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INTERIM RELIEF- A DETERMINING FACTOR FOR INDIAN PARTIES CHOOSING A FOREIGN SEAT

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ABSTRACT

In both international and domestic arbitration, India has always had a varied background. International commercial arbitration's popularity has increased in India in recent times because of increased dependence of Indian corporations on this mode of dispute resolution and support provided by the legislature and judiciary required for its effective working.

Multinational companies routinely request a foreign seat of arbitration in contracts involving their Indian subsidiary. If analysed by the law, however, this desire was still a desire. The question of whether two Indian parties can pick a foreign venue of arbitration and if the interim measures required to secure assets apply to such arbitrations remains unanswered under Indian law.

This research paper analyses the choice of seat in arbitration proceedings in India by analysing the recent judgement of PASL Wind Solutions Private Limited v. GE Power Conversion India Limited. The authors attempt to highlight the positive impact the judgment may have on the arbitration regime of the country along with a comprehensive discussion on the different factors involved in the choice of a seat of arbitration

INTRODUCTION

India has always strived to achieve an arbitration-friendly status not only for parties within India but for foreign parties as well. In its quest to become a hub of international arbitration, the government and judiciary of India have taken several progressive steps over the years. In pursuance of this, the Indian Arbitration and Conciliation Actv[2] allows the enforcement of

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[2] The Arbitration And Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

foreign arbitral awards. No provision in the Arbitration or Indian Contracts Act[3] expressly prohibits two Indian parties to choose a foreign seat of arbitration for the resolution of disputes. The Bombay High Court had opined that allowing two Indian parties to choose a foreign arbitration seat is against India's public policy and a violation of the scheme of the Arbitration Act[4]. But at the same time this practice has been allowed, both expressly[5] and implicitly[6], in various decisions by the Supreme Court and High Courts. Although choosing of foreign arbitration seat was not prohibited, courts have repeatedly denied the grant of interim relief in such cases[7], thus affecting a party's autonomy to choose a preferred seat of arbitration.

CHOICE OF SEAT IN ARBITRATION PROCEEDINGS

The terms seat is explained by the UNCITRAL Model Law which explains that arbitration 'seat' sets up a relationship between the system of arbitration law and arbitration by reference to the country to which arbitration is legally established.[8] The idea of the terms "seat" and "venue" in arbitration has been distinguished in the case of Bharat Aluminium Company (BALCO) v Kaiser Aluminium Technical Service Inc[9]. The court held the terms are different as the "seat" is where arbitration is anchored to while "venue" is a location or forum where meetings relating to arbitration are generally conducted.

In India, the law of foreign arbitral has its roots in the New York Convention and the Geneva Convention.[10] It is stated in the New York convention that when two Indian parties pick a foreign seat, the ensuing award is a foreign award, and India has an obligation to follow the same as a signatory under article 51(11) of the constitution.[11] This has become a practical issue for those companies who choose a seat outside of India. There are many companies in India having a parent company seeking a foreign arbitration seat and having many subsidiaries in India.

This is because of the importance given to choosing a seat in a country where the mechanism is

[3] Indian Contracts Act, 1872, No. 9, Acts of Parliament, 1872 (India).
[4] Seven Islands Shipping Ltd v. Sah Petroleum Ltd, AIR 2012 MhLJ 822; Addhar Mercantile Pvt Ltd. v. Shree Jagdamba Agrico Exports Pvt Ltd, AIR 2015 MH 1978.
[5] GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors., AIR 2017 DE 3689.
[6] Reliance Industries Limited v. Union of India,AIR 2015 SC 1604
[7] GE Power Conversion India Limited v. PASL Wind Solutions Private Limited, AIR 2021 SC 0295.
[8] UNCITRAL Model Law on International Commercial Arbitration, 1958

[9] Bharat Aluminium Company (BALCO) v Kaiser Aluminium Technical Service Inc, AIR 2019 SC 0968
[10] The New York Arbitration Convention on the recognition and the enforcement of Foreign Arbitral Awards, 10 June 1958
[11] INDIA CONST. art. 51

robust. The arbitral seat is given prime importance as it helps reduce the disputes if any between parties to the agreement. The selection of a seat also holds a major value since it dictates the laws applicable to the arbitration procedure and the execution of the awards granted by the arbitral tribunal. Parties also tend to choose an arbitration-friendly country as their seat in order to provide for an effective arbitration procedure and save their time. There are a lot of difficulties faced by companies that have been identified while conduction their arbitration proceedings. Indian legislation has made important amendments in the Arbitration Act in order to reduce the time taken to conclude an arbitration proceeding in India.

THE DISTINCTION BETWEEN ENFORCEMENT OF A DOMESTIC AWARD AND FOREIGN AWARD

The fundamental difference between enforcement of a domestic award and a foreign award is that any sort of application for enforcement is not required for the enforcement of a domestic award. This is because a domestic award is capable of execution as a decree by itself once any objections are rejected. Whereas a foreign award should be passed through a procedure of enforcement. For this purpose, the party which is seeking for enforcement must submit an application and the foreign award must be enforceable once the court is satisfied. The other way a foreign award differs from a domestic award is that there is no opportunity for setting aside a foreign award whereas a domestic award can be set aside. The lacuna of this observation has been cleared by applying the provisions under s. 34 of the Arbitration Act, 1996, and it was held by the court that a foreign award can be set aside in India[12].

ENFORCEMENT OF FOREIGN AWARDS IN INDIA

In India, the law of enforcement of arbitration awards, prior to January 1996 was extended between three enactments. Domestic awards were enforced in accordance with the 1940 Act. The Geneva Convention and the New York Convention governed the enforcement of foreign awards in India. A carefully structured framework is provided by the New York Convention for the implementation of foreign arbitral awards. These laws have been applied in India until the enforcement of the Indian arbitration and conciliation act 1996.[13] Despite certain justifications for resistance that have been made, the residual discretion to enforce a foreign award remains

[12] Venture Global Engineering v. Satyam Computer Services, AIR 2008 SC 0333
[13] Arbitration And Conciliation Act, supra note 1

with the Court under section 48[14]. The High Court of Madhya Pradesh is of the opinion that the provisions of Part II of the Arbitration Act establishes its application on the "seat" of arbitration, and not on the nationality of the parties. The court concluded that, when arbitration is placed outside India, the award will be regarded as a "foreign award," regardless of the nationality of the parties involved[15].

ENFORCEABILITY OF INTERIM RELIEF IN FOREIGN AWARDS

The right to apply for interim measures is given to the party under Section 9 of the Arbitration Act, 1996[16]. Such measures can be applied by the party before or during the proceeding which also includes the time of such arbitral award being made. The criterion by which an award is classified to be a foreign award is set out by section 44 of Part II of the Arbitration and Conciliation Act, 1996 which states that the nationality of a party is not a necessary criterion[17].

Section 2 clause 2 of the Arbitration Act is another important section to consider as it provides that even if the arbitration takes place outside of India the section shall still apply to foreign arbitration.[18] The issue relating to interim relief in foreign awards nevertheless persists as the concept of commercial arbitration does not fall under an arbitral treaty if the seat is outside India and both the parties are Indians. The enforceability of foreign seated arbitrations is not very simplistic for the same reason. A fresh application must be submitted to the court under section 9 of the Arbitration and Conciliation Act.[19] Parties have an additional burden in case of a foreign seated arbitration since they must prove a case that has already been decided by the arbitral tribunal.

To simplify this process an English case of Patley Wood Farm LLP v. Nihal Mohammad Kamal Brake can be considered[20]. It was held in this case that to review or second hand the interim order of the arbitrator is not the role of the court. However, if the arbitrator has acted on a completely mistaken basis, then the court may intervene. The remedy of seeking interim relief in a foreign seated arbitration may be ineffective unless such an approach is adopted by the Indian Courts.

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[14] Arbitration And Conciliation Act, supra note 1, at §48.
15 Sasan Power Ltd v. North America Coal Corporation India Pvt. Ltd., (2016) 10 SCC 813.
16 Arbitration And Conciliation Act, supra note 1, at §9.
17 Arbitration And Conciliation Act, supra note 1, at §44.
[18] Arbitration And Conciliation Act, supra note 1, at §2.

[19] Arbitration And Conciliation Act, supra note 15.

[20] Patley Wood Farm LLP v. Nihal Mohammad Kamal Brake, (2014) EWHC 4499

With High Courts divided in their opinion regarding Indian parties' rights to choose a foreign seat of arbitration, and the inability to obtain interim relief measures while the case is pending, the exercise of party autonomy in a free and fair manner is affected. While this may seem like a minor issue, it has severe implications over a party's choice of the seat of arbitration. Arbitration cases may take years to be concluded with a final arbitral award. In such a situation the affected party will be left with no relief throughout the procedure. It may even continue to suffer damages while waiting for the dispute to be settled. Thus, lack of interim relief will not only lead to monetary damages and mental distress to the affected party, but it will also defeat the purpose of arbitration due to the inability to mitigate losses of the affected party. As a result, parties would be forced to opt for an Indian seat of arbitration to avoid such complications, despite their right to party autonomy. Since the statute does not discuss the enforcement of interim orders passed by foreign seats of arbitration, it is crucial for the Indian judiciary to legitimize the practice in order to uphold the right to party autonomy of Indian parties.

CONCLUSION

In its attempt to achieve a pro-arbitration regime, India has taken a lot of steps over the years. However, not all these steps are in the right direction as they restrict the right of parties to exercise their autonomy in the process of arbitration.

The recent judgement lays emphasis on the importance of granting interim relief measures in cases where Indian parties opt for a foreign seat of arbitration. This judgment acts as a milestone as it allows grant of interim relief, enabling parties to formulate their legal strategies and arbitration agreements without any restrains. Although, this judgement is a major advancement in making India arbitration-friendly there are still several aspects that need improvement.

Places such as Singapore, London, and Geneva have robust arbitration mechanisms in place which have helped them develop into a hub of international arbitration. Several foreign parties often opt for these centres of arbitration due to their efficient procedures and well- formulated legislations. Currently, India lacks a proper infrastructure for arbitration which can be resolved by setting up a centralised institution of arbitration.

Thus, instead of creating obstacles for Indian parties in choosing a foreign seat of arbitration, the legislature and the judiciary should work towards building a more conducive system of arbitration in the country. This will also help to improve the ease of doing business for Indian

companies which can opt for a simpler method of dispute resolution and will also help reduce the burden on the judiciary.