Indian parties can arbitrate in a foreign seat. The resultant award would be a foreign award enforceable under Part II of the Arbitration and Conciliation Act, 1996 (Gujarat High Court)

Update by Editor

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GE Power Conversion India Pvt. Ltd. v. PASL Wind Solutions Pvt. Ltd.

Court: Gujarat High Court | **Case Number**: Petition under Arbitration Act No. 131 and 134 of 2019 | **Citation**: MANU/GJ/1345/2020 | **Bench**: Viren Vaishnav J | **Date**: 03 November 2020

A. The ruling summarised

The definition of a "foreign award" is set out under Section 44 ACA. To qualify, one of the conditions is that the tribunal must have made the award in a territory notified by the Central Government as a New York Convention country. It is now widely accepted that an award is "made" at the arbitral seat.

Can two Indian parties choose a foreign arbitral seat? Whether the resulting award would be a "foreign award" enforceable under Section 48 ACA? In this case, enforcement of such an award was resisted on the ground that it did not qualify as a "foreign award" because Indian parties could not arbitrate in a foreign seat. A single-judge bench of the Gujarat High Court –

(a) determined that the arbitral seat was indeed at Zurich (as the tribunal had ruled)

(b) concluded that to qualify as a "foreign award", the nationality of the parties was irrelevant

(c) and, therefore, ruled that the award was a "foreign award"

(d) found that choice of a foreign seat was not contrary to the public policy of India

(e) further found that none of the grounds to resist enforcement applied in the case

(f) and, therefore, allowed its enforcement

B. The background

B1. The contract and the dispute

PASL and GE Power, both Indian companies, had a contract for the sale of some pieces of equipment (converters) relating to wind turbines. A dispute arose, and the parties entered into a settlement agreement, which too had a dispute resolution clause. It provided for "arbitration in Zurich" under the ICC Rules. Indian law governed the main contract.

Some disputes arose again, and PASL initiated arbitration claiming breach by GE Power of the settlement agreement.

B2. The arbitration proceedings: Parties' common ground that Zurich was the arbitral seat, GE's challenge to the tribunal's jurisdiction claiming two Indian parties cannot choose a foreign seat

Before the tribunal, GE Power's admitted position was that the seat of the arbitration was Zurich. It challenged the tribunal's jurisdiction claiming that two Indian parties cannot choose a foreign seat. The tribunal rejected that challenge.

B3. The arbitration proceedings: Mumbai selected as the venue while Zurich remained the seat

Mr Ian Mekin, the sole arbitrator, fixed the venue for the hearing at Mumbai while emphasising that "the seat of the arbitration, of course, remains Zurich." He emphasised it through the hearing. For instance, one day, he noted, "[L]adies and gentlemen, welcome to Mumbai. In fact, we are in Zurich. The seat of the arbitration is Zurich, so the Swiss Private International Law statute applies with regards to procedural law. But pursuant to the ICC Rules, we are, for convenience purposes, sitting in Mumbai India."

Later, on another day of the hearing, he noted, "thank you for coming to testify. We are currently sitting physically in Mumbai, but this arbitration is actually taking place in Zurich Switzerland because that's the seat of the arbitration."

B4. The claimant PASL lost. GE was awarded legal costs

PAS, the claimant, lost in the arbitration. The tribunal, therefore, awarded GE power legal costs of approximately INR 2.6 crores plus USD 40,000 plus interest.

B5. GE power's petition to enforce and secure the amount

GE Power filed two petitions: a petition under Section 48 ACA (and other provisions of Part II) to enforce the award, and a petition under Section 9 ACA to secure the amount pending enforcement.

C. The court's decision

PASL's objections to enforcement can be classified under two broad headings: (i) the award was not a foreign award within the meaning of Section 48 ACA; and (ii) even if the award was foreign, it could not be enforced since the grounds to refuse enforcement were attracted.

C1. On the question, if the award was a foreign award

Biren Vaishnav J rejected the argument that the award was not a foreign award because the parties had chosen a foreign seat. His reasoning was that: -

(a) Section 44 ACA was the only provision with reference to which one should determine the question ("Section 44 can be held to be the sole repository for determining an award to be a foreign award").

(b) The nationality of the parties has no relevance.

(c) The determination is based (if other conditions are met) solely on the question— what is the seat of arbitration?

Then, Biren Vaishnav J considered the (alternative) argument that the arbitral seat was Mumbai. He rejected that argument and affirmed that the seat was at Zurich on the following reasoning: -

(a) He referred to the arbitration clause ("…finally resolved by Arbitration in Zurich …"). He said, "as clear as the plain reading of the above clause would reveal, the express designation of the seat of arbitration, which even if it were to be inferred from clause 6.2, is that the seat/venue of arbitration shall be Zurich."

(b) He said, "this, in addition to the fact that there is no other significant indicia to the contrary."

(c) Given the law laid down in *BGS SGS Soma JV NHPC Ltd.*, (2020) 4 SCC 234, "the inexorable conclusion is that the seat of the arbitration is Zurich" (read our Update on BGS Soma here).

(d) Vaishnav J then said that though no further enquiry was necessary, some "aspects deserve to be exploited to determine the express intentions of the parties … with respect to its seat …". He then referred to the arbitrator's preliminary ruling and his repeated emphasis as to where the seat was (B3 above).

C2. On the question of enforceability of the award

Vaishnav J referred to the law on enforcement of a foreign award and said that "the only argument admissible" among those raised was the public policy defence.

He then addressed the argument that choosing foreign seat was inconsistent with Section 28 of the Indian Contract Act, 1872 ("ICA")[1] and hit by Section 23 of that enactment.[2]

The argument based on Section 28 ICA was rejected, saying that the "disability provided for under Section 28 (of ICA) would exclude from its ambit a reference to arbitration." Further, he noted, parties can by agreement confer jurisdiction on a foreign court to which the Code of Civil Procedure does not apply.

He also added that Section 28 ACA does not *per se* prohibit Indian parties from designating a foreign court and vesting in it exclusive jurisdiction to supervise arbitration proceedings.

C3. On the question of maintainability of a petition under Section 9 ACA

The court rejected the Section 9 ACA petition concluding that the remedy is available in a foreign seated arbitration only for an "international commercial arbitration" as defined in Section 2 (f) ACA. Since both parties here were Indian, this matter did not fall under that definition.

[1] The argument was that choice of foreign seat was in restraint of legal proceedings because the legal recourse otherwise available would be absent. See para 18.2 read with 7.8-7.10 (Gujarat HC's website version).
[2] Vaishnav J had noted other arguments advanced by PASL but did not consider them under this heading. PASL had also argued that choice of a foreign seat by Indian parties defeated the provisions of the ACA, the Commercial Courts Act, 2015, and was opposed to public policy under Section 23 of the Indian Contract Act. See paras 7.4 onwards (Gujarat HC's website version).