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Party Autonomy Reigns Supreme: The Indian Supreme Court Rules that Two Indian Parties Can Choose a Foreign Seat of Arbitration

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In a landmark ruling in *PASL Wind Solutions Private Limited v. GE Power Conversion*,¹⁾ India's Supreme Court rejected the argument that the designation of a foreign seat between two Indian parties was contrary to public policy, and instead, ruled affirmatively that there was nothing in the (Indian) Arbitration & Conciliation Act, 1996 ('Act') that precluded Indian parties from arbitrating in a foreign seat and that party autonomy and freedom of contract must be upheld.

The foregoing principle of law has vexed the legal fraternity for years, with conflicting rulings from various High Courts – Is there a preclusion in the Act, against an arbitration involving only Indian parties opting a foreign seat? Is such a contract so violative of the public policy of India, that party autonomy, one of the mainstays of arbitration, cannot extend to the freedom to choose an arbitral seat outside India?

The critics have argued that such a contract would indeed be contrary to public policy and would render the ensuing award liable to be set aside or refused to be enforced by an Indian court and has accordingly been used as a routine defence in such cases. Indeed, this has resulted in conflicting rulings from various High Courts across India. While the Madhya Pradesh and the Delhi High Courts have ruled that such a choice is permissible (*Sasan Power* and *GMR Energy*), the Bombay High Court has ruled that having a seat outside India is impermissible and contrary to public policy (*Sah Petroleums* and *Addhar Mercantile*).

The Supreme Court held that in the present case, the Award, made in Zurich as the seat of the arbitration, between two Indian parties, was a foreign award enforceable under the Act.

Background

This arbitration emanated out of disputes between two Indian companies, viz. GE and PASL under a Settlement Agreement, which itself resolved earlier disputes, and which provided for resolution of disputes by arbitration in Zurich, in accordance with ICC Rules. PASL invoked arbitration in 2017, claiming damages of about USD 175 million, from GE. On the merits, the Sole Arbitrator passed a final award dated April 18, 2019, rejecting all of PASL's claims and awarding costs of the

arbitration along with interest thereon to GE (the “Award”).

Proceedings in the Gujarat Courts

GE applied for enforcement of the Award as a foreign award (under Part II of the Act), which deals with NY Convention awards). Simultaneously, it also applied for interim relief (under Section 9).

On the other hand, notwithstanding the foreign seat, PASL challenged the Award in a Gujarat Court. PASL argued that the Award should be treated as a domestic award because it resolved a dispute between two Indian parties.

The Gujarat High Court (“GHC”) in its [judgment dated November 3, 2020](#) upheld the right of Indian parties to select a foreign seat of arbitration and ruled that the Award was a foreign award enforceable under the Act.

Insofar as GE’s application for interim relief was concerned, the High Court ruled that only parties to an “international commercial arbitration” could approach Indian courts for interim reliefs meaning that at least one of the parties should be a foreign entity. The Court ruled that GE’s application for interim relief was not maintainable as both parties to the arbitration were Indian entities and the arbitration was not an “international commercial arbitration”.

PASL applied to the Indian Supreme Court for special leave to appeal against the judgment of the GHC.

The Supreme Court’s Judgment

The Indian Supreme Court in April 2021 judgment ruled on several principles fundamental to arbitration law in India.

- *Party autonomy is the guiding spirit of arbitration*

The Court acknowledged the critical role of party autonomy in arbitration, referring to it as, “*the brooding and guiding spirit of arbitration*”, relying on its previous decision in *BALCO*. In the context of the issue in the case, the Court held 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 territoriality principle holds sway under Part II of the Act and the NY Convention*

In detailed reasoning, the Supreme Court ruled that what was relevant to ascertain whether an award was a foreign award enforceable under the Act, was the ‘territoriality principle’, i.e., the territory in which the award was made – the ‘seat’ of the arbitration (under Part II, Chapter 1 – NY Convention Awards). The Court referred to *travaux préparatoires* of the NY Convention and noted that though many countries had advocated ‘nationality’ of parties being retained as a key condition (as mandated under the earlier Geneva Protocol & Convention) ultimately the NY Convention was based only on the principle of the situs of the award/seat of arbitration, and thus,

was *party-neutral*.

As such, merely the fact that the parties to the arbitration were both Indian entities, would not make an award passed in a foreign seated arbitration a domestic award – it would be a foreign award enforceable by an Indian court (subject to other relevant conditions being met – including that it was not contrary to Indian public policy).

- *Public Policy*

PASL's argument that the designation (of a foreign seat), was contrary to Indian public policy (by virtue of a contracting out of Indian law where it would otherwise apply), and therefore not permissible, was rejected. The Court held that "*The balancing act between freedom of contract and clear and undeniable harm to the public must be resolved in favour of freedom of contract, as there is no clear and undeniable harm caused to the public in permitting two Indian nationals to avail of a challenge procedure of a foreign county when, after a foreign award passes muster under that procedure, its enforcement can be resisted in India.*".

The Court relied on an earlier decision in *Atlas Export* which had held that enforcement of a foreign award arising out of an arbitration between two Indian parties would not be contrary to Section 23 of the Indian Contract Act, 1872, which deals with contracts that are unlawful, including because they are opposed to public policy and restraint of legal proceedings restrictions.

The Court also dismissed the argument that if Indian parties could choose to arbitrate abroad, that would effectively allow them to circumvent mandatory Indian laws or transact in a manner contrary to Indian law. Protection existed against such a situation inasmuch as, if in the facts of a case it was found that two Indian nationals had, "*circumvented a law which pertains to the fundamental policy of India, such foreign award may then not be enforced*".

While concluding that two Indian parties could choose a foreign seat of arbitration, the Court noted that a court must balance and weigh a private right against public order and where a private bargain does not cause harm to the public order, the court must allow for private bargain to flourish.²⁾

- *Indian parties to foreign seated arbitration have recourse to Indian courts for interim reliefs*

While upholding the judgment of the GHC (that the Award was enforceable as a foreign award), it set aside the dismissal of GE's application for interim relief. The Supreme Court differentiated between the term 'international commercial arbitration' used in the Act, ruling that the term as defined in Section 2(1)(f) was concerned with the status of the parties and their nationality, whereas when used in Section 44 (which deals with foreign awards), it was concerned with territoriality, nationality being irrelevant. therefore the proviso to Section 2(2) (which effectively entitles parties to an international commercial arbitration in a foreign seat to seek interim relief before an Indian court), should be read as referring simply to arbitrations seated outside Indian territory, such that parties thereto would have access to Indian courts for interim relief irrespective of their nationality.

Analysis

The position was comprehensively set to rest by the Indian Supreme Court, which has yet again

walked the talk, demonstrating India's pro-arbitration approach and recognizing a seminal principle of private law that in absence of public harm, party autonomy ought to be upheld.

Particularly for those multinationals with wholly-owned Indian subsidiaries, it is now open to them to mandate a foreign seat of arbitration, should they prefer a neutral territory.

It is important to note that the Court has been careful to not comment on whether, with the open choice of a foreign seat of arbitration, a choice of foreign substantive law is also permissible – since such an analysis would require further scrutiny and indeed a wider debate. No doubt, this will be another debate and another decision for another time.

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References

- ?1 Special Leave Petition (Civil) 3936 of 2021 (arising out of GHC judgment dated November 11, 2020), Supreme Court of India Judgment dated April 20, 2021.
- ?2 The Court noted that unlike India countries such as the USA and China had specifically added proscriptions against domestic parties having a foreign seat of arbitration.

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