extent that the Respondent's Section 9 application for interim measures was not maintainable.

Decision on issue(s)

The Supreme Court, therefore, answered the three issues as follows:

1. Issue (a) was answered in the affirmative, that is, two companies incorporated in India can very well choose a forum for arbitration outside India.

2. Issue (b) was answered in the affirmative, that is, an award made at such foreign seat is at par with a "foreign award" under Part II of the Arbitration Act, and is enforceable as a foreign award.

3. Issue (c) was answered in the affirmative, that is, an application for interim measures under section 9 of the Arbitration Act is maintainable, irrespective of a foreign seat of arbitration.

Overseas arbitration opens for India

The decision in ***PASL Wind Solutions*** (supra), by upholding the parties' right to choose a foreign seat, certainly would go a long way, in concertizing the principle of party autonomy in arbitration agreements and also the fast-catching judicial view that there should be minimal interference by Courts in arbitration matters. The decision paves way for Indian parties choosing a foreign seat and foreign law for adjudication of their disputes, and to have their award enforced as a foreign award in India under Part II of the Arbitration.

That apart, Gujarat High Court's faux pas in the impugned decision, whereby the High Court ruled that a Section 9 application, was not maintainable, has been correctly rectified and over turned by the Supreme Court. As a result, Indian Parties can now, fearlessly choose a foreign seat of Arbitration without being apprehensive of losing the protection by the way of interim

measures U/s 9 of the Arbitration Act. This, we suppose is the kernel of the ***PASL Wind Solutions*** (supra) decision.

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[i] (20.04.2021 - SC): MANU/SC/0295/2021
ii (2008) 14 SCC 271
iii (2012) 9 SCC 552
[iv] (2020) 4 SCC 234

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