WHAT HAPPENS WHEN STATE COURTS REFUSE TO PLAY BY THE RULES

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INTRODUCTION

- Although I have dealt with many arbitrations as counsel and arbitrator in the Latin American region, I am only authorized to practice law in Mexico.
- Most countries in Latin America have modified their laws on arbitration in the last 15 years.
- Many have adopted the UNCITRAL Model Law on Arbitration or a law inspired by this model.
- All important Latin American countries have ratified the New York Convention.
- International arbitration, which did not exist in the region 25 years ago, flourished with the implementation of the new arbitration laws, free trade agreements and BITS entered into by the different countries in the region.
- I will first discuss the main reasons for the negative interference of the courts in arbitration and, secondly, the most frequent areas where we have had bad decisions by the courts in the region.

I. Main reasons for negative court intervention in arbitration

- Political
  - Non-recognition of subjective arbitrability of State entities. Recent decision of Venezuelan Supreme Court of Justice.
  - For political reasons such as the case of Argentina with the negative impact of BIT disputes.
- Ignorance of Arbitration
  - Lack of experience due to small case load of arbitration cases in the past.
  - Very few training courses for judges.
- Corruption

II. Most frequent areas of intervention

- Enforcement of arbitration clause
  - Cases were judges assume jurisdiction:
    - Because one party requests provisional measures
    - Because one party answers ad cautelum lawsuit before State judge
- Nullification of award
  - Violation of agreement of parties for the constitution of the arbitral tribunal
  - Violation of public policy
  - Violation of due process

CONCLUSION

- Good arbitration clauses
- Establish place of arbitration in USA, Canada or Europe, particularly if State Parties from Latin America are involved
- Verify with local counsel subjective arbitrability if State Parties are involved

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Indian Arbitration

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PROBLEMS FACED IN INDIAN ARBITRATIONS AT VARIOUS STAGES

- **Prior to Commencement**
- **During Arbitration**
- **Post Award**

PROBLEMS PRIOR TO COMMENCEMENT

- **Chances of Indian Party invoking court jurisdiction to avoid arbitration is quite high.**

- **Existence of arbitration clause does not oust jurisdiction of court per se as is the case in some European Countries.**

- **It is for the defendant to file application for reference of dispute to arbitration.**

PROBLEMS IN ACHIEVING REFERENCE TO ARBITRATION

- **Likelihood of Court granting injunctions restraining arbitration pending initial hearing of injunction application.**

- **Substantial delays in the court system in getting even the first judgement.**

- **Further delays due to Appeals to High Court/ Division Bench High Court and Supreme Court.**

MULTIPARTY ARBITRATIONS

Attempt by Indian Parties to avoid arbitration altogether by creating multiparty dispute in court proceedings, where one or more co-defendants is not party to arbitration agreement. Decision of the Supreme Court (*Sukanya Holdings*) holds that there can be no reference to arbitration in court proceedings brought against multiple parties out of a single or connected cause of action.

DURING ARBITRATION

- **Arbitrations in India are slow and prone to adjournment without just cause.**

- **Difficult to find in India arbitrators of international reputation/experience.**

- **Cannot rule out parties attempting to delay by moving court during arbitration on one pretext or the other.**

POST AWARD

- **Award made in India can be challenged under Section 34 of the Indian Arbitration & Conciliation Act, 1996. Party has 90 days + 30 days grace (for just cause) to file challenge. The award is not final and binding until time expires without action or action is dismissed.**

- **Scope of Challenge is quite wide in light of the Supreme Court decision in *ONGC v. Saw Pipes* despite the text of Section 34 being similar to grounds of challenge in New York Convention/UNCITRAL Rules.**

- **Huge delays in dismissing challenges to awards which ranges from 3 years, and which may go upto 8 years or more (including appeals to High Court/Division Bench High Court & Supreme Court) depending on State of jurisdiction, etc.**

RECOMMENDED CONTRACTUAL CLAUSE

- **Arbitration Outside India.**

- **Specify Law Governing Arbitration Agreement as foreign law e.g. English Law, even if substantive law is Indian Law (ideally even substantive law to be foreign law).**

- **Specifically exclude the Application of Indian Arbitration & Conciliation Act, 1996, except for the purposes of enforcement of Award in India.**

- **Provide for exclusive jurisdiction of foreign Courts in relation to arbitration (except as necessary for enforcement of the Foreign Award in India.**

REASONS FOR RECOMMENDATION

- **Despite arbitrations held outside India, certain High Courts have held that the Indian Act would govern such arbitration. The awards have, therefore, been held to be "domestic" awards under the Indian Act and not "foreign" awards.**

- **These judgements are based on a Supreme Court judgement in *Bhatia International* where the Supreme Court held that Part I of the Indian Act generally dealing with domestic arbitration would equally apply to arbitrations outside India. The Court did not consider the law applicable to the arbitration agreement.**

- **Indian parties, therefore, argue based on the Indian law being the applicable substantive law to the contract, that even if the arbitration agreement is governed by a foreign law by reason of the seat being outside India or express choice of foreign law on the arbitration agreement, the resulting award would be amenable to challenge under Section 34 of the Act.**

ADVANTAGES OF FOREIGN AWARD VS. DOMESTIC AWARD

- **Grounds for resisting foreign award based on public policy are narrower than under Section 34 of the Indian Act. Under Section 34 the Award can be set aside if the award is contrary to the public policy of India. This phrase has been given a wide meaning in *ONGC vs. Saw Pipes*. Public policy has been interpreted to include patent illegality.**

- **The phrase in Section 45 is "enforcement of the award" would be contrary to the public policy of India. Therefore, the enforcement should result in patent illegality etc. Mere payment of money (damages) etc. would not result in enforcement being contrary to the public policy. It may be cautioned, however, that no decision of the Supreme Court has yet made this distinction.**

- **Time taken in Courts for enforcement proceedings (although quite a bit) is much shorter than for setting aside under Section 34.**

THANK YOU