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Interim measures and enforcement of foreign arbitral award between two Indian parties

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Introduction

On 3 November 2020 a single-judge bench of the High Court of Gujarat determined the scope and applicability of Sections 9 and 47 of the Arbitration and Conciliation Act 1996 in GE Power Conversion India Private Limited v PASL Wind Solutions Private Limited (R/PETN under Arbitration Act 131/2019 with R/PETN under Arbitration Act 134/2019). Importantly, while dealing with the objections raised under Section 48 of the act, the court also delved into the highly debated question of whether two Indian parties can agree to choose a seat of arbitration outside India. This issue is now ripe to be finally decided by the Supreme Court, provided that this matter reaches the apex court.

Facts

Disputes arose between GE Power Conversion India Private Limited and PASL Wind Solutions Private Limited. To resolve the disputes, the parties entered into a settlement agreement dated 23 December 2014. Clause 6 of the settlement agreement stipulated that disputes, controversies and differences would be resolved by arbitration in Zurich, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Clause 6 neither stipulated whether the substantive law of the settlement agreement was Indian law nor excluded this.

Zurich arbitration

On 3 July 2017 PASL issued a request for referral of the disputes to arbitration and in August 2018 the parties agreed to resolution of the disputes by a sole arbitrator, Ian Meakin. The venue of the arbitral proceedings was Mumbai. GE Power challenged the arbitrator's jurisdiction on the ground that since the parties to the settlement agreement were Indian, they could not resort to a foreign-seated arbitration. The arbitrator rejected GE Power's challenge to the jurisdiction and held that as the seat of arbitration was designated as Zurich, Swiss law applied.

In his award, the arbitrator rejected PASL's claim and granted GE Power costs amounting to Rs25,976,330 and $40,000 in legal costs and expenses with accumulated interest in accordance with the Indian Interest Act 1978.

Gujarat High Court decision

GE Power filed an application under Order XXI, Rule 11 of the Code of Civil Procedure 1908 read with Section 47 of the Arbitration and Conciliation Act 1996 for enforcement of the award before the Gujarat High Court. GE Power also filed an application against PASL under Section 9 of the act to secure the amount under the award by depositing this amount in the high court or furnishing adequate security to the court's satisfaction.

The court issued notice with respect to the applications under both Sections 9 and 47 of the act and, in its order dated 25 September 2019, granted ad interim protection to GE Power restraining PASL from transferring, alienating, selling or creating any right with regard to two of its properties in Gujarat.

Parties' arguments

GE Power

GE Power argued that the award was a 'foreign award' within the meaning of Section 44 of the Arbitration and Conciliation Act 1996. Under the scope of Section 48 of the act, GE Power relied on various judgments, including Vijay Karia (2020 SCC OnLine Supreme Court 177), and argued, among other things, that a challenge under Section 48 of the act does not entail a review on the merits of the award. Further, there was no scope for setting aside the award under Section 34 of the act since Part 1 of the act did not apply following the Supreme Court's decision in BALCO ((2012) 9 SCC 552) and the 2015 amendment to the Arbitration and Conciliation Act 1996.

The public policy defence under Section 48(2)(b) of the act was unavailable in this case as two Indian parties choosing a foreign seat of arbitration does not fall foul of any provision under Indian law. Reliance in this regard was placed on the judgments of the Supreme Court in Atlas Exports Industries ((1999) 7 SCC 61), the Delhi High Court in GMR Energy Ltd (2017 SCC OnLine (Del) 11625) and the High Court of Madhya Pradesh in Sasan Power Limited (2015 SCC OnLine MP 7417).

GE Power also argued that the petitions under both Sections 9 and 47 of the Arbitration and Conciliation Act 1996 were maintainable in light of the judgments in Trammo DMCC (2017 SCC OnLine Bom 8676) and Ecohidrotechnika LLC ((2010) SCC OnLine (Bom) 277).

PASL

The filing of the petition under Section 9 of the Arbitration and Conciliation Act 1996 by GE Power was itself an admission of the fact that the arbitration in question was not an international commercial arbitration and that the award was a domestic award. Therefore, the petition seeking enforcement under Part II of the act was not maintainable.

In any event, enforcement was prohibited by Section 48(2)(b) of the act as two Indian parties cannot designate a seat outside India and doing so would be against the public policy of India. It would also violate Section 23 of the Contract Act 1872. PASL relied on the Supreme Court's judgments in Shri Lacchumal ((1971) 1 SCC 619) and Murlidhar Aggarwal ((1974) 2 SCC 472) for the above arguments.

Decision

The court allowed the petition filed under Section 47 of the Arbitration and Conciliation Act 1996 seeking enforcement of the arbitral award and dismissed the petition under Section 9 of the act seeking interim relief. The court's reasoning was as follows.

In declaring that the juridical seat of arbitration was Zurich – a territory declared by the central government to which the New York Convention applies – and that all of the other components of Section 44 of the Arbitration and Conciliation Act 1996 had been satisfied, the court held the award to be a foreign award.

The court also held that the Supreme Court in Vijay Karia (supra) had emphasised the narrow scope of Section 48 of the Arbitration and Conciliation Act 1996 and that even if some grounds under Section 48 are met, the courts have the discretion to enforce an award. The court held that grounds such as 'perverse interpretation of an agreement', 'non-consideration of critical evidence' and 'scrutiny of contemporaneous evidence was selective' are not available under Section 48 of the Arbitration and Conciliation Act 1996.

The court held that parties are free to have their disputes resolved by a foreign court creating exclusive or non-exclusive jurisdiction. The court affirmed the well-settled principle that the explanation to Section 28 of the Contract Act 1872 excludes arbitration from the ambit of Section 28(a) of such act and that, per se, the Arbitration and Conciliation Act 1996 does not prohibit two Indian parties from choosing a foreign seat and vesting exclusive jurisdiction to adjudicate their dispute. The court observed that designating a foreign seat would not amount to conflict with the standard of public policy of India set out in the Supreme Court's judgments in Renusagar (AIR 1994 SC 860) and Glencore (2017 (4) ArbLR 228 (Delhi)).

The court held that an interpretation of the proviso to Section 2(2) of the Arbitration and Conciliation Act 1996 leads only to a conclusion that a petition under Section 9 is maintainable in case of an international commercial arbitration. The expression "even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act" in the proviso also applies only in cases of international commercial arbitration. The court determined that it cannot read anything into a statutory provision which is plain and unambiguous and that the first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature.

Comment

The Gujarat High Court has reiterated the position of the Delhi High Court in GMR Infra (supra) that two Indian parties can choose a foreign-seated arbitration and seek enforcement of the award in India. Although a conclusive decision of the Supreme

Court on this issue has yet to be made, its judgment in TDM Infrastructure (P) Ltd. v UE Development India (P) Ltd ((2008) 14 SCC 271), despite not answering the question directly, is often invoked when the courts deal with this issue.

This judgment also clarifies the position on maintainability of a petition under Section 9 of the Arbitration and Conciliation Act 1996 where Part 1 of the act does not apply (since the seat was outside India) and the arbitral proceeding were not an 'international commercial arbitration' within the meaning of Section 2 of the act.

This judgment is a welcome step in the development of Indian arbitration law as it eases the way for enforcement of a foreign award where the parties have consciously chosen a seat outside India.

The judgment may be appealed before the Division Bench of the Gujarat High Court and the Supreme Court.

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