Why Foreign arbitration seats are chosen even though both the parties are from India?

There is an increased trend of parties from India choosing popular seats like Singapore as Seat of Arbitration, despite the fact that both the parties are from India. There was a question, whether two Indian parties can choose a foreign seat to resolve their disputes and circumvent Indian law. The Supreme Court of India settled the law, by a well-reasoned Judgment in the case of PASL WIND SOLUTIONS case[1], holding that there is no bar in Indian law prohibiting Indian parties from choosing a foreign seat and resolving their disputes. The said Judgment also held that the award arising out of such an Arbitration is a foreign award under New York Convention[2]. It is important to note that choosing a foreign seat does not mean just seat, once you choose a seat of arbitration in a country, then it amounts to choosing the procedural law as well as the supervising courts. For example, once two Indian parties incorporate an arbitration clause in their contract, providing Singapore as the seat of arbitration, automatically the procedural law governing the arbitration will be International Arbitration Act of Singapore and not the Arbitration and Conciliation Act,1996. In the same way, any issue relating to the arbitration clause, appointment of arbitrators, removal of arbitrators, challenging the arbitration award etc., shall happen only in Singapore before the Singapore Courts and not the Courts in India. Above all the parties are at liberty to choose a foreign law as the substantive law. Even though an arbitration seated in India shall be less expensive and convenient to both the parties, why they choose a foreign seat, is the question.

As stated above naturally for the parties from India, it will be more comfortable to handle an arbitration in India and subsequent litigations arising out of the said arbitration. This is because it is not easy for an Indian party to understand the procedural law of a foreign country, engage lawyers from a foreign country and conclude the process. If the arbitration and subsequent litigations happen in India, it will be much easier for handling. But the following are the reasons why many Indians are choosing arbitration seats outside India.

Client friendly procedural law Even though India is a model law country and Indian Arbitration and Conciliation Act,1996 is also in line with the UNCITRAL Model Law[3] of arbitration, certain internationally recognized aspects are not incorporated. For example, there is no emergency arbitration procedure in Indian law, whereas countries like Singapore and Hongkong legislations have such provisions.

Professionally trained lawyers & Arbitrators In India, most of the lawyers claim that they also do handle arbitrations and many of them handle arbitration matters without a proper understanding and hence many clients get frustrated about the way in which matters are handled. Moreover, the High

[1] PASL Wind Solutions (P) Limited Vs GE Power Conversion (India) (P) Limited (2021)7SCC1
New York Convention on Recognition and Enforcement of Foreign Awards 1958
[3] UNCITRAL Model law on International Commercial arbitration 1985

Courts in India appoint only retired judges as arbitrators and hence professionally trained arbitrators are not getting opportunities. But in countries like Singapore, many well trained arbitrators are exclusively practicing as arbitrators. Moreover, the opportunities for the arbitrators to get updated are very high. Hence, the arbitration experience in the popular seats is much better than India. Recently because of the applaudable efforts of Mr Venkatramani Attorney General of India, Arbitration Bar of India is opened and much more such efforts are required to improve the situation.

Speed of the supervising courts in disposing arbitration matters Even though High Courts like Delhi, Mumbai & Chennai can be compared with any Foreign Court, they are overly burdened due to the number of cases pending before them. Sometimes a Section 11 application takes one year and Section 34 application goes for 3-4 years. For a commercial company if they need to wait for a decade to get their money back it is an unacceptable situation. But, in countries like Singapore the disposal is fast because of less pendency.

Predictable outcome One of the most important features of a popular seat of arbitration is predictable outcome from the arbitrators and courts. Predictable outcome is possible only when the arbitrators are professionally trained, and the Courts stop innovation and follow ensure predictable outcome. In India, to correct one wrong judgment of Supreme Court, it takes a minimum of 5-10 years. Before it gets corrected many High Courts would have followed the same. Because of these things, the courts in popular seats give more importance to predictable outcome in commercial matters. The above said judgment also allows parties to choose other substantive laws other than Indian law, hence parties at liberty to choose a foreign law that provides predictable outcome, as the substantive law applicable in the arbitration.

Foreign Arbitration Award Status in India Above all the award between the two Indian parties gets the privileged status of a “Foreign award” and hence courts in India cannot go into the merits of the case and they need to just enforce the same. In normal cases, an award between two Indian parties will take long time to cross S.34 stage, S.37 stage and SLP stage in the Supreme Court. But if the award is passed in a Seat recognized by India on Reciprocity basis, then the said award is a foreign award, and it can be enforced using the New York Convention.