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Does Investment Arbitration Now Provide a Second Bite at the Cherry?

Joanne Greenaway · Wednesday, March 28th, 2012

White Industries Australia Limited v. Republic of India (White v. India) is the latest in a growing line of cases where international investors have successfully resorted to investment treaty arbitration to recover sums owed under international commercial arbitral awards where there have been extensive delays enforcing those awards in domestic courts. However, the potential scope of this method of enforcing commercial arbitral awards remains far from certain: it is unlikely that this will result in a panacea for all enforcement problems.

Following nine years of fruitlessly attempting to enforce an ICC award in India against state-owned mining company, Coal India, over the supply of equipment and development of a coal mine, White Industries Australia Limited ('White') commenced UNCITRAL proceedings in Singapore against India under the Australia-India BIT. The claim was for failure to provide investors with an 'effective means of asserting claims and enforcing rights' owing to undue delay in the Indian courts. This claim was brought using the Kuwait-India BIT, whose obligations were imported via a Most Favoured Nation clause contained in the Australia-India BIT. Kuwaiti investments were allegedly treated more favourably by India than those of Australian investors as a result of this wording. In addition, White brought a claim for denial of justice, in breach of the fair and equitable treatment standard in the Australia-India BIT.

White also complained more generally of the Indian courts' willingness to engage in the extensive and protracted review of foreign arbitral awards, contrary to their obligations under the New York Convention – a recognised issue where arbitration seated outside India involves an Indian party and the parties have not excluded Part I of the Indian Arbitration Act 1996.

The delay they alleged was both in enforcement and setting aside proceedings; enforcement proceedings brought by White in the High Court of New Delhi and set aside proceedings brought by Coal India in the High Court of Calcutta. The enforcement proceedings were eventually stayed pending a decision on the set-aside proceedings. White applied to have the set-aside application dismissed and pursued its appeal to the Indian Supreme Court where it waited for a date to be set for more than five years.

The UNCITRAL Tribunal delivered its award in November 2011, granting White the amount due under the original ICC award plus interest. Effectively, therefore, the treaty arbitration afforded White a second bite at the proverbial cherry, to recover damages in relation to its original claim.

In the context of the set-aside proceedings, the tribunal accepted White's assertion that delays in the court system (the nine year jurisdictional claims) amounted to a breach of the obligation to provide 'effective means to assert justice and enforce rights', although not a 'denial of justice', which it considered (following *Chevron-Texaco v. Ecuador*) to be a more demanding standard under the BIT.

However, in the context of the *enforcement* proceedings, the tribunal did not accept either of these claims. Its argument was that White had not taken all measures available to prevent delay. With regard to White's complaints about the Indian courts' failure to adhere to their New York Convention obligations, the Tribunal was unsympathetic. It held that White should have known the attitude of the Indian judiciary towards implementing the Convention and should have been aware of India's 'seriously overstretched judiciary'. Such presumed knowledge meant that there could have been no legitimate expectation on White's part that the Indian courts would comply voluntarily with its obligation to enforce. The nuances of India's legal system were taken into account and it was decided, in context, that the time taken to process the claims was not excessive.

Therefore, the decision is something of a double-edged sword. On the one hand it provides a remedy of last resort to investors with a presence in countries such as India where judicial interference in the enforcement of arbitral awards is commonplace. In so doing, it, builds on the decisions in the cases of *Saipem S.p.A v. The People's Republic of Bangladesh* (ICSID Case No ARB/05/7), and more recently *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador* (UNCITRAL arbitration): Partial Award on the Merits of 30 March 2010.), both of which upheld claims of judicial delays as amounting to an infringement of the rights of an investor.

However, it is unlikely to open the floodgates for claims relating to delays in enforcement. Several hurdles would need to be overcome in any comparable case:

First, the relevant BIT relied upon by the investor would need to include 'effective means' wording, or, as was the case in *White v. India*, a Most Favoured Nation clause capable of importing such wording into the BIT.

Second, the Tribunal in question would need to accept that an arbitral award falls within the definition of an 'investment' under the respective BIT, which remains a contentious issue. In *White v. India*, for example, the Tribunal held that the ICC award fell within the definition of 'investment' not as an investment per se, but as a 'crystallisation of White's rights and obligations'. However, there is, of course, no formal doctrine of precedent within investment arbitration so it cannot be assumed that the same conclusion would be drawn, even in like circumstances.

Third, the counter-argument raised by the UNCITRAL tribunal – that there could be no legitimate expectations in respect of enforcement in the Indian courts could apply in most similar scenarios where a court system is subject to systemic delays.

In any case, commencing a BIT arbitration is not a quick or an easy route to obtaining enforcement of a commercial award. There is, after all, the necessary pre-requisite of long delays in enforcement in the commercial arbitration award. This will be followed by an investment treaty arbitration, the average length of which is currently over three years and at a substantial cost to the investor – costs which may not be recoverable. Even then, enforcement does not happen

automatically. Despite the procedures in place, notably under the ICSID framework, when States choose not to pay, the procedure can be equally protracted and fruitless.

For those investing in India, attention must be paid to the Department of Industrial Policy and Promotion's (DIPP) recent pronouncement that India is likely to exclude investor-state arbitration clauses from its future BITs (including the BIT that it is negotiating with the EU) on the basis that 'the state should not get drawn into private disputes'. It is not yet suggested that this might extend to the renunciation of current BITs and/or withdrawal from the ICSID convention, as per the trend in Latin America. Nonetheless this may well impose a further limitation on remedies for some investors into India.

In *White v. India* the foreign investor was entitled to a second bite at the cherry in order to eventually successfully enforce a commercial arbitral award. However, given the limitations – both from the point of view of applicable investment treaty frameworks and the procedural burden, this is likely to remain a remedy of last resort.

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