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Case Comment: PASL Wind vs GE Power: Upholding Indian parties autonomy to choose foreign arbitration seat

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INTRODUCTION

Citation - PASL Wind Solutions v. GE Power Conversion India, Civil Appeal No. 1647 of 2021

Decided on – April 13, 2021

Bench – Rohinton Fali Nariman (J), B.R. Gavai (J), Hrishikesh Roy(J)

Appellant – "PASL Wind Solutions Pvt Ltd"

Respondent – "GE Power Conversion India Pvt Ltd"

The Supreme Court of India has recently clarified in the case "PASL Wind Solutions Private Ltd v GE Power Conversion India Private Limited"[1] ('PASL v. GE') that two Indian parties have the option of selecting a foreign seat of arbitration and can seek interim relief. It also gives much-needed clarification on this issue to companies operating in India, especially

[1] *PASL Wind Solutions v GE Power Conversion India* Civil Appeal No 1647/2021

international companies with local subsidiaries. Through this article, we'll be comprehensively analysing the court's position regarding this issue.

FACTS

A settlement agreement was signed between two Indian companies, "PASL Wind Solutions Pvt Ltd" ("PASL") and "GE Power Conversion India Pvt Ltd" ("GE India"). Both the Indian companies are registered under the Companies Act, 1956, and have offices in Ahmedabad, Gujarat, and Chennai, Tamil Nadu, respectively. The settlement agreement's arbitration clause stipulated that the arbitration was seated in Zurich and would be governed by the ICC Rules.[2]

PASL filed arbitration proceedings against GE India in 2017 as a result of issues emerging from the settlement agreement. A preliminary application was filled by GE during the proceedings, questioning the Arbitrator's jurisdiction on basis that "two Indian parties cannot choose a foreign seat of arbitration"[3]. The arbiter, however, dismissed the claim and ruled that the arbitration would be seated in Zurich, Switzerland, with all proceedings taking place in Mumbai. PASL objected to it. GE won the arbitral award passed in 2019.[4]

PASL failure to comply with the award prompted GE to file an enforcement action in the High Court of Gujarat under "Sections 47 and 49 of the Arbitration and Conciliation Act" ("A&C Act"). PASL opposed the execution of the arbitral judgment at this point, claiming that Mumbai was the seat of arbitration, where all of the arbitral hearings took place. PASL claimed that the award doesn't qualify as a "foreign award", hence couldn't be enforced under Section 47[5] and 49[6]. PASL's claim was dismissed by the Gujarat High Court, which affirmed the arbitral award's enforcement. The High Court observed that:

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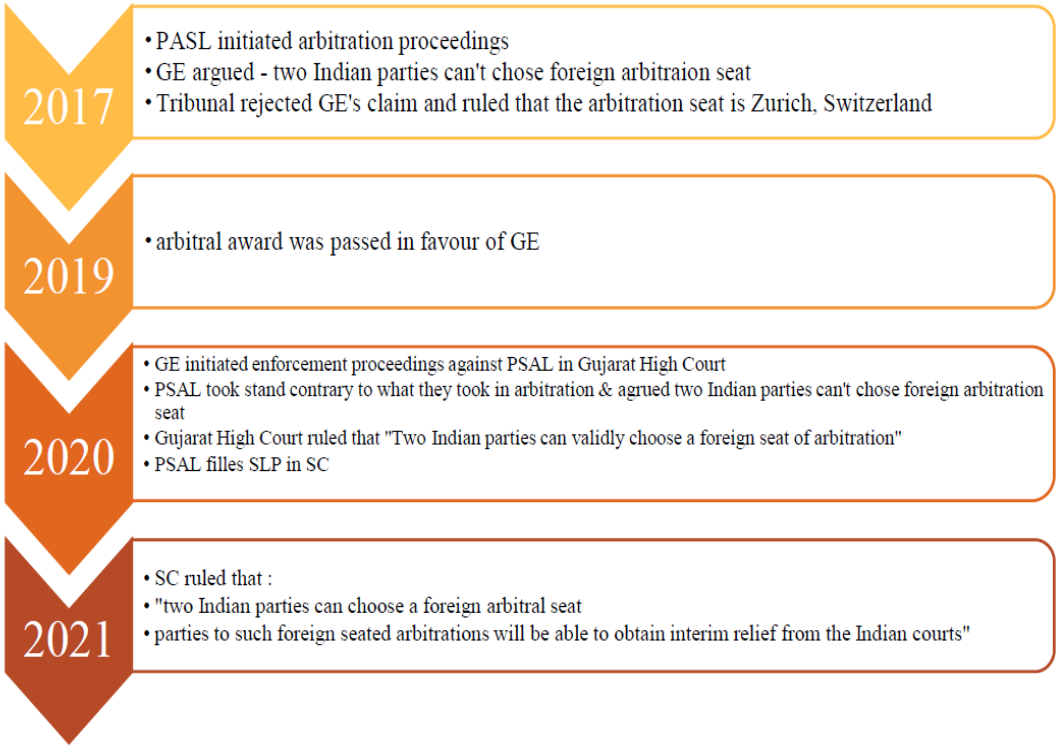
[2] *Ibid*
[3] Paul S, 'PASL Wind V. GE Power: A Step Towards Establishing a Pro-Arbitration Regime in India' (*Koinos*, 2021) <https://indianarbitrationlaw.com/2021/05/15/pasl-wind-v-ge-power-a-step-towards-establishing-a-pro-arbitration-regime-in-india/> accessed 17 September 2021
[4] *Ibid*
[5] Arbitration and Conciliation Act 1996, s 47
[6] Arbitration and Conciliation Act 1996, s 49

- Nationality of parties and other domestic considerations is irrelevant in ascertaining the fact whether an award is a "foreign award"
- Two Indian parties can choose a foreign arbitration seat.
- The request by GE India for interim relief was denied because the remedies available under Section 9 are limited to "international commercial arbitration" and "one of the parties must be a foreign entity" to qualify as ICA.

Here's a brief timeline of the proceedings of the case;



ISSUE

A Special Leave Petition was filed by PASL at the Supreme Court, pleading that the Gujarat High Court's decision must be overturned.

The issue was whether:

- Two Indian parties have the option of choosing a foreign arbitration seat?

- An award rendered by such a seat abroad subject to the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958"[7] ["New York Convention"], can be referred to as a "foreign award" under Part II of the Arbitration Act, 1996, and can be enforced as such?
- in such arbitration interim relief could be awarded?
- by allowing two Indian parties to choose a foreign arbitration seat leads to violation of Indian public policy under "Section 23"[8] of the Contract Act?

INDIAN RULES

- **Relevant sections of The Arbitration and Conciliation Act, 1996 -** Section 2(1)(f),[9] Section 2(2),[10] Section 9,[11] Section 28(1)(a),[12] Section 34(2A),[13] Section 44,[14] Section 47, section 48,[15] Section 49.
- **Relevant sections of The Indian Contract Act' 1872 -** Section 23 and Section 28[16].

KEY ARGUMENTS AND SUPREME COURT'S JUDGEMENT

1. **Application of the closest connection test to determine seat and party autonomy:**
   a. **PASL's Argument**: The seat of arbitration is Mumbai rather than Zurich. PASL argued that Section 47 (evidence for the enforcement of a foreign award) and Section 49 (enforcement of a foreign award) of the Act is only applicable to "foreign awards," and hence by applying the closest connection test, the seat of arbitration is Mumbai rather than Zurich.
   b. **SC's Observation:** The Supreme Court dismissed the argument stating that the closest connection test is only applicable when neither the parties nor the tribunal has selected

[7] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
[8] Indian Contract Act 1872, s 23
[9] Arbitration and Conciliation Act 1996, s 2(1)(f)
[10] Arbitration and Conciliation Act 1996, s 2(2)
[11] Arbitration and Conciliation Act 1996, s 9
[12] Arbitration and Conciliation Act 1996, s 28(1)(a)
[13] Arbitration and Conciliation Act 1996, s 34(2A)
[14] Arbitration and Conciliation Act 1996, s 44
[15] Arbitration and Conciliation Act 1996, s 48
[16] Indian Contract Act 1872, s 28

an arbitral seat. The arbitration agreement made it clear that the seat would be Zurich in this case. Zurich had also been selected as the seat by the arbitration tribunal. As a result, the Supreme Court decided that the closest connection test will not be applicable in this case to identify the arbitral seat.

While upholding the parties' right to choose a foreign seat of arbitration, the Supreme Court held that "the principle of party autonomy is virtually the backbone of arbitrations" in "**Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd[17]"**. In the case of "**Union of India v. U.P. State Bridge Corpn**. **Ltd,[18]"** the Supreme Court observed that party autonomy in procedure selection is one of the "foundational pillars of arbitration"[19].

2. There is no overlapping between Part I and II, and they are "mutually exclusive"

a. **PASL's Argument:** Section 2(1)(f) defines "international commercial arbitration" and an award made in ICA can be regarded as a "foreign award" and is enforceable under Part II of the A&C Act.

PASL contended that the judgement was not enforceable as a "foreign award" under sections 47 and 49 of part II as both the parties in the proceedings were Indian hence didn't qualify as "international commercial arbitration" as defined in "Section 2(1)(f)" of the Act.[20] The term "unless the context otherwise requires" in Section 44 (definition of foreign award), as per PASL, allows the definition of "international commercial arbitration" from Section 2(1)(f) to be transferred to Section 44. As previously stated, the definition under Section 2(1)(f) of "international commercial arbitration" needs that "at least one of the parties must have some foreign nexus" in order for a proceeding to be regarded as an "international commercial arbitration."

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[17] *Centrotrade Minerals & Metal Inc v Hindustan Copper Ltd* (2017) 2 SCC 228 (India)
[18] *Union of India v UP State Bridge Corp Ltd* (2015) 2 SCC 52 (India)
[19] Kazi S & Issac G, 'Supreme Court Approves Foreign-Seated Arbitrations Between Indian Parties And The Right To Seek Interim Relief Before Indian Courts - Litigation, Mediation & Arbitration - India' (*Mondaq.com*, 2021) <https://www.mondaq.com/india/arbitration-dispute-resolution/1097702/supreme-court-approves-foreign-seated-arbitrations-between-indian-parties-and-the-right-to-seek-interim-relief-before-indian-courts> accessed 18 September 2021
[20] *Ibid*

b. **SC's Observation:** PASL's arguments were dismissed by the Supreme Court, including its effort to import the definition of "international commercial arbitration" listed in "Section 2(1)(f)" of Part I of the Act into the definition of "foreign awards" found in Section 44 of Part II of the Act. The Supreme Court stated in "**Bharat Aluminium Co v. Kaiser Aluminium Technical Services**[21]" that "Part I of the Act is a comprehensive code that governs arbitrations seated in India".

"Section 2(1)(f)" of the A&C Act specifies an "international commercial arbitration" in respect to the parties. For example, in order for arbitration between persons to qualify as an ICA, one of the parties must be a "non-resident". This, however, must be read in conjunction with section 2(2) of the A&C Act, which restricts the applicability of Part I to arbitrations seated in India.

Part II instead focuses on the "enforcement of foreign awards". As a result, inapplicability there's no overlapping between the two parts and are "mutually exclusive," as the Supreme Court put it. The Supreme Court held, based on this interpretation of the Act, that the definition of "international commercial arbitration" in "Section 2(1)(f)" of Part I of the Act cannot be transferred to "Section 44" (defines foreign award) since that term is "party-centric," whereas the same term in Part II of the Act is intended to be "place-centric". To sum up, the fact that parties choose a foreign seat of arbitration is the sole element that matters while interpreting Part II of the Act, irrespective of the fact whether the parties have any foreign link or not.[22]

Court further highlighted that an award must meet four criteria in order to be classified as a "foreign award" under Section 44:

- "Dispute must be a commercial dispute" as defined by Indian law;
- the award must be issued in accordance with a written arbitration agreement; and
- the dispute must be between "persons" ("without regard to their nationality, residence, or domicile"),

[21] *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552 (India)
[22] *Ibid*

- The arbitration must take place in a country that is a "New York Convention" signatory.[23]

The arbitral ruling, in this case, met all four requirements, making it a "foreign award" under Part II of the Act, according to Court.

3. Difference between "international commercial arbitration" and "foreign award"

The Court made it clear that an ICA and a foreign award cannot be used interchangeably and there are major differences. A foreign award is one made in a state different than the one where enforcement is sought. The country, citizenship, and residency of the parties have no bearing on whether or not an award is a foreign award. However, the parties' nationality, citizenship, and residency would be important in determining whether or not an award is an ICA. The majority of the contracting States of NYC regard the "seat" selected by the parties or the tribunal as the place where the award is issued. As a result, the notion of a foreign award is more "seat-oriented" than "party-oriented."

4. The Indian Contract Act and Public Policy

a. PASL's Argument: Sections 23 and 28 of the Indian Contract Act, 1872, along with Sections 28(1)(a) and 34(2A) of the Arbitration and Conciliation Act, 1996, prohibit two Indian parties from choosing a foreign arbitral seat.

PASL further argued that allowing two Indian parties to select a foreign arbitral seat under Sections 23 and 28 of the Contract Act, read with Sections 28(1)(a) and 34(2A) of the A & C Act, would be contrary to Indian public policy.

In general terms, Section 23 of the Contract Act states that an agreement's object is unlawful if it is, amid other things, contrary to the public policy of India. A contract that prevents a party from enforcing its contractual rights in Indian courts is invalid, according to Section 28 of the Contract Act. Notably, arbitration agreements are explicitly excluded from Section 28's applicability.

b. SC's Observation: The Court confirmed that "Section 28" provides "an express carve-out for arbitration agreements"[24], based on the text of the section. As a result, the

[23] *Ibid*

> provision has no bearing on the terms of arbitration agreements, including the choice of arbitral seat. The Supreme Court found that there was nothing in India's public policy that restricted Indian parties' party autonomy in selecting a foreign arbitral seat under Section 23 of the Contract Act. The Supreme Court emphasised that contractual freedom must be balanced against "clear and undeniable harm to the public", and that permitting Indian parties to pick a foreign arbitral seat posed no such risk.[25]

PASL further contended that a domestic Indian arbitration could only be resolved in line with Indian law under Section 28(1)(a) of the A & C Act. Section 28(1)(a) of the A & C Act states that – "(1) Where the place of arbitration is situated in India, — (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"[26]

It contended, in particular, because contracting out of the substantive laws, in this case, "arbitration laws of India", would be averse to the public policy of India and the Act's objective. The Supreme Court disagreed, as the interpretation of "Section 28(1)(a)" of the Act holds that applicability of "Indian substantive law" is only mandatory in domestic arbitrations seated in India. This does not prohibit two Indian parties from selecting a foreign seat of arbitration.

However, in "**TDM Infrastructure (P) Ltd. v. UE Development (India)(P) Ltd",[27]** the Supreme Court decided that arbitration involving Indian parties cannot be classified as "international commercial arbitrations". In "**State of W.B. v. Associated Contractors",[28]** the Supreme court held that TDM Infrastructure since it was issued by a single judge could not be considered a binding precedent. In addition, the Madhya Pradesh High Court decided in "**Sasan Power Limited v. North America Coal Corporation India Private Limited",[29]** that two Indian parties

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[24] Steven P Finizio, 'PASL Wind Solutions Pvt Ltd V. GE Power Conversion India Pvt Ltd: The Indian Supreme Court Clarifies That Two Indian Parties Can Choose a Foreign Arbitral Seat' (*Wilmerhale.com*, 2021) <https://www.wilmerhale.com/en/insights/blogs/International-Arbitration-Legal-Developments/20210525-pasl-wind-solutions-pvt-ltd-v-ge-power-conversion-india-pvt-ltd> accessed 23 September 2021

[25] *Ibid*

[26] Arbitration and Conciliation Act 1996, s 28

[27] *TDM Infrastructure v UE Development India Pvt Ltd* (2008) 14 SCC 271

[28] *State of West Bengal v Associated Contractors* (2015) 1 SCC 32

[29] *Sasan Power Ltd v North American Coal Corp (India) (P) Ltd* (2016) 10 SCC 813

can choose a foreign arbitration seat with English Law governing the agreement. In "**Atlas Export Industries v Kotak & Company"**[30], the Supreme Court stated that two Indian parties entering into a foreign arbitration agreement with a would not be prevented to do so.

The Court further stated that parties will have "two bites at the cherry," the first being to challenge the award under "Swiss law" in Zurich, and the second being to resist the award's execution on the grounds set out in Section 48 of the A&C Act. However, the Court noted that if two Indian parties choose a foreign seat on the circumstances of a case in order to evade public policy of India, the execution of the foreign award issued may be challenged under the A&C Act's public policy exemption given under "Section 48(2)(b)"[31] of the A&C act.

5. **Validity of Interim Relief:** The Court upheld the validity of GE India's plea for interim relief which the Gujarat High Court refused to grant. Only arbitrations under Part I of the Act and foreign seated arbitrations that qualify as "international commercial arbitrations" are covered under Section 9 of the A&C Act. Given the Court's conclusion that the definition of "international commercial arbitration" under Section 2(1)(f) of the Act is not applicable to foreign seated arbitrations and the fact that the parties lacked a foreign nexus as needed by Section 2(1)[32] is irrelevant. (f). The Supreme Court held that "a foreign seated arbitration between two Indian parties acquired the character of being international simply by virtue of the choice of a foreign seat"[33].

OUTCOME OF THE DECISION

The ruling offers clarification on Indian parties' choice of foreign seats. The ruling highlights the importance of "party autonomy", describing it as the "brooding and guiding spirit of arbitration."[34]

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[30] *Atlas Exports Industries v Kotak & Company* (1999) 7 SCC 61
[31] Arbitration and Conciliation Act 1996, s 48(2)(b)
[32] Arbitration and Conciliation Act 1996, s 2(1)
[33] ILW Team, 'Can Two Companies Incorporated In India Choose Arbitration Forum Outside India - Indian Law Watch' (*Indian Law Watch*, 2021) <https://indianlawwatch.com/practice/can-two-companies-incorporated-in-india-choose-arbitration-forum-outside-india/> accessed 20 September 2021
[34] *Ibid*

By permitting a "non-ICA arbitration" to take place abroad, the court has upheld the notion that two Indian parties can apply any law/legal principles to their dispute and entirely exclude Indian Courts' jurisdiction by an agreement to that effect. Furthermore, when selecting a foreign arbitral seat the foreign companies and their Indian subsidiaries can be certain that the Indian courts would continue to be available and ready to issue interim relief when needed. This is significant since the parties mostly have assets situated in India because they are both Indian domiciled.[35]

CONCLUSION

The Supreme Court's decision is a positive step toward making India an arbitration-friendly nation since it respects the fundamental principles of party autonomy and contractual freedom, which are at the heart of arbitration. The Supreme Court has previously upheld party autonomy with respect to various aspects of the arbitration, as evidenced by the judgments discussed in the preceding paragraphs. However, this is the first time the Supreme Court has been asked to decide whether party autonomy under the Arbitration Act is open and free enough to allow two Indian parties to choose a foreign seat for arbitration. This decision will have far-reaching implications because there are many cases before the Supreme Court and the High Court that deal with similar issues. The Supreme Court's decision might be seen as a significant step toward India's goal of becoming an international arbitration centre.

[35] *Ibid*