Kluwer Arbitration Blog

Ramifications of Two Indian Parties Choosing a Foreign Seat of Arbitration

Shivani Singhal · Tuesday, December 15th, 2020

On 3 November 2020, the Gujarat High Court rendered a decision in *GE Power Conversion India Private Limited v. PASL Wind Solutions Private Limited* where it held that while two Indian parties can choose a foreign seat of arbitration, they would not be entitled to seek interim measures from Indian courts under section 9 of the Arbitration and Conciliation Act 1996 (the "**Arbitration Act**").

Background to the dispute

The dispute arose out of a settlement agreement executed between two Indian companies, GE Power Conversion India Private Limited ("**GE**") and PASL Wind Solutions Private Limited ("**PASL**"). The settlement agreement provided for arbitration in Zurich under the ICC rules of arbitration. In 2017, PASL referred certain disputes under the settlement agreement to arbitration. In the arbitration proceedings, GE raised a preliminary objection that both parties being Indian, the choice of a foreign seat was invalid. This objection was rejected by the Sole Arbitrator, and the decision of the Sole Arbitrator was not challenged by GE. The Sole Arbitrator made a final award in favour of GE, directing PASL to make payments to GE.

GE then commenced enforcement proceedings before the Gujarat High Court seeking enforcement of the award as a foreign award in India. At the same time, GE also made an application under section 9 of the Arbitration Act seeking security from PASL, pending the enforcement of the award.

The High Court's decision

The three main issues before the Court were: (i) whether the award could be enforced as a foreign award in India under Part II of the Arbitration Act, (ii) whether the enforcement of the award could be refused on the ground that it was contrary to the public policy of India, and (iii) whether GE's application for interim measures under section 9 of the Arbitration Act was maintainable.

On the first issue, the High Court held that the award was a foreign award under the definition of "foreign award" in section 44 of Part II of the Arbitration Act. The definition of "international

commercial arbitration" in section 2(f) in Part I, which requires at least one of the parties to the arbitration to be a foreign national or entity, is not relevant for determining the applicability of Part II of the Act. Part I and Part II of the Arbitration Act are mutually exclusive (as held in *BALCO*). Section 44 exhaustively sets out the requirements for an award to qualify as a foreign award, and the nationality of the parties is not a relevant consideration. However, the award should be made in a New York Convention Member State. In this case, the award was made in Zurich.

On the second issue, the High Court held that the award was not contrary to the public policy of India. PASL had contended that the award was contrary to the public policy of India because the choice of a foreign seat by Indian parties was violative of section 28(a) read with section 23 of the Indian Contract Act 1872 (the "**Contract Act**"), section 28 of the Arbitration Act as well as the Supreme Court's decision in *TDM Infrastructure Pvt Ltd v. UE Development India Ltd.*

The Court held that section 28(a) of the Contract Act, which provides that an agreement that absolutely restricts a party from enforcing its contractual rights "*by the usual legal proceedings in the ordinary tribunals*" is void to that extent, is inapplicable. This is because Exception 1 to section 28 of the Contract Act provides that section 28 will not render an arbitration agreement, which results in jurisdiction being conferred on another forum, illegal. Further, since the Arbitration Act does not *per se* prohibit two Indian parties from choosing a foreign seat, there is no breach of section 23 of the Contract Act.

As regards section 28 of the Arbitration Act, which sets out the rules applicable to the substance of a dispute when the place of arbitration is in India, the High Court, relying on *BALCO*, held that this only reflects the conflict of law rules applicable in India. When the arbitration is seated outside India, the conflict of law rules of the seat would be applied to determine the law applicable to the substance of the dispute. *TDM Infrastructure* was held to be inapplicable on the ground that it prevents two Indian parties from derogating from provisions of Indian law in cases where the arbitration is seated in India.

On the third issue, the High Court held that GE's application under section 9 was not maintainable. Section 2(2) of the Arbitration Act provides that Part I applies where the place of arbitration is in India, and section 9, subject to an agreement to the contrary, also applies to international commercial arbitrations seated outside India. Since a foreign seated arbitration between two Indian parties does not fall within the definition of "international commercial arbitration", section 9 is not available to the parties. The language of section 2(2) of the Arbitration Act being unambiguous, its scope cannot be extended to apply section 9 in cases of enforcement of a foreign award (not being an award made in an international commercial arbitration).

Comments

Freedom of Indian parties to choose a foreign seat

The decision is a welcome one because it supports parties' freedom of contract in the matter of choosing a foreign seat. There has been much confusion over whether two Indian parties can choose a foreign seat of arbitration, and the position taken by different Courts has not been consistent, as discussed previously on this blog here.

In *Atlas Export Industries v. Kotak & Company*, the Supreme Court held that two Indian parties

can choose a foreign seat, but that was a decision under the earlier Arbitration Act of 1940 which was repealed by the Arbitration Act of 1996. The decision in *Atlas Export* was relied on by a Division Bench of the Madhya Pradesh High Court in *Sasan Power Limited v. North American Coal Corporation India Pvt. Ltd.* to hold that two Indian parties can choose a foreign seat under the Arbitration Act of 1996 as well. The decision of the Madhya Pradesh High Court was challenged before the Supreme Court, but the issue whether two Indian parties could choose a foreign seat was not addressed by the Supreme Court – the Supreme Court on facts concluded that the agreement was between two Indian parties and one foreign party, and as such this was not a relevant issue. The decision of the Madhya Pradesh High Court, having merged with the decision of the Supreme Court, lost its precedential value.

The issue was indirectly considered in another Supreme Court decision – *Reliance Industries Limited v. Union of India* where Indian parties had agreed to London as the seat of arbitration. The question before the Court was whether the parties had impliedly excluded the application of Part I of the Arbitration Act by choosing a foreign seat and a foreign law to govern the arbitration agreement. The Supreme Court proceeded on the basis that the choice of London as the seat of arbitration was valid, but the question whether Indian parties could choose a foreign seat was not directly considered.

In the absence of an authoritative decision by the Supreme Court, different High Courts have taken different positions. The Delhi High Court in *GMR Energy Limited v. Doosan Power Systems India Private Limited* upheld the choice of a foreign seat by Indian parties while the Bombay High Court in *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd*. took the opposite approach.

The *GE* case, by upholding the parties' right to choose a foreign seat, would hopefully contribute to strengthening this legal position, which also gives effect to the principle of party autonomy.

Non-availability of section 9 remedies

Perhaps the most significant aspect of the *GE* case is the ruling that the section 9 remedy of seeking interim measures is not available in case of a foreign seated arbitration between two Indian parties. While Indian parties choosing a foreign seat would be entitled to have their award enforced as a foreign award in India under Part II of the Arbitration Act, they would not be entitled to avail of the section 9 remedies which are (subject to a contrary agreement) available to parties in an international commercial arbitration seated outside India. This would mean that a party that anticipates or receives an unfavourable award would be at liberty to dispose of the assets and defeat the rights of the award holder, and the Indian courts would be powerless to grant any interim measures for the protection and preservation of the assets. A civil suit before the Indian courts for such measures of an interlocutory nature would not be maintainable because interlocutory measures can only be granted when they are in aid of the final relief sought.

Indian parties opting for a foreign seat of arbitration would have to carefully weigh the pros and cons of having their award enforced as a foreign award in India vis-à-vis having no recourse to Indian courts under section 9 of the Arbitration Act for interim measures of protection.

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