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The Uncertainty around the Enforcement of Investment Awards in India

THE UNCERTAINTY AROUND THE ENFORCEMENT OF INVESTMENT AWARDS IN INDIA

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Enforcement of awards is the ultimate aim of arbitration.[2] 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 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 creates its own unique challenges to the enforcement of investment treaty awards.

India is one of the most attractive destinations for foreign direct investment (FDI),[3] however, when it comes to the enforcement of investment treaty awards, it is no different. Ordinarily, India deals with the enforcement of arbitration awards in foreign seated arbitrations in Part II of its domestic legislation, namely the Arbitration and Conciliation Act 1996 ("**the Act**").[4] However, there is some uncertainty about the applicability of the Act to investment treaty awards. The last decade in Indian investment jurisprudence has witnessed many instances which were approached by the judiciary in conflicting ways. India being non-signatory to the ICSID convention,[5] further complicates the enforcement regime in India.

THE APPLICATION OF THE NEW YORK CONVENTION

The major part of the regulatory framework in the international arena for the enforcement of awards is covered by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**").[6] The convention provides a duty for its member nation to give due recognition to the agreement containing the arbitration clause and ensure proper enforcement of the award. The convention also provides for two reservations: (i) qua applicability of the convention only to the arbitration awards which are given in countries party to the convention; and/or (ii) qua applicability of the convention only with respect to commercial matters ("**the commercial reservation**"). It is worth noting that India is a member of the New York Convention but also has

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2 Moazzam Khan & Kshama Loya, *Enforcement of BIT awards at bay in India as the courts rule out the applicability of the Arbitration and Conciliation Act,* ASIAN DISPUTE REVIEW 2020; Aram Aghababyan, *et al.*, *Global Implication of the Pandemic on Arbitration: Enforcement and other implications,* August 19, 2020, Kluwer Arbitration Blog.

[3] *UNCTAD World Investment Report 2023 Available here* https://unctad.org/publication/world-investment-report-2023.

[4] Arbitration and Conciliation Act, 1996, Act No. 26 of 1996, India.

[5] ICSID, *Database of ICSID Member States*, Available here https://icsid.worldbank.org/about/member-states/database-of-member-states .

[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

acceded to both the reservations.[7] Presently, India enforces Arbitration awards under Part II of the Act from only 48 notified Countries and recognises only those awards that arise out of legal relationships that are considered "commercial" under Indian laws.

In that view of the matter, it becomes pertinent to ascertain firstly, what constitutes "commercial" under Indian Laws and secondly, how Indian Courts have interpreted India's reservation to the New York Convention.

JUDICIAL INTERPRETATION OF THE COMMERCIAL RESERVATION

The contentious issue of "commercial" legal relationship as a requirement for enforcement of foreign awards in India has cast doubt on the enforcement of investment treaty awards in India since such awards are usually a product of a foreign investor's challenge to a policy decision of the host state and rarely arises out of a direct commercial relationship between the parties. What makes the matter more challenging is that courts have interpreted "commercial" in a variety of ways. Certain pronouncements by the Indian courts compel us to ponder over the reorganization of enforcement mechanisms in India.

R.M. Investment and Trading Co. (P) Ltd v. Boeing Co.

In this case, RM Investment, an Indian company, and Boeing, a US company, agreed that the former will provide consultancy service for the promotion of the sale of Boeing Aircraft in India.[8] The question that arose was whether rendering of consultancy services by RMI for promoting such commercial transaction as a consultant, was covered under "Commercial Transaction" or not. The Supreme Court in this case while construing the expression "commercial relationship" held:

"The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not..."

The Court, thus, opined that the word commercial should be construed expansively in matters of international trade.

Koch Navigation v. Hindustan Petroleum Corpn. Ltd

The Supreme Court in this case,[9] while considering the meaning of *commercial* transactions, held that a liberal construction is to be given to any expression or phrase used in the Act which, however, must be consistent with its literal and grammatical sense, since the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration.

Therefore, it can be inferred that the BITs which promote international trade and development between party countries would be within the ambit of the term, "commercial".

The conundrum, however, remains owing to the conflict between the decisions of two High Courts of the Country, namely, the High Court of Calcutta and the High Court of Delhi.

Board of Trustees of the Port of Kolkata v. *Louis Dreyfus Armatures*

[7] UNCITRAL, *India*, New York Convention Guide, Available here https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=581&opac_view=-1# ; Government of India v. Vedanta Limited, Civil Appeal No. 3185 of 2020; Spentex Industries Ltd v. Quinn Emanuel Urquhart, CS(OS) 568/2017.

[8] R.M. Investment & Trading Co. Pvt. Ltd. v. Boeing Co 1994 SCC (4) 541).

[9] Koch Navigation v. Hindustan Petroleum Corpn. Ltd, (1989) 4 SCC 259

In this case, the Calcutta High Court took an interesting stand.[10] A dispute arose between India and France under the India-France BIT. An anti-arbitration injunction (AAI) was sort to prohibit bringing a case under the said BIT. The facts of the case were that a contract was formed between Kolkata Port Trust and Haldia Bulk Terminals Private Limited. A substantial number of shares were owned by a French investor. By invoking the provision of BIT, the investor brought a notice against India. When hearing the AAI, a question arose as to the locus of Kolkata Port Trust since the arbitration arose out of an investment covered by the Indi-French BIT, to which, the Port Trust was not a party.

Interestingly, the application for this anti-arbitration injunction was made under Sec. 45 of the Act. When justifying its power to issue an anti-arbitration injunction, in this case, the court simply assumed that the Act applied to this investment arbitration, just like it does to foreign-seated commercial arbitrations. The judgment also provided insights regarding the instances wherein the AAI remedy can be awarded. Three instances were enumerated on this aspect: a) when the question pertains to the existence of an arbitration agreement and the court finds the non-existence of such agreement; (b) in cases where the agreement is void or incapable of being performed: c) where the court is also of the opining that proceeding with arbitration would lead to unconscionable.

Union of India v. Vodafone Grp. Plc U.K. – The Turning Point

The Delhi High Court appears to have a contradictory opinion, as in the *Vodafone* case,[11] it was held that even though the BIT, in this case, constitutes an agreement to arbitrate between the host state and a private investor, it does not give rise to international commercial arbitration or domestic arbitration under the Act. It was held that investment disputes are not the same as a commercial dispute as the cause of action, whether contractual or non-contractual, is based on state guarantees and assurances which make them fundamentally different from commercial contracts. The Court, therefore, created its own standard, holding that an Indian court could intervene in an investment arbitration and grant an anti-arbitration injunction only if the arbitration is "*oppressive, vexatious, inequitable or constitutes an abuse of the legal process.*" The Court further noted that roots of investment arbitrations are in public international law, State obligations, and administrative law.

Union Of India vs Khaitan Holdings (Mauritius)

Similarly, in the case of Union of India v. Khaitan Holdings (Mauritius) Limited & Ors,[12] the Delhi Court, placing reliance upon the Vodafone Case, held that investment arbitration being a different species of arbitration cannot be said to be covered under the Act. The court further held that the Code of Civil Procedure, 1908 shall apply while deciding the jurisdiction of the courts with respect to arbitral proceedings under a BIT.

The 2016 Model BIT

The 2016 Model Indian BIT, also provides under Article 27.5 that claims submitted to arbitration under the Model BIT would be treated as commercial "*for the purposes of Article I of the New York Convention*".[13] This implies that awards (including awards passed in arbitrations under the Additional Facility Rules) that must be enforced as per the New York Convention

[10] Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS 2014 SCC OnLine Cal 17695 ¶ 100.

[11] Union of India v. Vodafone Group, 2018 SCC OnLine Del 8842 ¶¶ 72, 144 (India).

[12] Khaitan Holdings, SCC OnLine Del 6755 ¶¶ 29-30 (India).

[13] Model Indian BIT, Article 27.5.

are to be treated as arising out of commercial relationship under the Indian law.

DO FOREIGN INVESTORS HAVE OTHER OPTIONS TO ENFORCE TREATY AWARDS AGAINST INDIA?

The position of the High Court creates uncertainty in the legal framework that would apply to enforcement of a treaty award if brought in India. Until such time that they are set aside or varied by the Supreme Court, any party applying for enforcement of a BIT award under the Act would first have to over-come the jurisdiction hurdle as laid down by these decisions, *i.e.,* the inapplicability of the A&C Act to BIT arbitration. Although other High Courts are not bound to abide by the decision of the Delhi High Court, these decisions would certainly hold a persuasive value and until a contrary ruling is rendered, would be a part of the law of the land. The mechanisms for the execution of a foreign decree of a Court are provided in the Code of Civil Procedure, 1908. It is pertinent to note that BIT awards cannot be treated as a decree or foreign judgment for execution under the CPC in India – since they are neither a "judgment" as defined under the CPC nor have they been delivered by a "Court" as defined in the CPC.[14] Thus, this also is not a viable option for a party seeking to enforce a BIT Award against India.

A legitimate avenue open to foreign investors holding a favourable treaty award is to identify Indian assets that are located outside India, preferably in a jurisdiction which has an established, recognised, tried and tested mechanism for the enforcement of BIT Awards. Other countries with robust international arbitration framework such as France, Germany, Australia and Japan are signatories to the ICSID Convention. They have rarely witnessed cases involving enforcement of any investment treaty awards. Yet, in light of the recent trend of Indian courts to push the Act away from investment treaty awards, award creditors can locate assets in the aforesaid countries, considering that they are signatories to the New York Convention and have a well-developed legislative framework to exercise jurisdiction over challenge and enforcement of investment treaty awards. This is further exemplified in the decision of *Carin Energy* to file a case in the U.S.A to enforce a $1.2 billion arbitration award it won in a tax dispute against India, instead of enforcing the same before the Indian Courts.

ENFORCING ARBITRAL AWARDS AS FOREIGN MONEY JUDGEMENT/ DECREE

The essence of section 44A was best explained by the Supreme Court in the case, ***M. V. AL. Qumar v. tsavliris salvage (international) Ltd***, where the court held that,

"*S.44A is an independent provision enabling a set of litigants whose litigation has come to an end by way of a foreign decree and who is desirous of enforcement of the same. It is an authorization given to the foreign judgments and the section is replete with various conditions and as such independently of any other common law rights and is an enabling provision for a foreign decree-holder to execute a foreign decree in this country*."[15]

However, a BIT award cannot be treated as a 'foreign decree or judgment' for the purposes of execution in India under Section 44A of the Code of the Civil Procedure, 1908 (CPC), since it is neither a 'judgment', nor has it been delivered by a 'Court' as defined in the CPC. The 2nd Explanation to Section 44A of the CPC, explicitly excludes arbitration awards from the purview of a *decree.*[16] Therefore, if the decisions of the Delhi High Court are followed strictly, award holders in investment treaty arbitrations may only be able to recover the

[14] Section 44A of the Civil Procedure Code, 1908.

[15] M. V. AL. Qumar v. tsavliris salvage (international) Ltd, AIR 2000 SC 2826

[16] Explanation 2, Section 44A of the Civil Procedure Code, 1908.

award amount by filing a fresh suit. In such a situation, the arbitral award may only have evidentiary value, defeating the very purpose of speedy resolution of investment treaty disputes by arbitration.

THE WAY FORWARD

In the complex landscape of investment arbitration in India, the enforcement of awards continues to grapple with various challenges, revealing persistent loopholes that undermine the efficacy of the system. While the country has made strides in aligning its legal framework with international standards, the practical implementation often falls short, leaving investors and stakeholders in a state of uncertainty. The need for a comprehensive and efficient enforcement mechanism has become increasingly apparent, necessitating a proactive approach to address these gaps.

Addressing the challenges in investment arbitration enforcement in India requires a collaborative effort from two key players: the legislature and the judiciary. The legislature plays a crucial role in paving the way for effective enforcement by amending Section 44 of the Arbitration and Conciliation Act. Currently, this section pertains to the enforcement of foreign awards, and its scope needs to be broadened to explicitly include arbitral awards within the realm of commercial disputes. This legislative amendment is vital to establish a clear and comprehensive legal framework for the recognition and enforcement of both domestic and international arbitration awards, eliminating any ambiguity in the process. By doing so, the legislature can provide a solid foundation for the judiciary to streamline and expedite the enforcement proceedings, ensuring a more efficient and predictable resolution of investment disputes in India. Such an initiative can also be taken by the Supreme Court, by explicitly holding that an arbitral award is unavoidably *commercial* in nature, as has been done in several other jurisdictions with the Commercial reservation.[17]

Furthermore, the judiciary in India can play a pivotal role in enhancing the enforcement of arbitral awards by adopting the Parallel Entitlement Approach. This approach, widely employed in the US courts, offers an alternative avenue for enforcement.[18] In the case of Island Territory of Curacao v. Solitron Devices,[19] by determining that the foreign arbitral award's validity was immaterial to a decision based on the judgment and by allowing recovery upon the foreign confirmation judgment, the USA court adopted the parallel entitlements approach accepting the foreign confirmation judgment as a distinct entitlement to recovery upon the arbitral award.

Under the Parallel Entitlement Approach, a judgment confirming an arbitral award could be treated as a foreign money decree, enforceable as a decision of any district Code.[20] However, this would mandate an amendment to the 2nd Explanation to Section 44A of the CPC.[21] This pragmatic approach aligns with international practices, providing a more streamlined and accessible method for enforcing awards. By incorporating the Parallel Entitlement Approach into the Indian legal framework, the judiciary can contribute significantly to the effectiveness and efficiency of the

[17] *Republic of Argentina v. BG Group PLC*, 764 F Supp2d 21 (DDC 2011), reversed by 665 F3d 1363 (DC Cir 2012), reversed by 134 S Ct 1198, 1204 (2014); *United Mexican States v. Metalclad Corp.*, 2001 BCSC 664 (British Columbia Sup Ct 2001), para. 44.

[18] Island Territory of Curacao v. Solitron Devices, 356 F. Supp. 1, 14 (S.D.N.Y. 1973); Victrix S.S. Co. v. Salen Dry Cargo A.B., 825 F.2d 709, 713-14 (2d Cir. 1987); In re Waterside Ocean Navigation Co., 737 F.2d 150, 154 (2d Cir. 1984); Fotochrome, Inc. v. Copal Co., 517 F.2d 512 (2d Cir. 1975).

[19] Island Territory of Curacao v. Solitron Devices, 489 F.2d 1313 (2d Cir. 1973).

[20] Section 44A of the Civil Procedure Code, 1908.

[21] Explanation 2, Section 44A of the Civil Procedure Code, 1908.

arbitration enforcement process, fostering a more investor-friendly environment in the country.

At present, absent any conclusive ruling by the Supreme Court of India on the application of the Arbitration Act for the purpose of enforcing investment awards, *Khaitan Holdings* and *Vodafone* may only have a persuasive value. This makes enforcement of investment awards under New York Convention a possible, progressive option, although highly unlikely.