Against Indian Parties Choosing a Foreign Seat

Kluwer Arbitration Blog
July 1, 2019

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Please refer to this post as: Vishvesh Vikram and Shubham Jain, 'Against Indian Parties Choosing a Foreign Seat', Kluwer Arbitration Blog, July 1 2019, http://arbitrationblog.kluwerarbitration.com/2019/07/01/against-indian-parties-choosing-a-foreign-seat/

The question whether two Indian parties can choose a foreign seat of arbitration has become far too obfuscated with some recent judicial pronouncements. This article seeks to argue that the scheme of Indian Arbitration and Conciliation Act ("Act") itself does not permit it.

In India, enforcement of arbitral awards is covered in two parts under the Act. Part I of the Act covers arbitrations with their seat in India, including international commercial arbitrations. Part II of the Act covers arbitrations which are seated outside India. Even though the Act mentions the word "place" instead of "seat", the Supreme Court has clarified in *Bharat Aluminium Company* v. *Kaiser Aluminium Technical Services* [(2012) 9 SCC 552] that it refers to seat only, except for Section 20(3), where the word "place" refers to the venue.

International commercial arbitration is defined in terms of involvement of a party who is either a national, a resident, a body corporate, or government, of another country.

The uncertainty caused by various High Court and Supreme Court judgments on this issue has previously been discussed in detail elsewhere. The argument for allowing Indian parties to choose a foreign seat stems from two judgments – *Sasan Power Limited v North American Coal Corpn India Pvt Ltd* [(2016) 10 SCC 813, "**Sasan Power**"] and *Reliance Industries Limited v Union of India*[(2014) 7 SCC 603*,* "**Reliance Industries**"]*.* In *Sasan Power,* the Madhya Pradesh High Court had allowed two Indian parties to choose a foreign seat. However, the Supreme Court, on appeal, clarified that the question did not expressly arise because of a foreign element in the case (NACCIPL was the subsidiary of an American company). Even in *Reliance Industries,* the Supreme Court did not venture into the discussion whether two Indian parties could choose a foreign seat – the judgment merely enforced an award where two Indian parties were seated outside India. On the basis of the ruling in *Sasan Power,* the Delhi High Court also allowed two Indian parties to choose a foreign seat in *GMR Energy Limited v. Doosan Power Systems India* [2017 SCC OnLine Del 11625].

For arbitrations seated in India, Section 28 requires that Indian law would be applicable as substantive law except for international commercial arbitrations. Further, Section 34 sub-clause (2A) provides that except for international commercial arbitrations, an award under Part I can be set aside if there is a patent illegality. Patent illegality has previously been defined by the Supreme Court in *Associate Builders v Delhi Development Authority* [(2015) 3 SCC 49] to mean a *prima facie* violation of Indian law, or a conclusion that no fair-minded person could reach through reasonable application of a legal provision. The proviso to sub-clause (2A) itself makes it clear that patent illegality cannot be claimed merely for erroneous application of a law or by reappreciation of evidence.

However, enforcement of foreign-seated arbitral awards under Section 48 in Part II does not require any such review. Thus, if two Indian parties are permitted to choose a foreign seat for arbitration, it would imply that they will be permitted to escape scrutiny from an allegation of patent illegality as Part II of the Act will be applicable. Compliance with the substantive law in force is not a precondition for enforcement of an award under Section 48, unless the law completely incapacitates a party or renders the arbitration agreement invalid.

Hence, the argument that two Indian parties choosing a foreign seat would still be subject to Indian law as applicable substantive law, and hence not evade it, cannot be accepted, since violation of substantive applicable law is not a ground for setting aside the award. Given that even parties with a foreign seat can opt for a venue for arbitration in India, permitting Indian parties to opt for a foreign seat may mean that two parties, without even venturing outside India's borders, would be able to opt out of compliance with Indian law.

Such a view would result in Part I becoming a penalty for those Indian parties who fail to opt for a foreign seat, since only arbitral awards where both parties were Indian can be subjected to review of patent illegality under the present scheme of the Act.

In this case, if two Indian parties were to be permitted to opt for Part II, there would be no incentive for them to choose Part I as both the parties will be free from their obligation to comply with Indian law by simply choosing a foreign seat and thus opting for Part II. Such a view of the scheme would make Part I redundant. Furthermore, the distinction in enforceability between Part I and Part II, insofar as patent illegality is concerned, only exists to ensure that two Indian parties cannot derogate from Indian law. Hence, the scheme of the Act is clear in prohibiting Indian parties from choosing a foreign seat.

The Arbitration and Conciliation Act provides for parties undergoing international commercial arbitration to bypass domestic regulatory mechanisms. If such a scheme was to be envisioned as applicable to two Indian parties as well, then it would result in Part I becoming a penalty for Indian parties for choosing to comply with Indian law. Allowing national parties to opt out of the Indian legal system may have many adverse effects. The authors do not wish to argue for an approach which diminishes the scope for arbitration in India in general. The authors believe sufficient protection is provided to an arbitral award even under Section 34 where it cannot be set aside merely for erroneous application of law or a need for reappreciation of evidence. The authors believe that the Arbitration and Conciliation Act is pro-arbitration even though two Indian parties may not opt for a foreign seat under its scheme.