PROS AND CONS OF FOREIGN-SEATED ARBITRATION

WITH INDIAN PARTIES NOW ABLE TO ARBITRATE OUTSIDE INDIA, **SUMEET KACHWAHA** AND **TARA SHAHANI** LOOK AT THE ADVANTAGES AND DISADVANTAGES, AS WELL AS HOW SOME PARTIES MAY LOSE OUT BY TAKING THE DISPUTE OFFSHORE

In cross-border disputes, a neutral venue with a strong arbitral institute and a thriving arbitration community is generally agreed upon as the seat, and there are no doubt advantages in doing so. Like most issues, however, there is more than one side to the discussion.

Leading arbitral institutes administer arbitrations globally, not locally, and arbitrators usually belong to diverse jurisdictions, and are not tied down to any particular place. To illustrate, statistics from the International Court of Arbitration disclose that, in 2019, it administered arbitrations in 116 seats spread over 62 jurisdictions, with the arbitrators hailing from 69 jurisdictions.

As long as the jurisdiction has supportive courts, does not suffer from xenophobia (or discriminate against either party), stands by the rule of law, and its arbitration jurisprudence is in sync with international norms, it should count as a suitable jurisdiction.

Indian courts are strong and independent, and have never been accused of any anti-foreigner bias. The courts regularly uphold high-value claims pursued by foreign parties against Indian entities (including state entities). India should therefore count among the arbitration-friendly jurisdictions.

COUNTING THE COST

The leading arbitration centres are all located in some of the costliest cities in the world. A foreign seat does not mean that only the arbitration moves to foreign shores, it also entails recourse to foreign courts.

It is the court of the seat alone that has supervisory jurisdiction in relation to conduct of the arbitration, and a challenge to the award. Therefore, foreign lawyers need to be engaged at some stage or another.

This not only adds an extra layer to the cost, but entails the matter being entrusted to a fresh set of lawyers who will need to be briefed and may have their independent views and perspectives. A party with a small or medium-stake claim may well be dissuaded from pursuing it if, on balance, the anticipated costs are too high. A party with deep pockets, on the other hand, will have an unfair advantage in dragging the weaker party to a costly jurisdiction.

A COURT SUPPORTIVE OF ARBITRATION

Historically, this is where India has received bad press. Being a large jurisdiction, Indian courts took time in adjusting and adapting to the arbitration jurisprudence and expectations of the international community. Some retrograde judgments came to be passed without a proper appreciation of the ethos of the Model Law, or the Arbitration Act of 1996. This no doubt led to a feeling that India as a seat carries a risk of unwarranted court interventions, and stalling of arbitrations. At the same time there has been a consistent effort by the legislature and courts alike to rectify past errors.

LEGISLATIVE INTERVENTIONS

Now an Indian court's power to intervene in an India-seated arbitration is far more limited than most jurisdictions. For instance, should civil proceedings be initiated by a party in an attempt to evade the arbitration agreement, the concerned court is mandated to refer the parties to arbitration, unless it finds that no valid arbitration agreement exists. This is a far narrower ground than the Model Law formulation, which enables a court to disregard the arbitration agreement if it finds it to be "null and void, inoperative or incapable of being performed".

The grounds for setting aside a domestic award have also been tightened. A challenge based on "patent illegality" on the face of the record is no longer available in the context of an international arbitration. The ground of "public policy" violation has been narrowed to "fundamental policy of Indian law". And the Indian Arbitration Act now clarifies (out of abundant caution) that an award shall not be set aside merely on the ground of an error of law, or by a process of re-appreciation of evidence.

CONCLUSION

A neutral venue is a relevant consideration, but not always. It should not matter, for instance, where the parties are of Indian nationality, or where the foreign party has a strong India presence, or its Indian lawyers are expected to have a key role. The anticipated costs and expenses should also be balanced.

Selecting a seat requires a careful consideration and balancing of various factors, including the nature of the parties and their likely disputes. One must not simply assume that a foreign seat is necessarily the better choice in every situation.

Sumeet Kachwaha
Partner
Kachwaha & Partners In New Delhi
Tel: +91 (11) 4166 1333
Email: skachwaha@kaplegal.com

Tara Shahani
Partner
Kachwaha & Partners In New Delhi
Tel: +91 (11) 4166 1333
Email: tshahani@kaplegal.com

KACHWAHA & PARTNERS
1/6 Shanti Niketan New Delhi 110 021 India
Tel: +91 (11) 4166 1444/1777
Email: mail@kaplegal.com

www.kaplegal.com