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Enforcement of BIT Awards at Bay in India as the Courts Rule Out the Applicability of the Arbitration and Conciliation Act 1996

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This article discusses the state of enforcement of investment arbitration awards against India made pursuant to Bilateral Investment Treaties in light of the decisions of the Delhi High Court in *Union of India v Vodafone Group PLC United Kingdom & Anor* (2017) and *Union of India v Khaitan Holdings (Mauritius) Ltd & Ors* (2019).

Introduction

Enforcement of arbitral awards is the ultimate aim of arbitration. Globally, legislation has been designed to cater for commercial arbitration proceedings and the enforcement of awards from start to finish. Over time and given the sheer prevalence of commercial arbitration in the modern business world, a sufficient volume of jurisprudence has developed on the enforcement of awards in a variety of jurisdictions.

However, the same cannot be said for its non-commercial cousin - investment treaty arbitration. Among other factors, the involvement of sovereign States, the nature of the State measures under challenge and the impact of an adverse award on a State's public exchequer create greater opportunities to hinder the enforcement of investment treaty awards. While a self-contained regime under the Convention on the Settlement of Investment Disputes between States

and Nationals of Other States 1965 (the ICSID Convention) partly resolves problems, investment treaty arbitral awards delivered pursuant to *ad hoc* arbitrations face the rigours of enforcement under national legislation.

India is a peculiar case. It is one of the most attractive destinations for foreign direct investment (FDI). FDI inflows in India have grown eleven-fold, from US\$4 billion to US\$44 billion over the last two decades. Liberalisation, sound macro-economic policies and an increased network of bilateral investment treaties (BITs) have paved the way for greater investment - and, as a result, a greater number of investor-State disputes. From the 1990s to the present, a record 28 cases have been filed by foreign investors against India. Eleven cases have been resolved so far, India having prevailed in two cases and paid compensation in one. The remainder are pending. The possible fate of awards made against India in the pending cases and likely to need enforcing requires assessment.

India is not a signatory to the ICSID Convention

The question of enforcement of BIT awards in India would have been moot if India had signed the ICSID Convention and ratified and implemented it through national legislation. However, India is not covered by the delocalised arbitration regime that offers immunity to ICSID awards from challenge in national courts. Additionally, India is deprived of a regime that makes ICSID awards automatically enforceable in signatory jurisdictions.

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The ICSID Additional Facility Rules

Arbitration clauses in the majority of BITs involving India provide either for arbitration administered under the ICSID Additional Facility Rules (the Additional Facility Rules) or *ad hoc* arbitration under UNCITRAL Arbitration Rules. However, as discussed below, neither of these options assist in improving the chances of enforcing a BIT award in India.

The Additional Facility Rules were designed to facilitate the resolution of disputes where one of the parties is not a Contracting State to the ICSID Convention. They merely provide for the administration of disputes under the umbrella of the International Centre for Settlement of Investment Disputes (ICSID), drawing support from but not incorporating the ICSID Convention. Unlike the full ICSID Rules of Procedure for Arbitration Proceedings, the Additional Facility Rules do not offer foolproof enforcement protection to resultant awards. Awards under the latter provisions would therefore be subject to the place of arbitration. This can be a hurdle for enforcement.

In order to mitigate the effect of this regime, the Additional Facility Rules provide that an arbitration conducted under those rules may be conducted only in States that are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). It can be inferred that this provision was inserted to ensure enforceability of awards made under the Additional Facility Rules through the mechanism provided under the New York Convention.

The non-applicability of the Indian Arbitration & Conciliation Act 1996

The mechanism for enforcing foreign and domestic awards in India is set out in the Arbitration and Conciliation Act 1996 (the 1996 Act).

However, in two cases brought by India to restrain investment treaty arbitrations, national courts in India have ventured into the subject of enforcement of BIT awards, sparking

controversy and fuelling uncertainty. In the *Vodafone* and *Khaitan Holdings* cases, discussed below, the Delhi High Court ruled that BIT awards are not governed by the 1996 Act, since the underlying arbitrations were not commercial in nature. These rulings have thrown the enforcement of BIT awards into an abyss of ambiguity.

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The *Vodafone* case¹

In April 2017, Vodafone Blv. invoked the India-Netherlands BIT to challenge a retrospective amendment of tax legislation by India that led to a tax demand of INR 11,000 crores (R110 billion, US\$ 1,530,100,000) against Vodafone, together with interest. While this arbitration was pending, Vodafone Plc (the parent company of Vodafone Blv) initiated arbitration under the India-United Kingdom BIT, also challenging that tax measure.² India applied to the High Court of Delhi for an anti-arbitration injunction against Vodafone Plc.

The Court held that national courts in India were not divested of jurisdiction in an investment treaty arbitration. The courts would grant an injunction only if there were very compelling circumstances, the court had been approached in good faith and no efficacious alternative remedy was available.

However, the Delhi High Court went further and opined on the enforcement of BIT awards by Indian courts. The Court

held that although the subject BIT constituted an arbitration agreement between a private investor and the host State, it gave rise neither to an international commercial arbitration governed by the 1996 Act nor a domestic arbitration. The Court considered that investment arbitration disputes are fundamentally different from commercial disputes as the cause of action (whether contractual or not) is grounded on State guarantees and assurances and so are not commercial in nature. The roots of investment arbitrations are in public international law, State obligations and administrative law. The Court reiterated that, when acceding to the New York Convention, India made the ‘commercial reservation’ under art I.3 to apply the Convention “only to differences arising out of legal relationships ... which are considered as commercial under the national law of the State making such declaration.”

The *Khaitan Holdings* case³

In *Khaitan Holdings*, the Delhi High Court held that arbitral proceedings under a BIT are a separate species of arbitration, one that was outside the purview of the 1996 Act. As such, the jurisdiction of the courts in relation to arbitral proceedings under a BIT would be governed by the Indian Code of Civil Procedure 1908 (CPC). The Court placed reliance upon the *Vodafone* case.

While assuming jurisdiction over the foreign investor and investment under the CPC, the Court stated that the 1996 Act did not apply in the present case as that Act governs only commercial arbitrations. The case emanated from a bilateral investment treaty and not from a simple commercial contract.

This is a preliminary judgment on an interim application. It will be interesting to see if the court continues to hold the same view after hearing all the parties on the merits.⁴

Options available to BIT award holders seeking to enforce against India

In light of the *Vodafone* and *Khaitan Holdings* decisions (and until such time as they are set aside or varied by the Indian Supreme Court), any party applying for the enforcement of

a BIT award would first have to overcome the jurisdiction hurdle raised by these decisions, ie the inapplicability of the 1996 Act to BIT arbitration. Although other Indian High Courts are not bound to abide by a decision of the Delhi High Court, these decisions would certainly hold persuasive value and, until a contrary ruling is rendered, would be part of the law of the land.

The mechanisms for executing a foreign court decree or judgment are provided in the CCP 1908. It is pertinent to note, however, that BIT awards cannot be treated as a foreign decree or judgment for the purposes of execution in India under the CPC, since they are neither a ‘judgment’ as defined under the CPC, nor have they been delivered by a ‘Court’ as also defined in the CPC. Thus, this is also not a viable option for a party seeking to enforce a BIT award against India.

A legitimate avenue that is open to BIT award creditors is to try and identify assets of the BIT award debtor (which may even be the Union of India) that are located outside India, preferably in a jurisdiction that has an established, recognised, tried and tested mechanism for enforcing BIT awards. Several such jurisdictions are briefly discussed below.

(1) Singapore

The international arbitration regime in Singapore is bifurcated into two pieces of legislation – the Arbitration (International Investment Disputes) Act (Cap 11) as amended (the International Investment Disputes Act) and the International Arbitration Act (Cap 143A) as amended (the International Act).

The International Investment Disputes Act was enacted pursuant to Singapore’s signature and ratification of the ICSID Convention. Section 5 of the Act states that for the purposes of execution, an ICSID award shall have the same effect as a judgment of the Singapore High Court.

The International Investment Disputes Act does not provide

grounds for resisting enforcement of an ICSID award beyond the ICSID annulment regime. To date, there has been no attempt to enforce an ICSID award in Singapore.

The International Act is applicable to arbitral awards made pursuant to international arbitrations seated in Singapore, as well as to those awards made on the basis of an arbitration agreement in the territory of a country that has ratified the New York Convention. The 1985 version of the UNCITRAL Model Law on International Commercial Arbitration (the UNCITRAL Model Law or the Model Law), with the exception of Chapter VIII, is incorporated by reference into the International Act, subject to the provisions of the legislation. The grounds for refusing the enforcement of a foreign award that avail the Singaporean national courts are those set out in art V.1 of the New York Convention.

To date, Singaporean courts have not been seized of an application for enforcement of a treaty award. However, in at least two cases,⁵ the courts have entertained challenges to investment treaty awards seated in Singapore. In both cases, the courts exercised jurisdiction under the International Act. It can only be deduced that an application for enforcement of an investment treaty award would also be entertained under the International Act. Unlike India, there is no conundrum over the applicability of that Act to treaty awards.

“... BIT awards cannot be treated as a foreign decree or judgment for the purposes of execution in India under the ... Civil Procedure Code, since they are neither a ‘judgment’ as defined under the CPC, nor have they been delivered by a ‘Court’ as also defined in the CPC.”

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Sundaresh Menon SC, Chief Justice of Singapore, in his speech, *International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*⁶ has stated:

“This evolving body of substantive investment arbitration law also suffers from a lack of coherence and consistency because its development has been piecemeal. ... Any attempt by the courts to provide oversight is fragmentary and restricted: fragmented because enforcement of awards can be sought before the courts of any of the many signatories to the New York Convention, and restricted because of the principle of minimal curial intervention.”

This suggests that non-ICSID international awards seated in Singapore, or seated in a country that is a signatory to the New York Convention, will be enforced in Singapore like any international commercial arbitration award, being subject to the same grounds of resistance as under the New York Convention.

It is also noteworthy to highlight the Investment Rules introduced by the Singapore International Arbitration Centre (SIAC) in 2017.⁷ The SIAC is the first arbitral institution to introduce specialised arbitration rules in the context of investment treaty arbitration.

(2) England & Wales

The United Kingdom, of which England & Wales is a law district, is a signatory to the ICSID Convention. International investment disputes decided under it are recognised and enforced in England & Wales pursuant to the Arbitration (International Investment Disputes) Act 1966 (the 1966 Act). This legislation states that an ICSID award has the same force and effect for the purposes of execution as if it had been a judgment of the High Court of England & Wales.

The UK is also a party to the New York Convention. The English Arbitration Act 1996 (the English 1996 Act) applies to the enforcement of arbitral awards made in international arbitrations seated in England & Wales and in other countries that are parties to the New York Convention. A Convention award may be enforced in the same manner as a judgment or order of the court. The English 1996 Act contains a list of the grounds on which the recognition or enforcement of an award may be refused that are identical to those in art V.1 of the Convention.

The courts of England & Wales have exercised jurisdiction over investment treaty awards under the English 1996 Act. In *Occidental Exploration & Production Co v Ecuador*,⁸ the Court of Appeal held that English courts had jurisdiction to hear challenges brought in respect of awards made under investment treaties. In *European Media Ventures SA v Czech Republic*,⁹ the Commercial Court interpreted the Czech-Belgium-Luxembourg Economic Union (BLEU) BIT to confer jurisdiction on the arbitral tribunal to determine issues of liability and quantum for expropriation. Similarly, in *GPF GP Sàrl v Republic of Poland*,¹⁰ the Commercial Court partially set aside a decision on jurisdiction issued by a London-seated arbitral tribunal. The tribunal had held that it lacked jurisdiction to hear the majority of the claims. The Court conducted a *de novo* review of the decision. In interpreting the BIT, it held that measures leading to consequences similar to expropriation could be read to encompass a breach of the fair and equitable treatment standard.

While cases involving challenges to investment treaty awards in English-seated arbitrations are usual, cases of enforcement of investment treaty awards rendered overseas are rare. Nevertheless, English courts have exercised jurisdiction in such cases under the English 1996 Act. In *OAO Tatneft v Ukraine*,¹¹ the Commercial Court entertained an application by Tatneft for the enforcement of a Paris-seated treaty award under the Russia-Ukraine BIT and rejected Ukraine's application for refusal of enforcement. The court assumed jurisdiction over the enforcement application under the English 1996 Act.

All of this suggests that non-ICSID international awards seated in England & Wales or in a country that is a signatory to the New York Convention will be enforceable there under the English 1996 Act like any international commercial arbitral award.

(3) The United States

The US is a signatory to the ICSID Convention. The recognition and enforcement of foreign arbitral awards is subject to the provisions of the New York Convention as well as the Federal Arbitration Act 1925 (the FAA), which incorporates the Convention into US federal law and grants subject-matter jurisdiction over recognition and enforcement proceedings to US federal district courts. By virtue of the Convention having been incorporated into the FAA, the grounds for challenging the enforcement of an international arbitral award are the limited grounds enumerated in art V of the Convention.

However the only way to enforce in the US an arbitral award issued against a sovereign entity under the ambit of ICSID or any other arbitral tribunal is in compliance with the Foreign Sovereign Immunities Act 1976.

In *Mobil Cerro Negro Ltd v Bolivarian Republic of Venezuela*,¹² Mobil filed an *ex parte* petition seeking to enforce an ICSID award by entering judgment against Venezuela in the US. The District Court refused to vacate the award and granted the petition. The Court of Appeals vacated the District Court's

decision, holding that the 1976 Act, and not the legislation implementing the ICSID Convention in the US, provided the sole basis for subject-matter jurisdiction in actions to enforce ICSID awards..

Non-ICSID awards are enforceable as Convention awards in accordance with the FAA. In *Chevron Corporation and Texaco Petroleum Co v Republic of Ecuador*,¹³ an UNCITRAL arbitral award rendered at The Hague was challenged by Ecuador in the Dutch courts. The courts having upheld the award, Chevron then applied for enforcement in the US. The District Court held that the award was enforceable under the New York Convention. The position in the US is therefore more or less similar to that of Singapore and England & Wales, while bringing the enforcement of an UNCITRAL investment treaty award seated in a New York Convention State within the ambit of the FAA.

“ ... [T]he Delhi High Court, in opining that the 1996 Act is inapplicable, has dealt a fatal blow to BIT award enforcement in India, forcing investors to explore avenues beyond the Indian courts, such as seeking enforcement of awards in other jurisdictions where award debtors might hold assets. ”

(4) Other countries

Other countries with robust international arbitration frameworks, such as France, Germany, Australia and Japan are signatories to the ICSID Convention. They have rarely witnessed cases involving the enforcement of investment treaty awards. Yet, despite the recent trend of Indian courts to exclude India's 1996 Act from the enforcement of investment treaty awards, award creditors can locate assets in these

countries, given that they are also signatories to the New York Convention and have well-developed legislative frameworks to exercise jurisdiction over challenges to and enforcement of investment treaty awards. As such, it may be prudent to locate assets of an investor or the host State prior to the initiation of treaty arbitration proceedings, in order to ring-fence the risks of resistance to enforcement at the early stages of the dispute.

Conclusion

The New York Convention is regarded as the cornerstone of international commercial arbitration. It draws life from the national laws that adopt it. In India, the 1996 Act is based on the UNCITRAL Model Law and adopts the New York Convention for the recognition and enforcement of foreign awards. Unlike ICSID States, there is no separate mechanism for the enforcement of investment treaty awards in India.

However, in opining that the 1996 Act is inapplicable to investment treaty arbitrations, the Delhi High Court has dealt a fatal blow to BIT award enforcement in India, forcing investors to explore avenues beyond the Indian courts, such as seeking enforcement of awards in other jurisdictions where award debtors might hold assets. Unless the Supreme Court of India overturns this decision, the outlook for enforcement of investment treaty awards in India remains bleak.

The other alternative would be for the Indian legislature either (1) to amend the 1996 Act to bring the enforcement of BIT awards within its scope; or (2) (a much less preferred option), to establish an entirely new regime (akin to Part II of the extant 1996 Act) dedicated solely to the enforcement of BIT awards. India would not be the first country to do so. South Africa, for example, has already introduced a specific framework for the resolution of investment treaty disputes, albeit not purely dedicated to the enforcement of BIT awards. However, the problem with enacting fresh legislation would be that courts ultimately tasked with the enforcement of BIT awards under a new regime would not have the benefit of decades of judicial evolution, refinement and interpretation applicable to other regimes.

For the time being, therefore, (1) the concerns of a number of foreign investors, (2) the effective application of investment treaties to which India is a party, and (3) the promises of the fastest growing economy in the world to provide a stable legislative and regulatory framework for FDI, lie with the Supreme Court of India. ■

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- 1 *Union of India v Vodafone Group PLC United Kingdom & Anor*, CS (OS) 383/2017, 22 August 2017. For discussion, see Nishith Desai Associates, *Vodafone Case: A Bit More Arbitration-Friendly*, available at http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/vodafone-case-a-bit-more-arbitration-friendly.html?no_cache=1&cHash=6d8d3f6c97a84bd120895dbf87ecd464.
- 2 It appears that the second arbitration was commenced as a result of a jurisdictional objection raised by India in the first.
- 3 *Union of India v Khaitan Holdings (Mauritius) Ltd & Ors*, CS (OS) 46/2019 I As 1235/2019 & 1238/2019, 29 January 2019.
- 4 See Nishith Desai Associates, *op cit* (note 1 above).
- 5 *Sanum Investments Ltd. v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536; *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* [2017] SGHC 195.
- 6 *Editorial Note: Keynote Address to the 2012 ICCA Congress, Singapore*, in AJ van den Berg (Ed), *International Arbitration: The Coming of a New Age*, ICCA Congress Series No 17 (2013, Alphen aan den Rijn: Wolters Kluwer), available at https://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf.
- 7 *Editorial note*: Available at <http://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Rules%202017.pdf>.
- 8 [2006] 2 WLR 70.
- 9 [2008] 1 All ER (Comm) 531.
- 10 [2018] EWHC 409 (Comm).
- 11 [2018] EWHC 1797 (Comm).
- 12 No 15-707 (2d Cir, 2017).
- 13 795 F 3d 200 (DC Cir, 2015).