INDIALAW

ARBITRATION AND CONCILIATION

Indian parties can choose a foreign seat of arbitration

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The Supreme Court in PASL Wind Solutions Private Limited vs. GE Power Conversion India Private Limited[1] has ruled that two companies incorporated in India can choose a forum for arbitration outside India. It also ruled that an award made at such a 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.

Both the parties before the Apex Court and involved in the arbitration were companies incorporated under the Companies Act, 1956. The settlement agreement between the parties said that in case amicable negotiations between the parties fail, "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."

The Tribunal issued an award and GE Power applied to enforce it in Gujarat. The Gujarat High Court then upheld the enforcement of the arbitral award. However, the High Court ruled that parties to such an arbitration would not be entitled to interim relief under Section 9 of the Arbitration Act.

The appellant had now contended that foreign awards contemplated under Part II of the Arbitration Act arise only from international commercial arbitrations. It asserted that "international commercial arbitration", as has been defined in section 2(1)(f) of the Arbitration Act, would make it clear that there has to be a foreign element when parties arbitrate outside India, the foreign element being that at least one of the parties is, 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.

However, the Apex Court now explained that for an award to be designated as a foreign award under Section 44 of the Arbitration Act, four conditions must be met: (i) the dispute must be considered to be a commercial dispute under the law in force in India, (ii) it must be made in pursuance of an agreement in writing for arbitration, (iii) it must be disputes that arise between "persons" (without regard to their nationality, residence, or domicile), and (iv) the arbitration must be conducted in a country which is a signatory to the New York Convention.

The Court then asserted that Section 44 of the Arbitration Act is "party-neutral", having reference to the place at which the award is made instead. It ruled that the four conditions were met by the award in question.

On public policy

The Apex Court further considered the issue whether an agreement between two Indian parties to arbitrate in a foreign seat violated Sections 23 and 28 of the Indian Contract Act, 1872, which makes agreements against public policy void, and provides that agreements in restraint of legal proceedings are void, respectively.

The Court ruled 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 country when, after a foreign award passes muster under that procedure, its enforcement can be resisted in India on the grounds contained in section 48 of the Arbitration Act, which includes the foreign award being contrary to the public policy of India."

It further asserted "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".

On interim relief

The Supreme Court also set aside the Gujarat high court's conclusion that such an arbitration would not be entitled to interim relief under Section 9 of the Arbitration Act.

It noted that 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".

It opined that the term 'international commercial arbitration' used here does not refer to the definition contained in Section 2(1)(f) (requiring a foreign party) but instead, is "place-centric", referring to arbitrations that take place outside India.

“This expression, therefore, only means that it is 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,” the court said.

[1] Civil Appeal No. 1647 of 2021