



International Arbitration:

Managing Risk in High Growth – High Risk Markets

A Conference for In-house Counsel and Executives
Involved in International Arbitration

Wednesday, September 10, 2008

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Presentation by

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on
Arbitration in India

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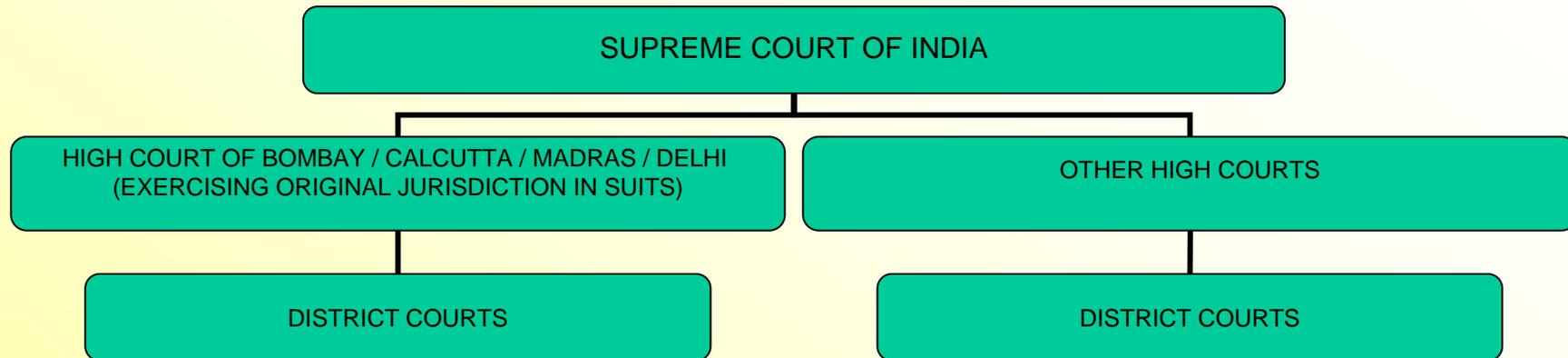


INDIA AS A SEAT OF ARBITRATION

- **As matters currently stand, we would not recommend India as the seat of an International Arbitration.**
- **Reasons include**
 - (a) Complicated court structure**
 - (b) Court interference and remedies for challenge to award and time taken by Court in disposals.**



COURT STRUCTURE IN INDIA



- **There are 19 High Courts in India with almost every state having its own High Court except 7 states having a common High Court at Assam.**
- **High Courts exercise supervisory jurisdiction over all district courts falling within their respective jurisdictions.**
- **Depending on venue of arbitration i.e. Seat or State in which the arbitration takes place, jurisdiction of such courts could be invoked. Additionally, there could be other courts with jurisdiction depending on whether part of the cause of action arose within that court's territorial jurisdiction.**
- **Courts of geographical locations have different approach and time constraints. Some courts are more favourable than others to arbitration.**



- **Any award made in an arbitration held in India is, for the purposes of the (Indian) Arbitration & Conciliation Act, 1996, a domestic award.**
- **Domestic awards can be challenged under Section 34 of the Indian Act.**
- **As drafted, Section 34 is in very similar terms to the New York Convention grounds for resisting enforcement. However, in practice, the Indian Supreme Court has construed the word “public policy” widely.**
- **For all practical purposes award can in effect be impeached as though the Court was sitting in appeal against the award.**



RECOMMENDED SEATS OF ARBITRATION

- **Strong recommendation is to choose a seat of arbitration outside of India.**
- **LONDON IS MOST RECOMMENDED**
- **Singapore is now favoured by Indian Parties.**
- **One has to be careful to ensure that the seat is in a country notified by India as convention country (only 44 convention countries are notified).**
- **If no choice but India, recommended seat would be Mumbai as the Mumbai High Courts is less interfering against the awards and time for disposal of challenge proceedings is also usually shorter.**

COURT INTERFERENCE IN ARBITRATIONS

- **Pre Arbitration**
- **During Arbitration**
- **Post Arbitration**

- **Courts of many geographical jurisdictions are ready to interfere in an arbitral process at any stage i.e. pre reference, during arbitration or post award.**
- **Indian Courts have been known to injunct parties even in respect of arbitrations outside India.**
- **During arbitration interference is rare but does occur occasionally.**
- **Only way to reduce risk of court interference is by providing (a) seat of arbitration outside India (b) exclusive jurisdiction of a court outside India and (c) possible anti-suit injunctions.**



ENFORCEMENT OF FOREIGN AWARDS

Section 48 of the Arbitration and Conciliation Act, 1996 lays down the conditions for enforcement of New York Convention awards. The enforcement of such awards may be refused on any of the following grounds:

- The parties to the arbitration agreement were under some incapacity under the law applicable to them;**
- The arbitration agreement is invalid under the law to which the parties are subjected to or under the law of the country where the award was made;**
- The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present its case;**



- **The award deals with a difference not contemplated by or not falling within the terms of submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration;**
- **The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place;**
- **The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made;**
- **The subject-matter of the difference is not capable of settlement by arbitration under Indian law; or**
- **The enforcement of the award would be contrary to the public policy of India.**

- **As is apparent, Section 48 incorporates the New York Convention grounds. In *Renusagar Power Co. Ltd. Vs. General Electric Co.* 1994 Suppl (1) SCC 644, the Supreme Court held that the public policy ground is a narrow ground. It was held by the Supreme Court that it must be held that the enforcement of a foreign award would be refused on the ground that a foreign award would be contrary to public policy of India if such enforcement would be contrary to**
 - (i) fundamental policy of Indian law; or**
 - (ii) the interests of India; or**
 - (iii) justice or morality**

- **In Furest Day Lawson Ltd. Vs. Jindal Exports Ltd. (2001) 6 SCC 356, the Supreme Court held that enforcement and execution can be one single proceedings;**
- **Limitation for filing enforcement is three years from the cause of action arising i.e. the date of award.**
- **Enforcement proceedings can take anything between 2 to 7 years depending on the originating court where the enforcement proceedings are commenced.**



RECOMMENDED POINTS IN ARBITRATION CLAUSES

ESSENTIALS

- 1. Choose substantive law other than Indian Law (e.g. English Law)**
- 2. Specifically provide for arbitration agreement to be governed in all respects by a foreign law (e.g. English Law)**
- 3. Provide for seat completely outside India and avoid even procedural sittings in India.**
- 4. Provide for exclusive jurisdiction of courts outside India in relation to the arbitration (except for enforcement purposes).**
- 5. Provide specifically that Part I of the Indian Act shall not apply.**



THANK YOU



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ARBITRATION IN BRAZIL

ARBITRATION IN BRAZIL: A risky business?

EDUARDO DAMIÃO GONÇALVES

**International Arbitration:
Managing Risk in High Growth/High Risks Markets
K&L Gates New York
10 Sept 2008**

ARBITRATION IN BRAZIL

BRAZIL – LEGAL FRAMEWORK

- In 1996 Brazil enacts the Brazilian Arbitration Act (Law 9,307/96)
- In 2001 the Supreme Court of Brazil (STF) ruled the Arbitration Act constitutional (SE-5206)
- In 2002 Brazil (finally!) ratified the New York Convention
- But is it enough to have an adequate legal framework to become a “arbitration-friendly” Nation? Or how contagious is it to be in Latin America?

ARBITRATION IN BRAZIL

BRAZIL – STATE INVESTOR ARBITRATION

- Washington Convention Of 1965 - ICSID? No
- BIT'S ? No
- How safe can it be to invest in Brazil?! And to settle disputes arising out of those deals?

ARBITRATION IN BRAZIL

POPULARITY OF ARBITRATION PROCEEDINGS INVOLVING BRAZILIAN COMPANIES

- The mentality to adopt arbitration has changed/90% of agreements with arbitration clause.
- The example in the Energy Sector.
- The number of arbitrations in Brazil increased 45% in the five-year period from 1999 to 2004 (CONIMA)
- Brazil – fourth place - most frequent nationality in 2006 for ICC Arbitration– (2006 Statistical Report – ICC Bulletin No. 18)

ARBITRATION IN BRAZIL

BRAZILIAN CASES MADE WORLD (IN)FAMOUS

- Is Brazil still the black sheep of arbitration?
- Anti-arbitration injunctions – The Curse of the Copel Case – State Owned company
- The return of the Curse – Inepar vs Itiquira – 2008 – TJPR Ag, Inst. 428.067-1 – the need for a “compromisso”

ARBITRATION IN BRAZIL

THE REAL TREND OF BRAZILIAN COURTS

- Renault vs CAO Case – since 1999 the Courts have established that an arbitration agreement is enforceable without need for Court Intervention – limited scope of article 7 of the Brazilian Arbitration Act
- Possibility of submitting State-owned entities to arbitration (AES Uruguaiana vs. CEEE – STJ – 2003)
(TMC Terminal Intermodal vs. Min. Ciência e Tecnologia STJ – 2005)
- Arbitrability of case involving bankrupt company (Diagrama case – STJ - 2008) and of company in a non judicial reorganization (ABC vs. Interclínicas Case – STJ 2005)
- If Lower Courts are sometimes reluctant (due to lack of knowledge rather than resistance), the Courts of Appeal are pro-arbitration

ARBITRATION IN BRAZIL

THE SEAT OF ARBITRATION IN BRAZIL

- **Time is of essence - Judicial Courts - (São Paulo – 5/10 years)**
- **Arbitration award is comparable to and has the same effect as a state court judgment (“judicial enforceable title”) and not subject to judicial review – encouragement to have the seat in Brazil**
- **Brazil is of course a good choice when the debtor has assets in the country (possibility of an easier enforcement)**
- **Brazil is a mandatory seat in PPP Projects (Law 11,079/2004)**

ARBITRATION IN BRAZIL

THE SEAT OF ARBITRATION IN BRAZIL

- **Limited grounds to set aside awards made in Brazil– art. 32 Arbitration Act**
 - the award is made by a person who could not be an arbitrator;
 - the award does not comply with the requirements of Article 26 (containing the requirement of an award);
 - it exceeds the limits of the arbitration agreement;
 - it does not decide the whole dispute submitted to the arbitrator;
 - proof establishes that the award was made "through unfaithfulness, extortion or corruption";
 - the award was made after the time limit; and
 - the award disregards the principles dealt with in Article 21, 2nd paragraph.¹⁸

ARBITRATION IN BRAZIL

THE SEAT OF ARBITRATION IN BRAZIL

- In Brazil, keep it simple!
- Avoid *ad-hoc* arbitration procedural – choose an arbitration institution
- If necessary, do not fear to have the case managed by a local institution (CCBC, CIESP, FGV, CAMARB, AMCHAM)
- Provide for jurisdiction of courts in Brazil in relation to the arbitration – to adopt enforcement measures.

ENFORCEMENT OF FOREIGN AWARDS

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN BRAZIL IS A RULE

- The Arbitration Act defines a foreign award as one issued outside the domestic territory – no concept of seat of the arbitration
- Superior Court of Justice – STJ has original jurisdiction
- Court control over foreign arbitral award is limited to the formal aspects and does not encompass the merit of the arbitral decision – confirmed several times!
- Great majority of arbitral awards were enforced by the Courts
 - Supreme Court of Brazil (STF) after the Arbitration Law – 5 rulings on Challenged Foreign Awards – 2 were not enforced
 - Superior Court of Justice (STJ) – 16 rulings on Challenged Foreign Awards – 4 were not enforced

ENFORCEMENT OF FOREIGN AWARDS

DECLINED FOREIGN AWARDS – ABSENCE OF FORMAL REQUIREMENTS

- **Absence of signature in the agreement that provides the dispute resolution clause/failing on the Party's acceptance of subjecting the conflict to arbitration** (1. Plexus Cotton Limited vs. Santana Têxtil S/A (STF); 2. Oleaginosa Moreno Hermanos vs. Moinho Paulista Ltda (STJ))

- **Failing to serve in the arbitration proceeding:**
 1. Challenged Foreign Awards 833 – Subway Partners C V vs. HTTP High Technology Foods Corporation S/A - absence of letter of request/ruling contrary to the Arbitration Law
 2. Challenged Foreign Awards 874 - Union Européenne de Gymnastique – UEG vs. Multipole Distribuidora de Filmes LTDA – evidence of service and delivery of all communications by mail – enforced award

- **Lack of standing of the Plaintiff** (Gottwald vs. Rodrimar)

ARBITRATION IN BRAZIL

Thank you!

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