

India Secures Ex-parte Ad-interim Injunction Restraining Vodafone BIT Arbitration

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The long-standing tax dispute between India and the Vodafone, also previously discussed in here, recently entered new territory when India secured an *ex-parte ad-interim* injunction restraining the continuation of one of two bilateral investment treaty (“**BIT**”) arbitration proceedings initiated against it by the Vodafone group.

A judge of the Delhi High Court granted this injunction on 22 August 2017 (I.A.9460/2017 in CS(OS) 383/2017) at the very first hearing of a civil suit filed by India against Vodafone Group PLC and Vodafone Consolidated Holdings Ltd. (the “**Vodafone Entities**”).

Background

In April 2014, Vodafone International Holdings B.V. (the “**Dutch BV**”) initiated arbitration proceedings (the “**First Arbitration**”) under the India-Netherlands Bilateral Investment Promotion and Protection Agreement (the “**India-Netherlands BIPA**”). The dispute arose as a result of India’s efforts to impose tax liability on the Dutch BV for its alleged failure to deduct tax in relation to the indirect acquisition of an Indian company by the Dutch BV. Subsequently, in January 2017, the Vodafone Entities, as parent companies of the Dutch BV, initiated separate arbitration proceedings (the “**Second Arbitration**”) in relation to (broadly) the same dispute under the India-United Kingdom Bilateral Investment Promotion and Protection Agreement (“**India-UK BIPA**”).

In response, India filed a civil suit against the Vodafone Entities seeking declaratory and injunctive reliefs in relation to the Second Arbitration. India asserted that: (i) both arbitrations were based on the same cause of action and sought identical reliefs; (ii) the Second Arbitration constituted an abuse of law relying on the recent award in *Orascom TMTI v. Algeria* (ICSID Case No. ARB/12/35, 31 May 2017), where an ICSID arbitral tribunal had applied the doctrine of abuse of rights to decline jurisdiction over one of multiple parallel BIT arbitration proceedings; (iii) disputes in relation to tax demands were beyond the scope of BIT arbitration proceedings as taxation was a sovereign function and tax disputes could only be raised before domestic courts; and (iv) laws passed by the Indian Parliament could not be the subject of adjudication in BIT arbitration proceedings.

The injunction

The court granted an *ex-parte ad-interim* injunction restraining the Vodafone Entities from pursuing the Second Arbitration. It relied on the following conclusions: (i) the principles of Indian law applicable to anti-suit injunctions (see *Modi Entertainment Network v. WSG Cricket Pte. Ltd.*, (2003) 4 SCC 341)

were also applicable to anti-arbitration injunctions, and accordingly, an arbitration could be restrained by an injunction if such arbitration was “*oppressive or vexatious*”; (ii) *prima facie* there was a duplication of parties and reliefs in the two BIT arbitration proceedings; (iii) *prima facie* India was the “natural forum” to resolve the disputes raised by the Vodafone Entities; (iv) *prima facie* the Vodafone Entities and the Dutch BV constituted one economic entity/corporate group with common management and shareholders; (v) *prima facie* the filing of two BIT arbitration proceedings in such circumstances was an abuse of the process of law and created a risk of parallel proceedings and conflicting decisions; and (vi) *prima facie* it would be inequitable, unfair and unjust to permit the Vodafone Entities to prosecute the Second Arbitration.

Comment

The court noted the overlap between the two BIT arbitration proceedings and recognised the abuse of the process of law which would result as a direct consequence. The grant of an interim injunction in such circumstances was clearly justified. However, the decision suffered from certain procedural and analytical lacunae, which provide cause for concern. These lacunae are briefly noted below.

- *Lack of urgency justifying an ex-parte order*

The *ex-parte ad-interim* injunction was granted under Order XXXIX of the Code of Civil Procedure, 1908 (the “**CPC**”). While Order XXXIX of the CPC permits a court hearing a civil suit to grant an *ex-parte* injunction, recourse to an *ex-parte* injunction is permissible only “*where it appears that the object of granting the injunction would be defeated by delay*”. In addition, a court granting an *ex-parte* injunction must “*record the reasons for its opinion that the object of granting the injunction would be defeated by delay*”. However, from a reading of the decision, it appears that no circumstances were cited by India to satisfy the above condition and the court did not record any reasons for its opinion to such effect. In fact, as the Second Arbitration appears to have not progressed beyond the appointment of arbitrators, there was no apparent urgency justifying an *ex-parte* order. This procedural lacuna may be relevant in any appeal against the *ex-parte ad-interim* injunction.

- *Tribunal being the more appropriate forum for relief*

Although the court considered the award in *Orascom TMTI v. Algeria*, it did not acknowledge the implicit point that the more appropriate forum for relief in relation to parallel BIT arbitration proceedings would be the arbitral tribunal in the Second Arbitration. The arbitral tribunal would likely be better placed to assess the scope of the two BIT arbitration proceedings and the likelihood of parallel proceedings and conflicting decisions. In addition, by permitting the arbitral tribunal to decide this issue, the court would give due regard to the *kompetenz-kompetenz* principle. Accordingly, before granting an *ex-parte ad-interim* injunction, the court should have considered whether India should be directed to move an application before the arbitral tribunal in the Second Arbitration to seek an appropriate order declining jurisdiction. However, from a reading of the decision, it appears that this issue was not considered by the court. This analytical lacuna is another cause for concern. While the jurisdiction of the court to grant an injunction is not in doubt, the court appeared to disregard the more appropriate forum for relief and the *kompetenz-kompetenz* principle.

- *Lack of clarity as to the scope of BIT arbitration proceedings*

India argued that disputes in relation to tax demands were beyond the scope of BIT arbitration proceedings as taxation was a sovereign function, and also that laws passed by the Indian Parliament could not be adjudicated in BIT arbitration proceedings. These arguments challenged the jurisdiction of the arbitral tribunals in the two BIT arbitration proceedings, and did not have any relevance to

whether these BIT arbitration proceedings were “*vexatious or oppressive*”.

While the court did not specifically address these arguments, it seemed to see some merit in them as it *prima facie* held that India was “*the natural forum for the litigation of the [Vodafone Entities’] claim against [India]*”. This conclusion (although *prima facie* in nature) indicated a lack of clarity as to the scope of BIT arbitration proceedings. While Indian courts have certainly had limited experience in deciding issues relating to BIT arbitration proceedings, to not recognise that state action (including legislation) can potentially be challenged in BIT arbitration proceedings with reference to independent standards of protection guaranteed under BITs is a serious analytical lacuna. However, it is quite likely that the court will ultimately recognise this aspect as it deals with the civil suit further.

- *Application of principles applicable to anti-suit injunctions*

The court granted an *ex-parte ad-interim* injunction by applying principles of Indian law applicable to anti-suit injunctions – specifically the principles laid down by the Supreme Court in *Modi Entertainment Network v. WSG Cricket Pte. Ltd.*, (2003) 4 SCC 341. However, the application of these principles in the context of anti-arbitration injunctions was specifically rejected by a Division Bench of the Delhi High Court in *McDonald’s India Private Limited v. Vikram Bakshi*, (2016) SCC OnLine Del 3949, which is binding precedent for the court. Thus, the court appears to have applied incorrect principles to decide on the grant of the *ex-parte ad-interim* injunction. However, because BIT arbitration proceedings are substantially different from commercial arbitration proceedings (which were also the subject of the decision of the Delhi High Court in *McDonald’s*), it is arguable that principles applicable to anti-arbitration injunctions should not apply to BIT arbitration proceedings.

Conclusion

The *ex-parte ad-interim* injunction is likely to provide some respite to India. However, the procedural and analytical lacunae in the decision of the court leave it vulnerable to challenge. Therefore, this victory may only be short-lived. In any event, this civil suit is likely to test and redefine the contours of the law governing anti-arbitration injunctions in India – particularly in respect of BIT arbitration proceedings.