Dispute Resolution Hotline

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INDIA VS. VODAFONE - TRIBUNAL TO RULE ON JURISDICTION IN MULTIPLE BIT ARBITRATIONS; A&C ACT DOES NOT APPLY

The Delhi High Court has ruled that:

- courts in India have inherent jurisdiction to pass anti-arbitration injunction;
- this jurisdiction was to be exercised only in compelling circumstances where there is no alternate efficacious remedy;
- an arbitral tribunal was competent to decide on its own jurisdiction;
- multiple claims under different BITs did not per se give rise to abuse of process;
- Indian Arbitration & Conciliation Act, 1996 does not apply to BIT arbitrations

BACKGROUND:

In a landmark ruling for bilateral investment treaty arbitration in *Union of India vs. Vodafone Plc. and Anr.*[1], the High Court of Delhi, India (**Court**) refused to restrain second international arbitration initiated by Vodafone Plc. against India under the India-United Kingdom Bilateral Investment Protection Agreement (**BIPA/BIT**) in 2017. The judgment was rendered despite the fact that Vodafone had initiated arbitration proceedings challenging the same measures by India under Netherlands - India BIT in 2015.

The Claim under India-Netherlands BIT

Vodafone Group Plc.,UK is the parent company of several subsidiaries. On April 17, 2014, Vodafone International Holdings BV ("**VIHBV**") – a Dutch subsidiary of Vodafone Group Plc. - initiated arbitration against the Republic of India under the India-Netherlands BIT. VIHBV challenged retrospective amendment of Sections 9(1) and 195 of the Indian Income Tax Act read with Section 119 of the Indian Finance Act, 2012 by the Indian government, to bring VIHBV under the tax-liability net for acquisition of stake in an Indian company. The retrospective amendment was carried out by the Indian Parliament after the Supreme Court of India quashed the tax-demand made by Government of India against VIHBV.

The Claim under India-United Kingdom BIT

During pendency of arbitration proceedings under the India-Netherlands BIPA, Vodafone Group Plc. initiated arbitration against the Republic of India on January 24, 2017 under the India-United Kingdom BIT. Vodafone Group Plc. challenged the same measure of Republic of India under the afore-said proceedings i.e. retrospective amendment of Sections 9(1) and 195 of the Indian Income Tax Act read with Section 119 of the Indian Finance Act, 2012.

Anti-arbitration injunction suit in India:

The Union of India filed a suit before the Delhi High Court seeking anti-arbitration injunction against Vodafone Group Plc. and another Vodafone subsidiary (collectively "**Defendants**"). Union of India sought to restrain the Defendants from continuing arbitration proceedings under the India-UK BIT.

On August 22, 2017, the Court passed an *ex-parte* interim order restraining the Defendants from initiating or continuing arbitration proceedings under the India-UK BIT. However, in its final judgment on May 7, 2018, the Delhi High Court vacated the stay and dismissed the suit against Union of India.

JUDGMENT:

The Court was seized of several issues. Following is a brief on the rulings on key issues:

Court has jurisdiction over Defendants & Subject-matter of dispute:

The Court resorted to provisions of section 20 of the Code of Civil Procedure, 1908[2] to determine personal jurisdiction of the Court. For the said purpose, the defendant must either (a) reside, carry on business or personally work for gain; (b) either defendant must fulfil (a) above; or (c) cause of action must have arisen –at the place where the jurisdiction is sought. The Court noted that in its Notice of Arbitration under the UK – India BIT, Vodafone stated that it made an investment in India, held economic interests in India, and carried on business in India. As such, the Court had jurisdiction over the subject-matter of the dispute. Further, the Court resorted to test of residence to ascertain personal jurisdiction. It applied the test of single economic identity to conclude that the defendants and its Indian subsidiary constituted a group of companies. As such, the Court had jurisdiction over the Defendants in

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subject-matter of the dispute and in *personam*.

The Court has also relied on the landmark judgment of *Modi Entertainment*[3] to state that courts in India have jurisdiction to pass anti-suit injunction to a party over whom it has personal jurisdiction.

Inherent lack of court jurisdiction in BIT arbitrations:

The Court held that jurisdiction of courts could be ousted only by express provision of law or where ouster was clearly implied. The Court noted that there was no legislation or case law in India that expressly or impliedly barred courts in India from exercising jurisdiction over bilateral investment treaty arbitrations. In addition, the Court relied on the fact that India had not ratified the ICSID[4] Convention apparently because it negates the role of national courts. As such, there was no bar as to jurisdiction of Indian courts to hear the case. The Court rejected arguments that it had no jurisdiction to interpret or apply treaties between investors and States. It ruled that if the court had no jurisdiction to pass an anti-arbitration injunction, it would be powerless even to execute a BIT award.

The Court also ruled that an agreement to arbitrate between an investor and a State resulting from the Treaty route did not constitute a treaty between the investor and the State. It formed a contract, a sui generis category, where contractual obligations and contractual rights were involved. As such, courts had jurisdiction to deal with cases involving such contracts.

International Law

Although the Court accepted jurisdiction over BIT arbitrations in general, it recognized the importance accorded to Indian law for international law. It referred to Constitution of India[5] and provisions relating to fostering respect for international law and treaties. The Court also referred to the use of Vienna Convention on law of Treaties for interpretation of international treaties, more particularly its provisions on good faith and discouragement from invoking internal law to justify failure to perform international obligations. Relying on these aids of interpretation, the Court ruled that BITs were intended to protect investors. As such, their purpose was better served if the arbitration agreement under the Bits was subject to international law rather than State law. As such, Courts ought to adopt a non-interventionist approach and must agree to give effect to international law.

Abuse of Process

Dealing with the argument of parallel claims leading to abuse of process under multiple BITs, the Court rules that abuse of process occurs when a procedural right is exercised in an abnormal, excessive or abusive way. The fact that multiple claims were subsisting did not per se indicate that there was abuse of process.. The Court relied on the UNCTAD World Investment Report 2016 to suggest that atleast 40% of the foreign affiliates were owned through complex vertical chains with multiple cross-border links in atleast three jurisdictions. As such, multiple claims initiated by various companies in a chain would not per se result in abuse of process. An anti-arbitration injunction could be granted only if the proceedings were oppressive, vexatious, inequitable, or resulting in abuse of process. Inversely, a court must not grant injunction if the same would deprive the defendant of a remedy. Since Vodafone suspected that its claim faced risk of jurisdiction under arbitration proceedings initiated under the Netherlands – India BIT, it had initiated arbitration under the UK – India BIT. This did not result in abuse of process, but was securing of a remedy available in international law. The Court reiterated that an anti-arbitration injunction was to be exercised with great caution.

Conditions offered by Vodafone

The Court noted the peculiarity of the present case. The Defendants had offered certain conditions that would have the effect of mitigating the risk of abuse of process. For instance, the Defendant had stated in its second notice of arbitration under the UK – India BIT that by challenging the same State measures, it was not seeking to make double claims against India. Further, the Defendants had offered to consolidate the two arbitration proceedings. This mitigated the risks associated with multiple claims leading to abuse of process.

Application of the Indian Arbitration & Conciliation Act, 1996 (A&C Act)

The Court delved into difference between commercial and investment arbitration. It stated that provisions of the A&C Act applied only to commercial arbitrations which were considered commercial under Indian law. However, investment treaty arbitrations found their roots in public international law, administrative law and State obligations. Where A&C Act did not apply, the court's inherent power was not circumscribed by anything contained in the A&C Act with respect to intervention of courts. The Court then relied on the inherent jurisdiction of arbitral tribunals to rule on their own jurisdiction, applying the principle of *kompetenz kompetenz*. It stated that an arbitral tribunal was better placed to assess the scope of both BIT arbitrations. Hence, the anti-jurisdiction of the court to pass anti-arbitration injunction was required to be used with caution and that courts were required to adopt a non-interventionist approach in such matters.

ANALYSIS:

The judgment of the Delhi High Court is certainly a landmark decision in terms of the 'internationalist approach' adopted by a national court and its respect for jurisdictional powers of international arbitral tribunals. However, the judgment brings to fore the growing concern over international arbitration as a mechanism for resolving investor-state disputes.

The Court has expressly voiced this concern by referring to scholarly articles and obiter dicta in various cases where international arbitration is considered inappropriate to adjudicate over correctness or otherwise of State measures and policy decisions. A school of thought believes that national courts are best equipped to assess the needs of a nation and the reasons and policies backing State measures. However, an opposing school of thought believes that an independent impartial arbitral tribunal supported by experts is necessary to rule out element of bias and over-zealously protected nationalist measures to balance investor rights with State protection and development.

In any event, the present decision of the Delhi High Court recognizes the international principle of *kompetenz kompetenz* i.e. powers of arbitral tribunal to rule on its own jurisdiction, and its limited power to intervene in BIT arbitrations. However, the ruling that the A&C Act does not apply to BIT arbitrations can create concerns over enforcement of BIT awards in India. Further, in a separate welcome move, the Court acknowledges that an abuse of

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process cannot be assumed at the first instance in case of multiple claims, and that ways could be adopted by parties to reduce the extent of abuse, if it exists. Measures such as consolidation of multiple proceedings, appointment of the same arbitral tribunal for parallel claims, avoiding double jeopardy amongst others could go a long way in effective dispute resolution in cases involving multiple claims. While there is a great move in the international commercial arbitration fraternity to consolidate related arbitration agreements despite choice of distinct institutional rules, a similar move in the investment treaty arbitration can offer a great push to consolidation of multiple related claims and encouraging consistency of awards, non-duplicity of proceedings and cost-effectiveness.

In such a scenario, the options offered by Vodafone with respect to consolidation of proceedings, constitution of the same arbitral tribunal for both proceedings and avoidance of double recovery of claims are creative and praise-worthy. While the fate of both arbitration proceedings depends on acceptance of these conditions by Union of India, it instils a greater sense of fairness and efficiency in the proceedings and rules out, atleast prima facie, an element of abuse of process, replacing it with a sense of good faith while resolving an investor-State dispute.

– Kshama A. Loya & Vyapak Desai
You can direct your queries or comments to the authors

[1] C.S. (S) 383 / 2017, High Court of Delhi

[2] *"20. Other suits to be instituted where defendants reside or cause of action arises .- Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—*
(a) The defendant, or each of the defendants where there are more than one, at the time of the commencement of the Suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
(c) the cause of action, wholly or in part, arises."

[3] Modi Entertainment v. WSG Cricket Pte.; (2003) 4 SCC 341

[4] International Centre for Settlement of Investment Disputes

[5] Articles 51(c)