Can Investment Arbitral Awards be Enforced in India?

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Introduction

The Delhi High Court's recent judgment in *Union of India v. Khaitan Holdings (Mauritius)* marks the third instance of an Indian court adjudicating upon issues related to arbitration under an international investment treaty. Within these three judgments, courts have fundamentally disagreed on a crucial point – the applicability of the Arbitration and Conciliation Act, 1996 ("Act") to such arbitrations. While the Calcutta High Court in *Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures* proceeded under the assumption that the Act applies to such arbitrations, the Delhi High Court in *Khaitan Holdings* and *Union of India v. Vodafone Group plc* assumed the opposite, holding that the Act only applies to commercial arbitrations.

An oft-ignored (and perhaps unintended) consequence of this disagreement is grave uncertainty on the enforceability of investment arbitral awards in India. Crucially, India is not a party to the ICSID Convention and is consequently under no obligation to recognise any investment arbitral awards like final judgments of its own courts, as provided for by Art. 54. It has also availed of the commercial reservation provided for in Art. I(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). Accordingly, Sec. 44 of the Act restricts the New York Convention's applicability in India to foreign awards arising out of legal relationships *"considered as commercial under Indian law"*. As this post will show, interpretations of this term by Indian courts are likely to exclude investment arbitral awards from its scope.

Contradictory Assumptions on the Applicability of the Act to Investment Arbitrations

Loius Dreyfus, decided by the Calcutta High Court in 2014 was the first Indian case to deal with investment arbitration. It concerned a request for an anti-arbitration injunction by the Kolkata Port Trust, preventing Louis Dreyfus from continuing proceedings against it before an investment arbitral tribunal constituted under the India-France BIT. The court granted the injunction, observing that the Kolkata Port Trust had been wrongly identified as a Respondent in the arbitration since only the Republic of India was a party to the arbitration agreement in the BIT.

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. It, therefore, discussed the position on anti-arbitration injunctions under Sec. 45 (as applied to commercial arbitrations) and held that it would interfere in foreign-seated investment

arbitrations in rare circumstances only, applying the same standard it applies when considering interference in commercial arbitrations under this section.

Following this, the Delhi High Court decided on another request for an anti-arbitration injunction in *Vodafone*. Here, the Union of India requested that Vodafone Group plc be barred from proceeding with an arbitration under the India-UK BIT since another arbitration under the India-Netherlands BIT had already been initiated by its Dutch holding company, based on the same cause of action. In denying the request, the court made the opposite assumption, observing that the investment arbitration in question was *"not a commercial arbitration governed by the Arbitration and Conciliation Act, 1996*". It, 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"*. In *Khaitan Holdings,* the Delhi High Court adopted this standard and made the same assumption again, cementing a fundamental disagreement between the two High Courts on the Act's applicability to investment arbitrations.

Comparison with the UK and Implications for India

As a previous post on this blog observed, the Calcutta High Court's position would have significant benefits when an investment arbitral award is brought for enforcement to India, since the enforcement mechanism in Part II of the Act would be applicable to it. This is in line with standard practice in the United Kingdom. In *Occidental Exploration and Production Company v Republic of Ecuador*, [2005] EWCA Civ 1116, a challenge to an investment arbitral award was made under Sections 67 and 68 of the English Arbitration Act, 1996, which otherwise applies to commercial arbitrations. The court affirmed that English courts have jurisdiction to consider challenges to investment arbitral awards under these provisions, even if they arise out of treaties to which the UK is not a party. Indeed, in *GPF GP S.à.r.l. v Republic of Poland*, the England and Wales High Court affirmed this position in setting aside a London-seated investment arbitral tribunal's Award on Jurisdiction.

By contrast, the Delhi High Court's position leaves no option open to parties seeking enforcement of an investment arbitral award in India. Indeed, even if the Delhi High Court's holding in *Vodafone* on the principles of India's Civil Procedure Code applying to investment arbitrations is applied, it will not help parties at the enforcement stage since only decrees of foreign *courts* (and not tribunals) can be enforced under that legislation.

The Impact of India's Commercial Reservation to the New York Convention

In China, the New York Convention's application to relationships between 'foreign investors and the host government' has been explicitly precluded through its adoption of the commercial relationship reservation under Art. I(3) of the Convention.[fn] Notice of the Supreme People's Court Regarding the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China [1987] *Fa Jing Fa* No. 5 (10 April 1987) [/fn] While not provided explicitly, the interpretation of the reservation in Sec. 44 points to a high likelihood of a similar position being adopted in India.

In *RM Investment & Trading Co. v. Boeing Company*, India's Supreme Court observed that the New York Convention intends to facilitate the speedy settlement of disputes arising out of international trade through arbitration and that consequently, *"the expression commercial should be construed broadly, having regard for the manifold activities that are an integral part of international trade today"*. It, therefore, held that a contract for consultancy services fell within the reservation's scope and an award rendered in that regard could be enforced in India under the Convention.

While seemingly broad in its scope, this interpretation of the reservation has still been limited to

relationships *between individuals*. Thus, in *Union of India v. Lief Hoegh Co.*, the Gujarat High Court held that 'commercial relationships' in this context would include "*all business and trade transactions in any of their forms, including the transportation, purchase, sale and exchange of commodities between the citizens of different countries*".

However, investment arbitral awards arise out of a relationship between the investor and the state created and governed by treaties under Public International Law, and not a relationship between private citizens. Furthermore, claims in investment arbitrations look to redress a state's breach of its treaty obligations and not terms of a commercial relationship. Thus, while the Delhi High Court provided no concrete basis for the exclusion of the entire Act from the scope of investment arbitrations, a brief survey of Indian precedent on the issue suggests that this position is likely to prevail. While it would result in a "pro-investment arbitration" outcome that would serve investor interests best, there is, unfortunately, no clear basis on which the Calcutta High Court's assumption on the Act's applicability to investment arbitrations can be extended to the applicability of the New York Convention at the enforcement stage.

Conclusion – Solutions to the Present State of Affairs

While the application of the Convention to investment arbitrations has been explicitly precluded in China, there is still no clarity on the exact position in this regard in India. Arguments like the one made presently are merely speculative. The unpredictability of Indian courts' response to this issue is only compounded by the lack of analysis in the Calcutta and Delhi High Court decisions that hold that Act to be either applicable or inapplicable to investment arbitrations, making it impossible for one to suggest that subsequent courts may prefer one High Court's approach over the other based on the strength of their reasoning. Given that some foreign investors have already been successful in obtaining investment arbitral awards against India and many others have very large claims against India pending before investment arbitral tribunals, the likelihood of Indian courts having to grapple with the enforceability of these awards in India soon is high. Since courts seem very likely to deny enforceability of these awards, these investors can seek easy enforceability only if the Indian Parliament amends Sec. 44 of the Arbitration and Conciliation Act and explicitly includes investment arbitral awards within the scope of India's commercial relationship reservation to the New York Convention. Unfortunately, all one can say with any degree of certainty is that parties seeking enforcement of an investment arbitral award in India will face a long, complex battle before Indian courts, which they are ultimately likely to lose.