

- Ultimately, the arbitration proceedings went on, albeit with Mumbai as the location of the hearings. The Arbitrator passed an award dated April 18, 2019 (**Impugned Award**). Under the Impugned Award, the claims of the Respondent were rejected and the counter-claims of the Petitioner were granted. The Impugned Award distinctly specified that the seat of arbitration was Zurich, Switzerland.
- The Petitioner therefore filed the present Arbitration Petition No. 131 of 2019 (**Enforcement Petition**) under Section 47 of the Arbitration and Conciliation Act, 1996 (**Act**), seeking enforcement of the Impugned Award, being a foreign award, before the Gujarat High Court (**Gujarat HC**). The Petitioner also filed Arbitration Petition No. 134 of 2019 under Section 9 of the Act (**Section 9 Petition**) before the Gujarat HC, seeking of an injunction against the Respondent from alienating its assets during the pendency of the Enforcement Petition.
- The Respondent, in turn, opposed the Enforcement Petition as not being maintainable, as the Impugned Award was not a foreign award, but instead a domestic award. The Respondent based this argument on the following grounds:
 - The Act envisaged only three categories of arbitrations and awards:
 - Purely domestic awards governed by Part I of the Act;
 - International commercial arbitrations seated in India resulting in a domestic award governed by Part I of the Act; and
 - International commercial arbitrations seated in another country resulting in a foreign award governed by Part II of the Act.
 - The definition of “international commercial arbitration” (**ICA**) under Section 2(1)(f) of the Act clearly requires that one of the parties be based/incorporated in a country other than India. Undoubtedly, since both parties in the present case were Indian, their arbitration could not be termed as an ICA.²
 - The Arbitration Clause did not specify that the “seat” of arbitration as Zurich. Hence, in light of the Supreme Court’s judgments in *Enercon*³, *BGS Soma*⁴ and *Mankastu*⁵ the seat would have to be determined by applying the ‘closest connection test’. In the present case, application of the test would show that the seat necessarily had to be India, and more specifically Mumbai, because *inter alia*:
 - Both parties to the Settlement Agreement, which was executed in India, were Indian;
 - Assets of the parties were in India;
 - Substantive law was that of India;
 - The entire transaction had taken place in India; and
 - All arbitration proceedings had been held in Mumbai, India.
 - The Act clearly provided that Section 9 is applicable to either a domestic arbitration or an ICA seated outside India. Since the arbitration was not an ICA, the filing of the Section 9 Petition was tacit admission from the Petitioner that the Impugned Award was a domestic award. Alternatively, if the Impugned Award did not arise out of a domestic arbitration or an international commercial arbitration, then it was not recognized under Part I of the Act, and Section 9 could not possibly be availed of by the Petitioner.
 - The execution of a domestic award had to be filed under Part I of the Act, and not under Part II.
- Relying on *TDM Infrastructure*⁶, the Respondent contended that two Indian parties could not be permitted to choose a foreign seat of arbitration and derogate from Indian law – specifically Sections 23 and 28 of the Indian Contract Act, 1872 (**Contract Act**). Therefore, if the Gujarat HC held that the Impugned Award was indeed a foreign award to be governed by Part II of the Act, enforcing such an award would be violative of the public policy

² *TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.*, (2008) 14 SCC 271; *L&T-Scomi v. MNRDA*, (2019) 2 SCC 271.

³ *Enercon (India) Ltd v. Enercon GmbH*, (2014) 5 SCC 1.

⁴ *BGS SGS Soma JV v. NHPC*, (2020) 4 SCC 234.

⁵ *Mankastu Impex Private Limited v. Air Visual Limited*, (2020) 5 SCC 399.

⁶ *TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.*, (2008) 14 SCC 271.

of India. The Respondent further contended that the level of judicial scrutiny for enforcement of a foreign award is lesser and this mechanism with a deliberate lesser judicial scrutiny given to foreign parties for a quick redressal will stand defeated if two Indian parties are allowed to choose a seat abroad.

ISSUES AND FINDINGS

- The following issues therefore arose before the Gujarat HC:
 - Was the Impugned Award a foreign award?
 - If the Impugned Award was a foreign award, was it enforceable in India?
 - Was the Section 9 Petition maintainable before the Gujarat HC?

Issue No. 1 – Whether the Impugned Award was a foreign award?

- The Gujarat HC noted that while the law related to domestic arbitration and ICA was contained in Part I of the Act, Part II of the Act exclusively relates to ‘enforcement of foreign awards’. Thus, in the Court’s view, the scheme of the Act demonstrates a clear distinction between Part I and Part II, which are applicable in completely different fields.
- In the Gujarat HC’s view, for determining whether an arbitral award qualifies to be a foreign award, one only needs to look at Section 44 of the Act, which provides an exhaustive definition of ‘foreign award’, and the provisions of Part I of the Act have no role to play in such determination. The Gujarat HC noted that the nationality of the parties had no relevance for considering the applicability of Part II of the Act. It opined that, for the Impugned Award to meet the requirements under Section 44, the only ingredients to be determined were the seat of the award and the applicability of the New York Convention to the agreement.
- For determining the seat of arbitration, the Gujarat HC found that a plain reading of the Arbitration Clause was sufficient to infer that the parties intended Zurich to be the seat of arbitration. This was further buttressed by the fact that there were no other significant indicia to the contrary, as per the principles laid down in *BGS Soma*.
- The Gujarat HC also noted that the Jurisdiction Order of the Arbitrator, which held the seat of arbitration to be Zurich, had never been challenged by either of the parties, thus attaining finality. Moreover, from the correspondences and transcripts during the arbitration proceedings, it was clear that the Arbitrator and the parties were clear that the seat of arbitration was Zurich, and that Mumbai had merely been chosen as a convenient venue for hearings.
- Thus, the Gujarat HC found that the juridical seat of the arbitration was Zurich. Given that there was no argument regarding the fact that the Central Government had declared Switzerland as a territory to which the New York Convention applies, the ingredients prescribed in Section 44 stood satisfied. Therefore, the Gujarat HC held that the Impugned Award was a foreign award under Part II of the Act.

Issue No. 2 – Was the Impugned Award enforceable in India?

- Once the Impugned Award was held to be a foreign award, the Gujarat HC inquired regarding the enforceability of the Impugned Award. For the said purpose, it considered whether the requirements of Section 47 of the Act were satisfied. The Gujarat HC held that since the assets of the Respondent were located in its jurisdiction, it had jurisdiction to hear the Enforcement Petition. The Gujarat HC was guided in this conclusion by the Explanation to Section 47 of the Act, as well as the Supreme Court’s judgment in *BALCO*⁷.
- Thereafter, the Gujarat HC proceeded to determine whether the Respondent had made out any grounds under Section 48 of the Act for the Court to refuse enforcement of the Impugned Award. The Gujarat HC noted the settled law on the narrow scope of Section 48 of the Act. The only argument raised by the Respondent within the confines of Section 48 was that an agreement involving two Indian parties designating their seat of arbitration

⁷ *Bharat Aluminum Company v. Kaiser Aluminum Technical Services Inc.*, (2012) 9 SCC 552.

to be outside India, would fall foul of Section 28 read with Section 23 of the Contract Act. The Respondent placed reliance on *TDM Infrastructure*⁸ and argued that such an agreement was violative of the public policy of India.

- Section 28 of the Contract Act lays down that any agreement under which a party is absolutely restricted from enforcing his legal rights is void to that extent. However, the Gujarat HC noted that the Explanation 1 to Section 28 clearly excludes the applicability of that provision to arbitration agreements. The Gujarat HC noted that it is clear that parties to a contract may agree to have their disputes resolved by a foreign court termed as a 'neutral court' or a 'court of choice' creating exclusive or non-exclusive jurisdiction in it.
- The Gujarat HC found that neither Section 28 of the Contract Act, nor anything in the Act, suggested that two Indian parties were prohibited from designating a foreign court and vesting it with exclusive jurisdiction to supervise their arbitration proceedings.
- The court also found that *TDM Infrastructure*⁹ was not applicable to the facts of the present case.
- Thus, the court held the Impugned Award to be enforceable in India.

Issue No. 3 – Whether the Section 9 Petition was maintainable before the Gujarat HC?

- Once the Gujarat HC held that the seat of the arbitration was Zurich, it could no longer be argued that the Impugned Award arose out of a domestic arbitration governed by Part I of the Act.
- Section 2(2) of the Act, however, provides that Section 9 is also applicable to an ICA, subject to an agreement to the contrary between the parties. However, as discussed earlier, the present arbitration did not fulfill the criteria for ICA, as neither party was based/incorporated outside India.
- Thus, in order to avail of the protection under Section 9, the Petitioner attempted to argue that the use of the phrase 'international commercial arbitration' in the proviso to Section 2(2) of the Act was a misnomer. The Petitioner placed reliance on the case of *Trammo DMCC*¹⁰, wherein the Bombay High Court, while interpreting Section 2(1)(e)(ii) of the Act, had recognized the incongruity of the words 'international commercial arbitration'.
- The Petitioner argued that if any other interpretation was given to the proviso to Section 2(2), the holder of a foreign award would be left without effective remedy before the courts of India, pending the enforcement of the award.
- The Gujarat HC, however, agreed with the Respondent, that a plain reading of the proviso to Section 2(2) clearly extends the applicability of Section 9 specifically to ICA. The Gujarat HC was not inclined to accept the Petitioner's argument that the usage of the term ICA was a misnomer, as that would be inconsistent with the principles of statutory interpretation, whereunder the intention of the legislation must be found in the words used by the legislature itself.
- The Gujarat HC also opined that decision in *Trammo DMCC*¹¹ was easily distinguishable on facts, as that decision involved an ICA, whereas the present case had a unique situation where two Indian parties were involved in a foreign seated arbitration, which did not qualify as an ICA.
- Therefore, the Gujarat HC held that the Section 9 Petition was not maintainable.

ELP COMMENT

- Whether two Indian parties can choose a foreign seat of arbitration has long been a grey area. The Gujarat HC seems to have clarified this issue by adopting a strict textual interpretation. This approach of the Gujarat HC must be appreciated, as it is not the mandate of courts to read things into statutory provisions. While at best only of

⁸ *TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.*, (2008) 14 SCC 271.

⁹ *TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.*, (2008) 14 SCC 271.

¹⁰ *Trammo DMCC v. Nagarjuna Fertilizers and Chemicals Limited*, 2017 SCC Online Bom 8676.

¹¹ *Trammo DMCC v. Nagarjuna Fertilizers and Chemicals Limited*, 2017 SCC Online Bom 8676.

persuasive value, the present decision is another testament to the pro-arbitration approach taken by courts in India.

- Having said that, while two Indian parties may consider choosing a foreign seat of arbitration in light of this judgment, they must also be wary that they may be left without any mechanism to ensure that the award-debtor does not dissipate its assets pending enforcement of the foreign award. This is because, based on the reasoning applied by the Gujarat HC, it appears that a petition under Section 9 would not be maintainable before any Indian court whatsoever, in respect of such an arbitration.
- Whether the legislature will ever choose to address this unique loophole remains to be seen.

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