REVISITING THE PRINCIPLES OF PARTY AUTONOMY, PUBLIC POLICY, FOREIGN AWARDS & INTERIM RELIEF W.R.T FOREIGN SEATED ARBITRATION OF INDIAN PARTIES

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Introduction

Indian Arbitration Law is a dynamic force constantly changing and adapting to the needs of the time and society. Indeed, the Arbitration and Conciliation Act, 1996, ["**Arbitration Act**"] has undergone considerable changes from time to time. In recent times, the 2015 amendment had taken into account various suggestions made by the 246th Law Commission Report.[1] Arising out of the amendment and few conflicting Judicial opinions, uncertainty in the sphere of international arbitration was causing unwarranted confusion. Recently, in the case of in *PASL Wind Solutions Private Ltd v. GE Power Conversion India Pvt Ltd.*[2] ["**PASL**"], the Supreme Court has put an end to some of the few issues by upholding the Pro-Arbitration regime for speedy disposal and remedy of disputes. The Apex Court undertook to settle the validity of a Foreign Seated Arbitration Agreement entered into by two Indian parties. The Court revisited the principle of party autonomy, further analysing to what extent can there be interference by the Court in the decision to choose the seat of their arbitration.

This time the Court took to test one such foreign seated arbitration agreement and applied the established principles of 'Public Policy' in light of granting interim reliefs against the enforcement of the arbitral award. In other words, the Apex Court settled the principle that two Indian Parties can arbitrate a dispute which is not governed by substantive Indian law. The Court additionally, settled the conflicting position of law and reinforced the 2015 Amendment having an effect on Interim Reliefs for International Commercial Arbitration. It becomes very pertinent to now understand the relevance and rationale of the Court's decision through briefly discussing the following principles.

[1] Law Commission of India, *Report No 246: Amendments to the Arbitration and Conciliation Act 1996* (Law Comm No 20, 2014).
[2] *PASL Wind Solutions Private Ltd v GE Power Conversion India Pvt Ltd* [2021] SCC OnLine SC 331.

Legal Positions of Indian Courts on Foreign Awards with respect to Public Policy, Party Autonomy & Interim Relief

Foreign awards generally operate at the level of private international law as opposed to domestic awards. Thus, a distinction needs to be drawn while applying the rule of public policy between a matter governed by domestic law and a matter involving a conflict of laws.[3] The doctrine of public policy has a more restricted relevance in the sphere of conflict of laws than it does in domestic law, and courts are more reluctant to apply it in cases having a foreign element than in situations involving exclusively local legal issues.[4]

There are two types of public policy norms: *first*, which are overriding in nature and can be resisted, and the *second*, which are local in origin and represent some component of internal policy. Assuming this is the case, it must be limited to domestic law conditions and not extend to international law concerns.[5] When it comes to domestic awards, the legitimacy of judicial intervention is far greater than when it comes to foreign awards or domestic awards in international commercial arbitration, according to the supplementary report of the 246th Law Commission.[6]

The fact that minimal judicial action is required in enforcing international judgments and domestic public policy must be seldom applied demonstrates a limited understanding of public policy. Courts in India have supported a narrow view of public policy as will be evident below.

In *Renusagar Power and Co Ltd v. General Electric Co*[7] ["**Renusagar**"], with respect to the 'fundamental policy of Indian law', the Court held,

> *"(i) the award must invoke something more than merely a violation of Indian law to be refused enforcement; (ii) a violation of economic interests of India is contrary to public policy; (iii) it is the fundamental principle of law that orders of courts must be complied with and a disregard for such orders would be contrary to public policy".*

Similarly in *Ssangyong Engineering and Construction Company Ltd. v. NHAI.,*[8] ["***Ssangyong Engineering***"], the award was set aside on the grounds that it unilaterally altered the terms of the underlying contract, violating fundamental justice principles and shocking the court's conscience.[9]

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[3] Bhavana Sunder, Kshama A Loya, 'Demystifying public policy to enable enforcement of foreign awards – Indian perspective' (*The National Law Review*, 4 May 2021) <https://www.natlawreview.com/article/demystifying-public-policy-to-enable-enforcement-foreign-awards-indian-perspective> accessed 05 August 2021.
[4] *Dicey, Morris, Collins on The Conflict of Laws* (5th supp, 15th edn, Sweet and Maxwell).
[5] *PASL Wind Solutions* (n 2).
[6] *Law Commission* (n 1).
[7] *Renusagar Power and Co Ltd v General Electric Co* [1994] Supp (1) SCC 644.
[8] *Ssangyong Engineering and Construction Company Ltd v NHAI* [2019] (15) SCC 131.
[9] ibid.

In the case of *Cruz City 1 Mauritius Holdings v. Unitech Limited.,*[10] ["***Cruz City***"], the Delhi High Court proposed a balancing test to determine when a foreign arbitral award may be refused enforcement on the ground of public policy. The Court further held that while the width of discretion to refuse the enforcement of an arbitral award is narrow and limited, if sufficient grounds are established, the courts can accept the contentions to refuse the enforcement of an arbitral award.

Applicability of Part-I and Part-II of Arbitration Act with respect to '*Foreign Award*'

The Court in the PASL judgement clarified the four elements that must be satisfied for an award to be designated a "foreign award" under Section 44:

> *"(i) the dispute must be a commercial dispute as understood under Indian law; (ii) the award must be made pursuant to a written arbitration agreement; (iii) it must be a dispute that arises between "persons" (without regard to their nationality, residence, or domicile), and (iv) the arbitration must be conducted in a country that is a signatory to the New York Convention.*[14]

The Court found that if the arbitral award, in this case, satisfied all four elements, then it becomes a "foreign award" under Part II of the Act. Section 44 (which defines Foreign Awards) of the Arbitration Act, was "*party-neutral*" and the key factor to be looked at is the place of arbitration. Part II of the Arbitration Act applies to the enforcement of foreign awards in India.[11] According to PASL, the phrase "unless the context otherwise requires" in Section 44 (set out above) permits the definition of "International Commercial Arbitration" in Section 2(1)(f) to be imported into Section 44. Therefore that definition of "International Commercial Arbitration" requires that at least one of the parties have some foreign nexus before a proceeding can be considered an "International Commercial Arbitration."

Following its decision in *Bharat Aluminium Co v. Kaiser Aluminium Technical Services.,*[12] ["**Bharat Aluminium**"], the Supreme Court noted that Part I of the Act is a comprehensive code that deals with arbitrations seated in India. Part II, on the other hand, is primarily concerned with the enforcement of foreign awards. The two parts thus do not overlap in the application and,

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[10] *Cruz City 1 Mauritius Holdings v Unitech Limited* [2017] 239 DLT 649.
[11] *GMR Energy Limited v Doosan Power Systems India* (2017) CS (Comm) 447.
[12] *Bharat Aluminium Co v Kaiser Aluminium Technical Services* [2012] 9 SCC 552.

in the words of the Supreme Court, are "mutually exclusive."[13] Based on that understanding of the Act, the Supreme Court held that the definition of "international commercial arbitration" in Section 2(1)(f) in Part I of the Act could not be imported into Section 44 because that term is "party-centric," while the same term when spoken about in the context of Part II of the Act is meant to have a "place-centric" focus. Put differently, for the purposes of Part II of the Act, the only relevant factor is whether the parties had chosen a foreign arbitral seat, regardless of whether the parties themselves have any foreign nexus.[14]

In agreeing to a neutral forum outside India, the Court remarked that parties are taking two bites of the cherry namely, *"the recourse to a court or tribunal in a country outside India for setting aside the arbitral award passed in that country on grounds available in that country (which may be wider than the grounds available under section 34 of the Arbitration Act), and then resisting enforcement under the grounds mentioned in section 48 of the Arbitration Act."* [15]

Thus, it was held that the balancing act between party autonomy and the undeniable harm to public policy, must be tilted in favour of party autonomy if in fact there lies no harm to the fundamental policy and it is a conscious decision of the parties. Therefore, it becomes relevant to discuss further upon the issue of Party Autonomy.

Foreign Seat and Party Autonomy

In light of recent judicial pronouncements, the issue of the foreign seat of arbitration has also been categorically analysed. It is not that Indian parties never had an option of choosing an overseas seat for arbitration. In 1999, the Supreme Court, in *M/S Atlas Export Industries v. M/S Kotak & Company*,[16] ["**Atlas**"] had held that two Indian parties can indeed choose a foreign seat for arbitration.

It is important to note that the Atlas Division Bench decision was passed in the context of the Foreign Awards (Recognition and Enforcement) Act, 1961 and not the Arbitration Act, 1996,

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[13] 'Indian Supreme Court allows Indian Parties to choose a foreign seat of arbitration' (Herbert Smith Freehills, 30 April, 2021) <https://hsfnotes.com/arbitration/tag/pasl-wind-solutions-private-limited-v-ge-power-conversion-india-private-limited/> accessed 06 August 2021.

[14] Abhi Udai Singh Gautam, Mustafa Rajkotwala, 'Indian Parties without an Indian Court: The Verdict in PASL Wind Solutions' (*India Corp Law,* 14 May 2021) < https://indiacorplaw.in/2021/05/indian-parties-without-an-indian-court-the-verdict-in-pasl-wind-solutions.html> accessed 06 August 2021

[15] *PASL Wind Solutions* (n 2).

[16] *M/S Atlas Export Industries v M/S Kotak & Company* [1997] 7 SCC 61.

thereby rendering it inadequate with the provisions of the Arbitration Act.[17] To top this defect came the judgment of *TDM Infrastructure Private v. UE Development India Pvt. Ltd.*,[18] ["**TDM**"] which in the context of the appointment of a foreign arbitrator, held that arbitration between Indian entities cannot be considered as 'International Commercial Arbitration'. The Apex Court agreed that Indian parties who desire to arbitrate should not be allowed to deviate from Indian law, adopting an anti-foreign arbitral seat policy. Therefore, the Court undertook a party-based rather than a location-based determination of curial law, which would not have been in the spirit of section 2(2) and section 44 of the Arbitration Act. In *GMR Energy Limited v. Doosan Power Systems India*,[19] the court relied on the ratio of Atlas, allowing Indian parties to continue with a foreign seat of arbitration.

In Bharat Aluminium, the Court had envisaged the freedom of parties on different laws governing their contract as;

> "*Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract — (1) proper law of contract, (2) proper law of arbitration agreement, and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as "curial law".*

With the 2021 PASL judgement, there has been a resolution for a boost to India's pro-arbitration trend and against the adverse judicial methods. The Apex Court had primarily focused on arguments arising from section 28 of the Indian Contract Act, 1872 ["**ICA**"] wherein it found that the right of a party to enter into an arbitration agreement was preserved by Exception 1 to Section 28.[20] This meant that an arbitration agreement, regardless of its choice of seat, could not be contested on the grounds that it excluded Indian courts from jurisdiction.

The Continuum on Interim Relief's on Foreign Awards

The genesis of this issue that whether Interim Reliefs should be provided to arbitration with a foreign seat can be categorized by taking two different stances opposing each other. *First,* is wherein the scope of Part I of the Arbitration Act provided in the proviso of Section 2(2)[21] is

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[17] Steven Finizio, Shanelle Irani, Dharshini Prasad, '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' (*JDSupra*, 26 May 2021) <https://www.jdsupra.com/legalnews/pasl-wind-solutions-pvt-ltd-v-ge-power-8050136/> accessed 05 August 2021.
[18] *TDM Infrastructure Private v UE Development India Pvt Ltd* [2008] 14 SCC 271.
[19] *GMR Energy* (n 11).
[20] *India Corp Law* (n 14).
[21] Arbitration and Conciliation Act 1998, s 2(2).

restrictive to the Part I itself, and therefore when two or more parties are undergoing arbitration seated outside India, the same is barred from invoking the possible measure under Part I.[22] Additionally, the parties could have 'impliedly excluded' the jurisdiction by redirecting the governing law of the arbitral agreement outside India,[23] or when the arbitral proceedings were to be conducted under Singapore International Arbitration Centre, and the seat was to remain as Singapore, the apex court barred the application of Part I,[24] similar reasoning was again followed in the case of *Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd.*[25]

Whereas on the other hand, the contrary judicial approach has been that when the parties have knowingly entered into an agreement, and with the effect to that agreement have selected their seat of arbitration as a foreign country then such choice must be upheld.[26] The Supreme Court in this reasoning held that provisions of Part I are equally applicable to ICA held outside India unless provided otherwise and the application under Section 9 shall also remain maintainable unless excluded in the arbitral agreement.[27] It was further held that where the arbitration was to be conducted as per ICC rules, the right to approach appropriate judicial authority for interim relief was appropriate.[28] A similar approach was again taken by the Apex court in addition to applying the Close Nexus Test for establishing the jurisdiction of Indian Courts in entertaining an application for interim relief. [29]

The status quo tipped when the Apex Court Constitutional bench overruled both *Bhatia International v Bulk Trading* and *Venugopal Global Engineering v Satyam Computer Services*, the bench held with the 'place-centric approach' that Part I will apply only to the arbitrations taking place within the territory of India. Furthermore, in light of justice, the bench made this ruling in prospective application creating a Pre-Post Balco continuum.

The 2015 Amendment remedying Balco's impact

The approach of the court led the legislature into action wherein by virtue of the 2015 Amendment,[30] a proviso was added to Section 2(2). It provided that, '*subject to an agreement to the contrary'*, provisions pertaining to Interim Measures, provisions relating to the Courts assistance in

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[22] *TDM Infrastructure* (n 18).
[23] *Videocon Industries Ltd v Union of India* [2011] 6 SCC 161.
[24] *Yograj Infrastructure Ltd v Ssangyong Engineering Construction Co Ltd* [2012] 12 SCC 359.
[25] *Harmony Innovation Shipping Ltd v Gupta Coal India Ltd* [2015] 9 SCC 172.
[26] *TDM Infrastructure* (n 18).
[27] *Bhatia International v Bulk Trading*, [2002] 4 SCC 105.
[28] International Chamber of Commerce (ICC) Rules of Arbitration, art 23.
[29] *Venugopal Global Engineering v Satyam Computer Services* [2008] 4 SCC 190.
[30] The Arbitration and Conciliation (Amendment) Act, 2015.

taking evidence and appeals[31] shall be applicable to International Commercial Arbitration, even if the place of arbitration is outside India. It is relevant to note that Post the amendment, the reliance made by Balco on judgments such as *Channel Tunnel* which provided that an underlying right should also be provided with the necessary jurisdiction to exercise interim measures,[32] would have a resultant different effect altogether.

Finally arriving towards the recent development where the Supreme Court in the PASL[33] judgement has finally settled the issue by interpreting the expression "International Commercial Arbitration", the two different contexts of interpretation this expression can elucidate completely changes the consequence and reference of the same. If the same is 'party-centric', then as per Section 2(1)(f)[34] at least one of the parties should be a person who is a national or habitually a resident in any country other than India. However, when the point of reference is shifted as 'Place-centric' as provided in Section 44,[35] then expression simply means to be taking place outside the territory of India whereupon the New York Convention applies. Therefore the Apex court upheld the High Court's judgement except the finding on Section 9's maintainability, it cleared the controversy holding that two Indian parties are free to arbitrate outside India and their interim relief would be enforceable in Indian courts, it further held that these types of arbitrations are not international commercial arbitrations according to section 2 (1) (f) of Arbitration Act. The proviso to Section 2(2) which effectively entitles parties to ICA in a foreign seat to seek interim relief before an Indian court, should be read as referring solely to arbitrators outside of Indian territory, allowing parties to seek interim relief from Indian Courts regardless of nationality.

Conclusion

The Hon'ble Bench of Supreme Court Consisting Justice Rohinton Fali Nariman, BR Gavai, and Hrishikesh Roy have endeavoured to settle one of the most important issues of International Commercial Arbitration in India, there is no doubt that this shall provide an impetus to the parties in opting for arbitration as a dispute resolution mechanism. Such a decision welcomes, the Pro-Arbitration Regime and promotes foreign arbitrators and Arbitral Seat to undertake Indian disputes comprising of both the parties as Indian Parties themselves. The court in the light of party autonomy has recognised the seminal principle of private law that in the absences of public harm, autonomy must be maintained. It is settled that now parties who arbitrated domestically can choose

[31] Arbitration and conciliation Act 1998, s 9, 27, 37(1)(b), 37(3).
[32] *Channel Tunnel case* [1993 AC 334: (1993) 2 WLR 262: (1993) 1 All ER 664: (1993) 1 Lloyd's Rep 291 (HL)]
[33] *PASL Wind Solutions* (n 2).
[34] Arbitration and Conciliation Act 1998, s 2(1)(f).
[35] Arbitration and Conciliation Act 1998, s 44.

to do so abroad as two parties can now opt for a foreign seated arbitration as Section 9 of the Act shall remain applicable.