# Supreme Court Approves Foreign-Seated Arbitrations between Indian Parties and the Right to Seek Interim Relief before Indian Courts

The vexed question of whether two Indian parties can validly choose a foreign seat of arbitration under Indian law and the applicability of interim relief, in the event of such a choice, remained a long-standing debate. It is pertinent to note that there was never an express statutory bar on Indian parties' choice to select a foreign seat of arbitration under the Arbitration and Conciliation Act, 1996 (the "**Arbitration Act**"). However, the complex interplay of the party-centric definition of "international commercial arbitration" with certain other provisions of the Arbitration Act, in the context of a fundamental principle of Indian law that no Indian party can exclude the application of Indian law to itself, led to conflicting decisions on this issue. The uncertainty forced Indian parties to actively avoid a foreign seat of arbitration to circumvent a potential challenge to the validity of the arbitration agreement at the time of enforcement of the award.

In a recent judgment, the Supreme Court of India (the "**Supreme Court**"), in *PASL Wind Solutions Private Limited* v. *GE Power Conversion India Private Limited*[1] ("**GE Power**"), has affirmed that two Indian parties can validly select a foreign seat of arbitration and are equally entitled to apply to Indian courts for interim relief under Section 9 of the Arbitration Act. This article briefly discusses the genesis of the debate, including the scheme of the Arbitration Act, and the definition of "international commercial arbitration" under the Arbitration Act vis-à-vis the issue being discussed and the conflicting positions adopted by courts in India. This article also examines the key findings of the Supreme Court's decision in *GE Power*.

## SCHEME OF THE ARBITRATION ACT AND DEFINITION OF "INTERNATIONAL COMMERCIAL ARBITRATION"

The Arbitration Act, which is modelled on the UNCITRAL Model Law on International Commercial Arbitration, is divided into four parts: Part I applies to an arbitration seated in India whereas Part II applies to arbitrations seated outside India. Part III and Part IV deal with the

[1] *PASL Wind Solutions Private Limited* v. *GE Power Conversion India Private Limited,* 2021 SCC OnLine SC 331.

process of conciliation and other miscellaneous provisions, respectively. Part I and Part II are mutually exclusive of each other.[2]

Under Section 2(f) of the Arbitration Act, which falls under Part I, an "international commercial arbitration" is an arbitration involving at least one foreign party. Under Section 44 of the Act, which falls under Part II, a "foreign arbitral award" is an award resulting from an arbitration seated outside of the territory of India. This means that nationality/residence of parties or place of incorporation is the determinative factor for an arbitration to be classified as international or domestic, whereas the seat of arbitration is the determinative factor that classifies an arbitral award as foreign or domestic. This creates a strange anomaly in that an arbitration between two Indian parties seated outside of India would be a "domestic arbitration" but the resulting award would be a "foreign award".

## FROM *ADDHAR MERCANTILE* TO *GE POWER*: THE CONUNDRUM OF INDIAN PARTIES AND CHOICE OF FOREIGN SEAT

The genesis of the debate lies with the Bombay High Court's decision in *Addhar Mercantile Private Limited* v. *Shree Jagdamba Agrico Exports Pvt Ltd*[3] ("**Addhar Mercantile**"), which answered the question of whether two Indian parties' can choose a foreign seat of arbitration in the negative. In *Addhar Mercantile,* the Bombay High Court was hearing an application for appointment of an arbitrator and request for interim relief under Sections 11(6) and 9 of the Arbitration Act respectively between Indian parties who had agreed to *"arbitration in India or Singapore".* The Bombay High Court, relying on the Supreme Court's decision in *TDM Infrastructure Private Limited* v. *UE Development India Private Limited*[4] ("**TDM Infrastructure**"), observed that the seat of arbitration ought to be India since under Section 28(1)(a) of the Arbitration Act *"Indian nationals should not be permitted to derogate from Indian law"* as such derogation would be against the "*public policy*" of India.

The aforesaid view in *Addhar Mercantile* is criticized for two reasons. *First*, the Bombay High Court did not correctly apply the principle in Section 28(1)(a) of the Arbitration Act. Section 28(1)(a) only regulates parties' choice of the law governing the substance of the dispute i.e. the law governing the rights and obligations of the parties under the contract, and not the seat of arbitration which determines the procedural framework. *Second*, the Bombay High Court relied on *TDM Infrastructure,* a single judge bench decision of the Supreme Court to support its finding overlooking the Supreme Court's division bench's decision in *Atlas Export Industries* v*. Kotak & Co.*[5] ("**Atlas Exports**"), which dealt with the same question as *Addhar Mercantile*. In *Atlas Exports,* the Supreme Court had held that *"merely because the arbitrators [were] situated in a foreign country [it] cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement."*

---

[2] *Bharat Aluminium Co.* v*. Kaiser Aluminium Technical Services Inc*., (2012) 9 SCC 552.

[3] *Addhar Mercantile Private Limited* v. *Shree Jagdamba Agrico Exports Pvt Ltd.,* 2015 SCC OnLine Bom 7752.

[4] *TDM Infrastructure Private Limited* v. *UE Development India Private Limited,* (2008) 14 SCC 271.

[5] *Atlas Export Industries* v*. Kotak & Co.,* (1999) 7 SCC 61.

On the other hand, the Madhya Pradesh High Court in *Sasan Power Limited* v. *North American Coal Corporation India Pvt. Ltd.*[6] ("**Sasan Power**") relied on the Supreme Court's decision in *Atlas Export*, and held that when two Indian parties willingly choose a foreign seat of arbitration, it would neither be against public policy nor barred by Section 28 of the Indian Contract Act, 1872. In such case Part I of the Arbitration Act will not apply. Although the judgment in *Sasan Power* was in appeal before the Supreme Court, the question was left unanswered as the Supreme Court found that the Respondent's foreign parent entity's involvement in the contract satisfied the requirement of foreign element under Section 2(f)(ii) of the Arbitration Act, and therefore categorized the arbitration as an "international commercial arbitration".[7]

The aforesaid view in *Sasan Power* was later adopted by the Delhi High Court in *GMR Energy Limited* v. *Doosan Power Systems India Private Limited*[8] and *Dholi Spintex Pvt. Ltd.* v. *Louis Dreyfus Company Pvt. Ltd.*[9] and followed by the Gujarat High Court in *GE Power Conversion India Private Limited* v. *PASL Wind Solutions Private Limited*[10]*.* However, although the Gujarat High Court approved Indian parties' choice of a foreign seat, it categorically stated that such choice would limit parties' remedy of seeking interim relief before Indian courts under Section 9 of the Arbitration Act. An appeal against this decision was made before the Supreme Court in *GE Power.*

## NO OVERRIDING PUBLIC INTEREST AGAINST INDIAN PARTIES' CHOICE OF FOREIGN-SEATED ARBITRATION

In *GE Power*, a three-judge bench of the Supreme Court observed that the selection of a foreign seat is an expression of the principle of party autonomy, the guiding spirit of arbitration and that the balancing act between freedom of contract and harm to the public must be resolved in favour of freedom of contract, when it found that there is no clear and undeniable harm caused to the public in permitting two Indian nationals to avail of a challenge procedure in a foreign country.

## AVAILABILITY OF INTERIM RELIEFS BEFORE INDIAN COURTS TO INDIAN PARTIES IN A FOREIGN-SEATED ARBITRATION

In *GE Power*, the Supreme Court overturned the Gujarat High Court's finding that a Section 9 application for interim reliefs in a foreign seated arbitration involving two Indian parties would not be maintainable. The Supreme Court observed that in an arbitration between Indian parties seated outside of India, at least one of the parties may have assets in India, and courts in India should be empowered to pass any interim orders against such assets. The Supreme Court observed that in terms of the *proviso* to Section 2(2) of the Arbitration Act, the remedy

[6] *Sasan Power Ltd.* v. *North American Coal Corporation India Pvt. Ltd.,* 2015 SCC OnLine MP 7417.

[7] *Sasan Power Ltd.* v. *North America Coal Corporation India Pvt. Ltd*., (2016) 10 SCC 813.

[8] *GMR Energy Limited* v. *Doosan Power Systems India Private Limited,* 2017 SCC OnLine Del 11625.

[9] *Dholi Spintex Pvt. Ltd.* v. *Louis Dreyfus Company Pvt. Ltd.,* 2020 SCC OnLine Del 1476.

[10] *GE Power Conversion India Private Limited* v. *PASL Wind Solutions Private Limited,* 2020 SCC OnLine Guj 2432.

of seeking interim relief under Section 9 of the Arbitration Act would apply to an arbitral award which is enforceable and recognized under the provisions of Part II of the Arbitration Act. Accordingly, the Supreme Court held that Indian parties to foreign-seated arbitration proceedings are not precluded from seeking interim reliefs from Indian courts.

## CONCLUSION

The parties' selection of a seat of arbitration is an extension of the principle of party autonomy and a strategic choice that is more likely to be centered on considerations like arbitration costs and legal fees, the efficiency of seat courts and their track record in enforcing arbitration agreements and awards, and the quality of legal representation, award among others. The judgment in *GE Power* is a clear reflection of Supreme Court's endorsement of the principle of party autonomy in arbitration and brings Indian arbitration law in line with other leading arbitration jurisdictions like the United Kingdom[11] and Singapore[12]. The decision is equally noteworthy for its finding on the availability of interim relief to foreign-seated arbitrations involving Indian parties.

On the question of whether there is a restriction on Indian parties' choice of substantive law in foreign-seated arbitration under Section 28(1)(a) of the Arbitration Act, the Supreme Court clarified that such restriction only applies to arbitrations between Indian parties seated in India. It added that, in any case, two Indian parties are *"more likely"* to *"apply the substantive law of India to disputes between them*". Further, the Supreme Court noted that, even if the arbitration agreement is silent on such choice of law, the *"substantive law of India will be applied by the arbitrator in accordance with the conflict of law rules".* Accordingly, in the view of the authors, as the Supreme Court has made such observation on the basis of 'likelihood' and not 'certainty', a certain degree of ambiguity still remains on the question of validity of Indian parties' choice of a foreign substantive law.

*This insight has been authored by **Shahezad Kazi** (Partner) and **Gladwin Issac** (Associate). They can be reached on skazi@snrlaw.in and gissac@snrlaw.in for any questions.* 



[11] Section 3, Arbitration Act, 2002 (Cap. 10), United Kingdom.

[12] Section 3(a), Arbitration Act, 1996, Singapore.