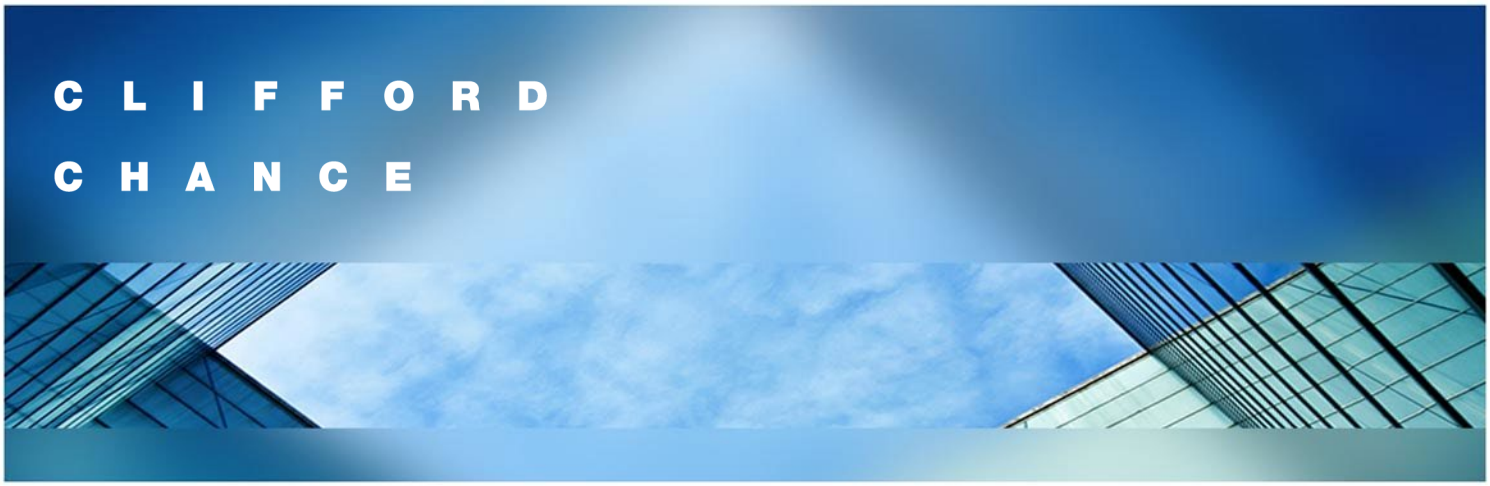

INDIAN SUPREME COURT RULES THAT TWO INDIAN COMPANIES CAN CHOOSE A FOREIGN SEAT OF ARBITRATION

The Indian Supreme Court in *PASL Wind Solutions Private Limited v GE Power Conversion India Private Limited* (Civil Appeal No. 1647 of 2021) has held that two companies incorporated in India can validly designate a foreign seat for arbitration of their disputes.

Previously, there had been inconsistent judicial precedent in this area, and lingering concerns that an offshore arbitration award made pursuant to an arbitration agreement between exclusively Indian parties could be susceptible to challenge in the Indian courts. This decision should put an end to such concerns and may provide renewed incentive for Indian parties (including local Indian subsidiaries of foreign investors) to opt for foreign-seated arbitration in their dispute resolution clauses.

Key issues

- The Indian Supreme Court has ruled that Indian companies can choose a foreign seat of arbitration.
- Awards made between domestic Indian parties at an offshore seat are regarded as "foreign awards" and enforceable in India under the New York Convention.
- Foreign investors which are entering into contracts with Indian parties via a local Indian subsidiary may safely opt for foreign-seated arbitration.
- The Court also ruled that interim relief in the Indian courts is available in respect of foreign-seated arbitration involving domestic Indian parties.

BACKGROUND

The disputing parties were PASL Wind Solutions (PASL), a company incorporated in India with its registered office in Ahmedabad and GE Power Conversion India (GE Power), a company in the GE group incorporated in India with its registered office in Chennai. A dispute arose in relation to the supply of converters under certain purchase orders and the parties entered into a settlement agreement which provided for arbitration in Zurich in accordance with the ICC Arbitration Rules.

When a dispute arose under the settlement agreement, PASL commenced ICC arbitration proceedings (in which Indian law was agreed to govern the merits of the dispute). At this point, GE Power challenged the jurisdiction of the tribunal, contending that two Indian parties could not have validly chosen a foreign seat of arbitration. The sole arbitrator rejected the challenge, finding that there was no impediment to two Indian parties agreeing to arbitrate outside India. The seat was determined to be Zurich and hearings were to be conducted in Mumbai.

The tribunal eventually dismissed PASL's claims in the arbitration and issued an award ordering PASL to pay costs to GE Power. GE Power applied to

enforce the costs award in the High Court of Gujarat and also applied for interim relief under section 9 of the Indian Arbitration and Conciliation Act 1996 (the Arbitration Act) in terms of security for the award amount. PASL contested enforcement of the award on the basis that the seat of the arbitration was in fact in Mumbai (thus taking essentially the opposite position to that which it had advocated in the arbitration). The Gujurat High Court allowed enforcement of the award but denied the section 9 application on the basis that Indian parties who had chosen a foreign seat were not entitled to interim relief from the Indian courts. The matter was appealed to the Supreme Court.

ARGUMENTS BEFORE THE INDIAN SUPREME COURT

The key issue before the Supreme Court was whether Indian law permits two domestic Indian parties to elect for their disputes to be determined by arbitration in a foreign seat.

PASL argued that the legislative framework under the Arbitration Act precludes two Indian parties from designating a foreign seat of arbitration. In particular, debate focussed on section 44 under Part II of the Arbitration Act, which provides that "*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* (…)". PASL contended that a "foreign award" under Part II of the Arbitration Act would necessarily arise from an "international commercial arbitration" as defined under section 2(1)(f) of the Arbitration Act (under Part I), pursuant to which at least one of the parties must be a non-Indian national or resident or incorporated outside India. The present award, involving two Indian companies, would therefore not qualify as a foreign award under section 44.

GE Power contended that Parts I and II of the Arbitration Act are mutually exclusive, and as such there can be no basis to import the definition of "international commercial arbitration" from Part I of the Arbitration Act into section 44. On the contrary, the nationality, domicile or residence of parties is irrelevant for the purposes of section 44. This is consistent with the ethos of the New York Convention, under which parties from the same State are entitled to agree to have their disputes resolved in a third State and for the resulting award to be enforceable as a foreign award under the Convention.

PASL also argued that two Indian parties designating a foreign seat of arbitration would be contrary to sections 23 and 28 of the Indian Contract Act 1872 (the Contract Act) (read with sections 28(1)(a) and 34(2A) of the Arbitration Act), since by designating a foreign seat, two Indian parties could effectively opt out of Indian substantive law, which would be contrary to Indian public policy. GE Power highlighted that neither section 23 nor section 28 of the Contract Act proscribe the choice of a foreign seat in arbitration, and that contraventions of "public policy" under section 23 must be restricted to clear and incontestable cases of public harm.

THE FOREIGN SEAT ISSUE

At the outset, the Supreme Court found that the parties had clearly designated Zurich as the seat of arbitration.

The Court restated that Part I and Part II of the Arbitration Act must be regarded as mutually exclusive (following the landmark decision in *Bharat Alumnium Co v Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552): Part I being a "complete code" in relation to India-seated arbitration with no application to foreign-seated arbitrations and Part II being concerned solely with the enforcement of foreign awards. PASL's arguments on statutory interpretation which attempted to "breach the wall" between Part I and Part II of the Arbitration Act were therefore held to be ill-founded. Consequently, the Court did not see any basis to import the Part I definition of "international commercial arbitration" or impose any nationality requirement in relation to section 44 of the Arbitration Act. It noted that for an award to be designated as a "foreign award" under section 44, there are four simple elements: (i) the dispute must be considered to be a commercial dispute under Indian law, (ii) the award must be made pursuant to an agreement in writing for arbitration; (iii) the dispute must arise between "persons" (*without* regard to nationality, residence or domicile; and (iv) the arbitration must be conducted in a country which is a signatory to the New York Convention. All four elements were clearly satisfied in this case.

The Court also observed that unlike other certain jurisdictions (such as the US), which specify that some kind of foreign connection is required for an award to fall within the scope of the New York Convention, no such caveat is contained in the Arbitration Act.

As for sections 23 and 28 of the Contract Act, the Court agreed that there is nothing in those provisions which prohibits two Indian parties from referring their disputes to arbitration outside India, and found PASL's arguments based on section 28(1)(a) and 34(2A) of the Arbitration Act to be contrived. As to PASL's argument that Indian parties could utilise the choice of a foreign seat to circumvent substantive rules of Indian law, the Court considered that this issue would not arise in most cases by virtue of the tribunal applying the substantive law of India in accordance with the conflict of law rules at the seat of arbitration. Even otherwise, an aggrieved party would still have an opportunity to challenge enforcement of a foreign award under s48(2)(b) of the Arbitration Act and, if the foreign award is contrary to the fundamental policy of Indian law, then it will not be enforced in India.

The Court acknowledged the balancing act between freedom of contract and party autonomy, on the one hand, and clear and undeniable harm to the public on the other. However, the Court found that no clear and undeniable harm can be caused to the public in permitting two Indian nationals to choose a foreign seat of arbitration in circumstances where enforcement of foreign award can still be resisted in India on the grounds contained in section 48 of the Arbitration Act, which include the foreign award being contrary to the public policy of India. In summary, the Court held that nothing stands in the way of party autonomy in designating a seat of arbitration outside India, even if both parties are Indian nationals.

AVAILABILITY OF INTERIM RELIEF

The Gujurat High Court had found that where Indian parties had elected a foreign seat, interim relief under section 9 of the Arbitration Act would not be available on the basis that an arbitration between two Indian parties does not qualify as an "international commercial arbitration" (for the purposes of section 2(2) of the Arbitration Act).

The Supreme Court, however, took a more practically-minded reading of section 2(2) and found that the meaning of "international commercial arbitration" in that provision is not limited by the definition in section 2(1)(f) of the Arbitration Act but should be construed as meaning an arbitration which takes places between two parties in a New York Convention member State outside India.

As such, the Court concluded that parties to foreign arbitration proceedings involving exclusively Indian companies are *not* precluded from seeking interim relief in the Indian courts, and set aside the corresponding part of the judgment of the Gujarat High Court.

COMMENT

The Supreme Court decision is to be welcomed as resolving the long-running uncertainty as to whether two Indian parties are permitted to choose a foreign seat of arbitration. While two Indian parties cannot derogate from Indian substantive law (*TDM Infrastructure Pvt. Ltd. v Union of India* (2014) 7 SCC 603), the Court has confirmed that selection of a foreign seat of arbitration is valid. It should therefore no longer be open to aggrieved parties in arbitrations which involve exclusively Indian companies to make jurisdictional challenges or resist enforcement of awards on the basis that the choice of foreign seat was impermissible.

The decision is also likely to have a tangible impact on the negotiation of arbitration agreements in India-related transactions. While India's standing as a seat of arbitration has improved significantly in recent years (following the 2015 and 2019 amendments to the Arbitration Act), there are still various reasons why parties to Indian transactions may prefer an international seat (such as Singapore, Hong Kong, or London) over an Indian seat:

- If recourse to the courts is needed during arbitration proceedings, the court system in the international seats of arbitration is likely to be more efficient than the Indian courts, which are overburdened and well-known for delays;
- When arbitrating outside India, there is (generally speaking) a reduced risk that parties will be dragged into Indian court proceedings ancillary to the arbitration;
- Strictly speaking, the grounds for resisting enforcement of foreign awards should be subject to a narrower scope of review than an award between Indian companies made in India, which may be set aside "*if the Court finds that the award is vitiated by patent illegality appearing on the face of the award*" (under section 34(2A) of the Arbitration Act). There is no available ground to resist enforcement of foreign awards on the basis of "patent illegality" under section 48 of the Arbitration Act.

Further, as the Supreme Court has confirmed in this decision, parties to arbitrations seated outside India (even where all the parties to a dispute are Indian) are still entitled to apply for interim relief before the Indian courts under section 9 of the Arbitration Act.

It is well-known that Indian parties are already frequent users of arbitration seated outside India (for instance in 2020, Indian parties were again the top foreign user at the Singapore International Arbitration Centre (SIAC),

contributing 690 new cases to SIAC's caseload). The Supreme Court's recent decision is only likely to accelerate this trend.

The decision may also change the negotiation dynamic in relation to dispute resolution clauses where a foreign investor is contracting with its Indian counterparty via a domestic Indian subsidiary. Traditionally, investors had agreed to arbitration seated in India in such scenarios, due to an underlying apprehension that the choice of a foreign seat of arbitration may be undermined. Now, foreign investors may have more leverage in pushing for foreign-seated arbitration, bearing in mind that even where local Indian parties choose a foreign seat of arbitration, they may still opt to hold any physical hearings in India as a matter of practical convenience.

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