VOLUME 1 | ISSUE 4

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

PARTIES AUTONOMY IS THE UNDERLYING PRINCIPLE OF ARBITRATION-PASL LTD v GE POWER[1]

Recently in PASL Wind Solutions v. GE Power Conversion India, the question arose as to whether two companies incorporated in India can choose a forum for arbitration outside India. On 20 April 2021, the Indian Supreme Court in this case said that, Indian parties are free to choose a seat of arbitration outside India and that there is no bar under the Arbitration & Conciliation Act 1996 for choosing a foreign law as the procedural law. It further clarified that the award would enforceable as a foreign award in India under Part-II of the Act.

FACTUAL BACKGROUND AND ISSUES RAISED

PASL Wind Solutions Pvt. Ltd. (PASL) is a Gujarat based company under the Companies Act, 1956 and GE Power Conversion India Pvt Ltd (also known as GE India) is a company under the Companies Act, 1956 with its office at Chennai.

"In 2010, GE Power gave purchase orders to PASL Wind Solutions for supplying of six converters. PASL supplied six converters out of the which the respondent decided to keep one in its factory as a prototype and the five remaining converters were all commissioned by July 2, 2014. The warranty clause was similar in all three which was 24 months from the date of commissioning or 30 months from the date of dispatch whichever came earlier. The petitioner contended that the warranty on the converters expired in June 2014 which is 30 months from the date of dispatch which was January 2012."[2]

"Post commissioning some disputes arose between the parties in respect of the functioning of the converters. The petitioner contended that it had already provided a large number of free services in relation to the converters and the warranty had also expired, whereas, according to the respondent, the warranty on the converters was in continuance. In order to amicably resolve the said dispute, the parties entered into a settlement agreement, which included any failure to

[1] Nigam Shah & Pratyush Mohanty, Students at Amity Law School, Noida
[2] https://indiankanoon.org/doc/79928496/

the converters panel would be attended within a period of 7 days"[3]

"It was also decided that in case no amicable settlement could be reached through negotiations, all disputes shall be referred to Arbitration seated in Zurich, and its award shall be final and binding on both the Parties."[4]

In 2017, PASL initiated arbitration proceedings against GE India in the same matter but the hearing was decided to be held in Mumbai as it was better for both the companies to reduce the cost of arbitration. In 2019, the arbitration tribunal issued the final award dismissing PASL's claims and awarded GE India damages and costs.

As the appellant failed to oblige to the award by the arbitral tribunal, under Sections 47 and 49 of the Indian Arbitration and Conciliation Act, 1996 (the enforcement of foreign awards), GE India commenced enforcement proceedings before the Gujarat High Court. They also sought interim relief from the Court under Section 9 of the Act to prevent PASL from dissipating its assets to avoid complying with the award. To this, the appellant filed proceedings challenging the said final award under section 34 of the Arbitration Act, before the Small Causes Court, Ahmedabad.

PASL contented that the award was not a foreign award for enforcement under Sections 47 and 49 of the Act. It backed its case with the reference of prior cases of the Supreme Court to determine the arbitral seat,[5] among other things, the place where the hearings took place and PASL thus sought to set aside the arbitral award under Section 34 of the Indian Arbitration and Conciliation Act 1996.

The Gujarat High Court declined the to grant the said interim relief under the above said section as that was only applicable to domestic arbitration. Aggrieved by the decision of the High Court a special leave petition was filed before the Hon'ble Supreme court of India.

OBSERVATIONS OF THE BENCH

The Primary issue that was dealt by the Hon'ble Supreme court in this case was towards the right of choosing a foreign seat of arbitration by the Indian parties. In this judgement the Supreme Court most importantly highlighted the underlying principle of arbitration i.e.

[3] https://www.legitquest.com/case/ge-power-conversion-india-private-limited-v-pasl-wind-solutions-private-limited/1C8057

[4] Clause 6 of the settlement agreement (the dispute resolution clause)

[5] Enercon (India) Ltd. v. Enercon GmbH (2014) 5 SCC 1

"Parties' autonomy" which allows the parties to decide on how to resolve their disputes which also includes the freedom to choose the seat of arbitration, the only exception should be where such action goes against any general public interest.

The Court took the precedents from *"Sasan Power Limited vs North American Coal Corporation India Private Limited*[6] *which distinctly states that two Indian parties can arbitrate outside India and from DM Infrastructure Private Limited v. UE Development India Private Limited*[7] *which permitted such arbitration provided that Indian substantive law is being followed."* This clearly negated the contention of the said respondents G.E. Power which had challenged against the jurisdiction of arbitration of two Indian Parties and therefore the arbitration clause mentioned in the agreement was deemed to be valid and Swiss act would be applicable as the seat of arbitration was Zurich, Switzerland. Further through this judgement the court has cleared the deck to give complete freedom to parties in arbitration as "party autonomy has been held to be the brooding and guiding spirit of arbitration. Thus, in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.,*[8] this Court held:"5. Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract — (1) proper law of contract, (2) proper law of arbitration agreement, and (3) proper law of the conduct of Arbitration, which is popularly and in legal parlance known as "curial law"."

The next issue that was raised before the bench was regarding the mutual exclusiveness of part 1 and part 2 of the Arbitration act. While deciding on the above said issue the court clearly outlined that part-1 of the act deals with only matters pertaining to Arbitration whose seat is located in India and has no applicability to foreign seated Arbitrations and deals with only appointment, commencement, award, execution and challenges to such award of Arbitration done in India, whereas Part 2 deals with only enforcement of foreign award and it does not apply to arbitral proceedings whose seat is situated outside India.

As per section 2(7)[9] of the act also it is clearly mentioned that "An arbitral award made under this part shall be considered a domestic award"

[6] (2016) 10 SCC 813 (RL-6),
[7] (2008) 14 SCC 271
[8] (2016) 4 SCC 126
[9] Arbitation and Conciliation act 1996

Hence the above said provisions limits the territorial scope of Part-1 of the act and under no prudence circumstances can the sections of this part be applicable to a foreign seated Arbitration and further the term "international" deals with pre-award situation in domestic arbitration which includes international commercial arbitration held in India but in no way is applicable to foreign award as is visible from the clear distinction between the part 1 and 2 of the act[10].

Therefore the contention regarding the supplementary and overlapping nature of part 1 and 2 of Arbitration act was clearly struck down as it is a settled law that a provision cannot travel beyond its enacting provision as laid down in *Union of India v. Dileep Kumar Singh*.[11]

Further the issue was raised questioning the standing of the award under section 44 as a foreign award.

In determining the credibility the court took the interpretation of section 44 which broadly tests an award on 4 grounds to make it fit as a foreign award. "First the dispute between the said parties should be commercial in nature as per law in India, secondly the Arbitration must be done in pursuance of a legally enforceable contract, thirdly the said dispute must be between "persons"[12] (without regard to their nationality, residence, domicile) and lastly it must be done in a place which is a signatory to the New York convention as India is a signatory to the same."

As in the said case all the required conditions were being fulfilled so the court held the said award to be a foreign award under Section 44[13] and the contentions of bringing the said award under the ambit of International commercial arbitration was subsequently rejected as the court observed that the context of section 44 is party-neutral, having reference to the place at which the award is made. For this reason, it is not possible to accede to the argument that the very basis of section 44 should be altered when two Indian nationals have their disputes resolved in a country outside India.

Lastly to upheld the award the court relied on the judgment of *Atlas Export Industries v. Kotak*

[10] Arbitation and Conciliation act 1996

[11] (2015) 4 SCC 421 (at paragraph 20),

[12] In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—
(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

[13] Supra 5

& Co[14] where it was clearly laid down that the enforcement of a foreign award can't be restrained on the basis that the parties were Indians.

And finally the Issue regarding contraventions of section 23[15] and 28[16] of the Indian contract act was also rejected as with reference to section 28 court held that "exception 1 to section 28 of the Contract Act clearly saves the arbitration of disputes between two persons without reference to the nationality of persons who may resort to arbitration and cannot be held, by some tortuous process of reasoning, to interdict two Indian parties from resolving their disputes at a neutral forum in a country other than India."

And with regards to the contention of such Arbitration going against the moral of public policy, the court held that since the parties are following the applicable substantive laws of India in their Arbitration proceedings which in no way goes against the public policy as "Public policy is a restive horse and when you get astride of it, there is no knowing where it will carry you."

AUTHORS' ANALYSIS

This judgment of the Supreme Court has completely changes the scope and applicability of the definition of International Arbitration as per section 2(1)(f) of the arbitration act[17] which states *"international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—(i) an individual who is a national of, or habitually resident in, any country other than India; or(ii) a body corporate which is incorporated in any country other than India; or(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or(iv) the Government of a foreign country;"* This definition was also highlighted in the case of *TDM Infra vs UE Development*[18] where one the directors of one party was a Malaysian resident and on that ground he wanted to invoke the clause of International commercial arbitration but the Hon'ble court declined the same stating that since the cases were between

[14] (1999) 7 SCC 61.

[15] 23-What consideration and objects are lawful, and what not.—The consideration or object of an agreement is lawful, unless—The consideration or object of an agreement is lawful, unless—"opposed to public policy". In each case, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful or opposed to public policy is void.

[16] 28 Agreements in restraint of legal proceedings, void. —Exception 1. Saving of contract to refer to arbitration dispute that may arise. —This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration,

[17] Arbitration and conciliation act 1996

[18] TDM Infrastructure Private vs UE Development India Pvt.Ltd on 14 May, 2008,IN THE SUPREME COURT OF INDIA,CIVIL ORIGINAL JURISDICTION,ARBITRATION APPLICATION NO. 2 OF 2008

corporations whose incorporation is in India so the same should fall within the ambit of domestic arbitration and shall be governed by the part-1 of the arbitration act but post the PASL judgment which allowed domestic parties to arbitrate on a foreign seat the scope and meaning of the above section has been brought under scanner and will give rise to various interpretational disputes before the judiciary.

Further this judgment also emphasizes the difference between seat and venue of arbitration as seat refers to the place or institution whose procedural laws would be governing the said arbitration whereas venue refers to the place only where the arbitration takes place and it has no legal implications upon the said arbitral proceedings.

This Judgment also further deliberated upon the mutual exclusiveness of Part-1 and 2 of the arbitration act as parties despite seeking the foreign seat of arbitration often used to seek interim relief from the Indian courts unless there was an express exclusion of Indian law the high courts used to grant such relief as held in Bhatia International case but post PASL judgement where the court said that there is no mutual exclusiveness such relief might not be now available to the parties and with regards to section 47 and 34 of the arbitration act as post this judgement of PASL the applicability of section 34(2) is only to International commercial arbitration held in India, however under section 48 the enforcement of foreign awards still may be refused but the award still holds for enforcement in any third country, hence the correlation between the above said sections is minimized.

This judgment has till some extent forced the Indian judiciary to rethink about the inclination of parties for choosing a foreign seat of arbitration despite the huge costs involved, as the Indian ad-hoc mechanism of arbitration which is the most commonly used method of arbitration in India is proving to be less effective and efficient for the parties compared to the institutional system of arbitration which already has a pre- determined set of procedures in place and makes the entire process of dispute resolution smooth and less time consuming as usually once the proceedings start the dispute is resolved within few weeks of continuous proceedings as pre-scheduled as there are no adjournments as in case of the ad-hoc mechanism. Thus the rigidity of institutions ensure the efficiency in the entire process of Arbitration. However there are also certain disadvantages of such foreign arbitration as usually there might be instances of Indian parties seeking arbitration before the panel of foreign arbitrators which have procedural law completely different from that of India and there might lead to some issues such as third party

financing in International Arbitration as the same would not have been allowed had the two Indian parties had agreed to resolve their disputes through domestic Arbitration, then for another instance Indian courts don't allow disputes related to trusts to be resolved through Arbitration however post this judgment the Indian parties may choose any such foreign platform which allows such Arbitration.

This judgment might have ensured parties freedom or autonomy and may also promote many foreign bodies, corporations to incorporate in India and seek a foreign seat of Dispute resolution as it portrays India's image as an Arbitration friendly country but the same time this judgment has also many emerging challenges and issues which needs to be resolved or else there would be a severe breakdown of law further this judgment also pushes India's effort of making itself an International arbitration hub a step back.