Supreme Court on Choice of Foreign Seat of Arbitration by Indian Parties

23 April 2021

This update covers:

In its latest pro-arbitration judgement delivered on 20 April 2021 in the case of *PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited,* a 3 judge bench of the Supreme Court settled the most frequently asked question in Indian arbitration law - whether two Indian parties can adopt a foreign seat of arbitration. The Supreme Court has decided this issue in favour of party autonomy and has, without qualification, held that two Indian parties can choose a foreign seat of arbitration. The Supreme Court has further upheld the right of parties to seek interim relief under Section 9 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) in such cases.

The Supreme Court has recently in PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited upheld the right of two Indian parties to choose a foreign seat of arbitration and additionally held that an application for interim reliefs under Section 9 of the Arbitration Act is maintainable in such cases.

1 Factual Background

Pursuant to certain disputes, the Appellant, PASL Wind Solutions Private Limited (**PASL**) and the Respondent, GE Power Conversion India Private Limited (**GE Power**) entered into a settlement agreement whereby GE Power agreed to provide certain warranties.

Further disputes arose between the parties in relation to the scope of the warranties provided by GE Power under the settlement agreement. These disputes were referred to a sole arbitrator appointed by the International Chamber of Commerce (**ICC**). The relevant portion of the governing law and dispute resolution clause in the settlement agreement provided as follows:

"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."

Initially, GE Power challenged the jurisdiction of the sole arbitrator on the ground that two Indian parties could not have chosen a foreign seat of arbitration. This argument was opposed by PASL. The sole arbitrator held that there is no bar under Indian law for two parties to freely agree to a foreign seat and accordingly held that the seat of the arbitration was Zurich, Switzerland. This procedural order was not challenged, and the arbitration proceeded further on this basis. The arbitral hearings were conducted in Mumbai. A final award dated 18 April 2019 (**Award**) was issued in favour of GE Power.

PASL however did not comply with the Award and GE Power initiated enforcement proceedings under the Arbitration Act before the Gujarat High Court. As a part of the enforcement proceedings, GE Power also filed an application under Section 9 of the Arbitration Act to secure the Award. At this stage, PASL took the stance that the seat of arbitration was Mumbai (diametrically opposite from the stance it had previously taken in the arbitration) and initiated proceedings for setting aside the award.

The Gujarat High Court in these enforcement proceedings (while also dealing with the Section 9 application) held that:

a. Two Indian parties can validly choose a foreign seat of arbitration and in this case, Zurich was the seat of arbitration.

b. Where two parties choose a foreign seat, they cannot make an application for interim measures under Section 9 of the Arbitration Act as recourse to Section 9 is available (under the proviso to Section 2(2) of the Arbitration Act) only to '*international commercial arbitrations*' and the definition of international commercial arbitration in Section 2(1)(f) of the Arbitration Act required at least one foreign party, which did not exist in the present case.

In an appeal preferred against the Gujarat High Court's decision, the Supreme Court considered these two issues.

2 Ruling of the Supreme Court on Key Issues

2.1 Choice of foreign seat by two Indian parties

The Supreme Court unequivocally held that two Indian parties can adopt a foreign seat. The Supreme Court based its findings on the following:

a. There is nothing under the Indian Contract Act, 1872 (**Contract Act**) which interdicts two Indian parties from opting for an arbitration with a seat outside India. The Supreme Court adopted the reasoning taken by it in 1999 in the case of *Atlas Export Industries v. Kotak & Company* (**Atlas**). In *Atlas*, the Supreme Court had considered a foreign award in the context of near-identical provisions of the Foreign Awards Act (a pre-Arbitration Act legislation) and had held that a foreign award cannot be refused to be enforced merely because it was made between two Indian parties, and rejected the argument that the same was opposed to public policy.

b. The argument that the Arbitration Act reflects public policy of India and that Indian parties ought to be confined to arbitrations in India deserved to be rejected.

c. Freedom of contract needs to be balanced with clear and undeniable harm to the public. It cannot be said that there is any clear and undeniable harm caused to the public merely by two Indian nationals choosing a challenge procedure of a foreign country. Accordingly, the balance between public policy and freedom of contract must, in this instance, be resolved in favour of freedom of contract.

d. For an award to be a 'foreign award' in terms of Section 44 of the Arbitration Act, there is no requirement that one of the parties must be a foreign party (as stipulated in Section 2(1)(f) of the Arbitration Act). Section 44 of the Arbitration Act merely stipulates that the award must be in respect of disputes that arise between 'persons' and does not accord any regard to their nationality, residence, or domicile. Section 44 is party-neutral but seat-centric and therefore, reference must be only to the place at which the award is made to determine if the award is a foreign award.

The Supreme Court also considered and addressed previous precedents on this issue, and overruled or distinguished earlier judgments which held otherwise. Therefore, overall, the Supreme Court held that nothing stands in the way of party autonomy in designating a seat of arbitration outside India even when both parties are Indian.

2.2 Availability of Interim Relief

Setting aside that part of the Gujarat High Court's findings where the High Court held that Section 9 application for interim reliefs under the Arbitration Act was not maintainable, the Supreme Court held that Section 9 of the Arbitration Act remains available where two Indian parties adopt a foreign seat.

The proviso to Section 2(2) of the Arbitration Act makes certain sections of Part I of the Arbitration Act (such as Section 9 for interim relief from Indian courts) that are ordinarily applicable to only domestic arbitrations, applicable even to "*international commercial arbitration, even if the place of arbitration is outside India*". The Supreme Court reasoned that the term international commercial arbitration as used here does not refer to the definition contained in Section 2(1)(f) (requiring a foreign party) but instead, is a seat-centric terminology that refers to arbitrations that take place outside India. On this basis, the Supreme Court held that in international commercial arbitrations situated outside India, even if there are no foreign parties, reliefs under Section 9 of the Arbitration Act ordinarily remain available (subject to an agreement to the contrary).

3 Conclusion

The Supreme Court has provided much needed clarity on an issue that was muddled in controversy for a long time. The Supreme Court has recognised and upheld that absent any clear harm to public policy, there is no reason to interfere with party autonomy and disallow Indian parties from opting for foreign seats.

Until now, the Supreme Court's decision in *Sasan Power Ltd. v. North American Coal Corporation (India) Pvt. Ltd., (2016)* (Sasan) was relied upon by Indian parties to opt for a foreign seat where the transaction involved a foreign element. In Sasan, the Supreme Court found that Indian parties were entitled to adopt a foreign governing law in relation to contracts which involved a foreign element. The logic in *Sasan* was extended to choice of seat, albeit with some trepidation given the uncertainty caused by previous decisions and the lack of clarity around what constituted a 'foreign element'.

The judgement of the Supreme Court in the present case now puts to rest this uncertainty and opens the door for Indian parties to freely opt for foreign seated arbitrations. Specifically, this decision will significantly assist parties in cross-border transactions and parties having a multinational presence who may prefer to streamline disputes by opting for a uniform seat across countries.