

Dispute Resolution Hotline

February 15, 2019

IN LINE WITH VODAFONE, DELHI HIGH COURT REFUSES ANOTHER ANTI-BIT ARBITRATION INJUNCTION

The Delhi High Court held that:

- Indian courts have jurisdiction to grant anti-BIT arbitration injunctions
- Anti-BIT arbitration injunctions are to be granted in rare and compelling circumstances
- Arbitral tribunal appointed under a BIT has competence to rule on its own jurisdiction
- Arbitration & Conciliation Act, 1996 applies only to commercial arbitration

INTRODUCTION

Recently, the Delhi High Court (“**Court**”) in the case of *Union of India v. Khaitan Holdings (Mauritius) Limited & Ors.*¹, refused to grant anti-arbitration injunction (i.e. stay on arbitration proceedings) to Union of India in a dispute under India-Mauritius Bilateral Investment Treaty (“**BIT**”). It held that interference by domestic courts in arbitral proceedings under BIT is permissible only in “*compelling circumstances*” in “*rare cases*”. The Court reaffirmed that issues as to the jurisdiction of the arbitral tribunal should be decided by the arbitral tribunal itself.

FACTUAL MATRIX

Khaitan Holdings (Mauritius) Limited (“**Khaitan Holdings**”), a Mauritian entity, had investments into Loop Telecom and Trading Limited (“**Loop**”), an Indian entity. In 2008, Loop was awarded a license of 21 Unified Access Services (“**UAS / 2G License**”) by the Government of India. However, in 2012, the 2G License was cancelled by the Supreme Court in the case of *Centre for Public Interest Litigation v. Union of India*² (“**CPIL Judgment**”) owing to irregularities in the license granting process. Loop approached TDSAT for refund of license fees. Its request was dismissed.

Owing to the license cancellation, one Kaif Investments Limited (“**Kaif Investments**”) and Capital Global Limited (“**CGL**”) that held substantial interest in Loop issued a notice to India under Article 8.1³ of the BIT seeking settlement of disputes. Thereafter, Kaif Investments merged with Khaitan Holdings. In 2013, Khaitan Holdings issued a notice of arbitration under Article 8.2⁴ of the BIT on the ground that it held 26.95% equity in Loop and is entitled to claim compensation in relation to the cancellation of the 2G License. Subsequently, both sides nominated their arbitrators in 2013.

Mr. Ishwari Prasad Khaitan (“**Ishwari Prasad Khaitan**”) and Ms. Kiran Khaitan (“**Kiran Khaitan**”), Indian citizens, were alleged to be beneficial shareholders of Khaitan Holdings. Loop and the Khaitans were charged with cheating and criminal conspiracy to secure licenses. Further, the Khaitans were alleged to be fronts for Mr. Ravikant Ruia (“**Ruia**”), promoter of the Essar Group of Companies. However, in December 2017, the Special Judge – Central Bureau of Investigation acquitted the accused of all charges. After acquittal, Loop made a second request to TDSAT for refund of license fees. This was also dismissed.

Post the decision of CBI Judge in 2017, the Permanent Court of Arbitration (“**PCA**”) scheduled the first arbitration meeting on January 28, 2019. On January 27, Union of India filed a suit against Loop, Khaitan Holdings, the Khaitans and Ruia seeking various declaratory reliefs, with an interim application to urgently restrain the arbitral proceedings. The present judgment is on the said interim application.

KEY ARGUMENTS BY PARTIES

Union of India argued that Khaitan Holdings was controlled by Indian shareholders. Therefore, it was not a genuine Mauritian investor to invoke the India-Mauritius BIT against Union of India. Further, Loop was barred from invoking BIT since it had approached TDSAT and had accepted its jurisdiction. Khaitan Holdings argued that the issue of whether Khaitan Holdings was a genuine investor is to be considered by the arbitral tribunal under the BIT, and not by the court. Further, the basis of claims before TDSAT were distinct from expropriation claims made by Khaitan Holdings under the BIT.

JUDGMENT

The Court acknowledged that under public international law even judgments of courts could trigger investment dispute under BIT.⁵

Supreme Court judgment can trigger a BIT claim

At the outset, the Court assessed if a judgment of the Supreme Court of India could trigger a BIT claim. Relying on the ILC Draft Articles on State Responsibility, it held that judiciary is an organ of the State. Its conduct could therefore be attributable to the State and constitute treaty violation. The Court recognized that this was theoretically true, even when the judiciary in India was separate from the other organs such as the Legislature and the Executive. However, while the judgment of the Supreme Court appeared to be the trigger of the BIT claim, the Court delved deeper into

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the findings in the judgment and held that the Supreme Court had in fact called the executive action to question.⁶

Loop was not barred from invoking BIT

The Court first considered whether Loop Telecom by approaching TDSAT was barred from invoking arbitration under India-Mauritius BIT. While the Court noted that the 2G License and Khaitan Holdings' investment into Loop Telecom were subject to Indian laws, it held that BIT is self-contained and is primarily governed by the principles of public international law. Applicability of BIT therefore, is not subject to applicability, interpretation and adjudication under domestic laws. Accordingly, interference with BIT dispute mechanism in the case of genuine investor dispute would defeat the purpose of BITS.

Court's jurisdiction is not ousted

The Court recognized that arbitral proceedings under BIT is a separate specie of arbitration. It is outside the purview of Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") which only covers commercial arbitration. As such, the court held that jurisdiction of courts in relation to arbitral proceedings under BIT would be governed by Code of Civil Procedure, 1908 ("**CPC**"). The Court placed reliance upon Union of India v. Vodafone Group,⁷ ("**Vodafone Judgment**") where the Court had accepted jurisdiction in a similar matter involving an anti-BIT arbitration injunction. In the present case, the Khaitans were residents of Delhi. Loop was an entity registered in Delhi. Subject matter of dispute were the investments in Loop. Hence, the Court stated that it has jurisdiction to entertain the suit filed by Union of India.

Whether Khaitan Holdings is a "genuine investor" and arbitral proceedings ought to be stayed

In the present case, Khaitan Holdings, had opted for adjudication of disputes in accordance with Arbitration Rules of the United Nations Commission on International Trade Law, 1976 ("**UNCITRAL Rules**"). As per Article 21⁸ of UNCITRAL Rules, the arbitral tribunal has the power to rule on objections as to its own jurisdiction – an embodiment of the widely recognized doctrine of *kompetenz-kompetenz* in international arbitration. Thus, the question whether an entity is an investor under BIT has to be determined by the arbitral tribunal.⁹ Accordingly, the Court decided not to interfere with the ongoing arbitral proceedings at this stage and ruled that anti-BIT arbitration injunctions should be granted only in rare and compelling circumstances.

ANALYSIS

The present judgment is commendable and in line with the evolved non-interventionist approach of Indian courts in relation to BIT arbitration proceedings.¹⁰ BIT arbitration proceedings involve an interplay of private and public international law. As such, court intervention backed by respective domestic laws ought to be kept to minimum and in the Court's words, restricted to 'rare and compelling circumstances'. It is also interesting to note that while accepting jurisdiction, the Court relies on CPC as opposed to the Arbitration Act. The ouster of BIT arbitrations from the ambit of Arbitration Act may be problematic as it leaves this special specie of arbitrations high and dry, and devoid of a governing arbitration regime under Indian law. If not at the preliminary stage of jurisdiction, the exclusion of BIT arbitrations from Arbitration Act assumes gravity at the stage of enforcement of a BIT award.

However, even while assuming jurisdiction to entertain an anti-arbitration injunction, the courts ought to exercise caution in treading into the merits of the dispute, and the validity or otherwise of impugned measures that trigger a BIT claim which may fall purely within the domain of the arbitral tribunal. In the instant case, the court opined that the cancellation of license by Supreme Court may qualify under exceptions to Article 6 of the BIT which deals with expropriation.¹¹ At another instance, the Court hinted that it is possible that the foreign investor is not a real investor but the Khaitans posing as one. However, the Court recognized that such questions are for the arbitral tribunal to decide after hearing both parties on merits.

The present judgment is a preliminary judgment in the interim application. It would be interesting to see if the court continues to hold the same view after hearing all the parties on merits. In the event the Court decides to grant the anti-BIT arbitration injunction, the arbitral proceedings may not be impacted and can continue. However, this can result in a conflict, ultimately posing a risk for enforcement of the BIT award in India.

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You can direct your queries or comments to the authors

¹ CS (OS) 46/2019 I.As. 1235/2019 & 1238/2019 dated January 29, 2019

² (2012) 3 SCC 1

³ "Any dispute between the investor of One Contracting Party and other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute."

⁴ If dispute cannot be settled amicably, investor has the following options:

i. Invoking arbitration under Indian Law;
ii. If the countries are parties to the Convention on the Settlement of Investment Disputes, the disputes can be referred to ICSID;
iii. To seek conciliation of the disputes under the UNCITRAL Conciliation Rules;
iv. To seek adjudication of the disputes by an ad-hoc Tribunal in accordance with the UNCITRAL arbitration rules

⁵ See Article 4 of Responsibility of States for Internationally Wrongful Acts, 2001

⁶ The Supreme Court ruled that the first-come-first serve policy for grant of licenses was flawed, and that the procedure adopted by the Government of India was not fair and transparent. Owing to these arbitrary allocations, the Supreme Court had cancelled the licenses.

⁷ CS(OS) 383/2017 – Delhi High Court

⁸ Article -21 - "1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement..."

⁹ Board of Trustees of the Port of Kolkata Vs. Louis Dreyfus Armatures SAS, G.A. 1997 of 2014 decision dated 29th September, 2014 – Calcutta High Court

¹⁰ Board of Trustees of the Port of Kolkata Vs. Louis Dreyfus Armatures SAS G.A. 1997 of 2014 decision dated 29th September, 2014 – Calcutta High Court; Union of India v. Vodafone Group, CS(OS) 383/2017 – Delhi High Court

¹¹ "Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalisation or expropriation except for public purposes under due process of law, on a non-discriminatory basis and against fair and equitable compensation..."

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