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Indian Courts' First Brush with Investment Treaty Arbitration: Taking Some Lessons from the Calcutta High Court

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On 29 September 2014, the Calcutta High Court in *Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armaturs SAS & Ors* delivered the first decision by an Indian Court on a case directly arising from an investment treaty arbitration. The case concerns an anti-arbitration injunction sought against Louis Dreyfus Armateurs SAS ("**LDA**"), prohibiting it from proceeding with an investment treaty claim under the 1997 India-France BIT. The Court allowed the application and ordered that LDA restrain from continuing proceedings against Kolkata Port Trust, which was wrongly identified as a Party to the investment arbitration.

This decision is significant for two main reasons. First, it gives valuable insight on whom to identify as the appropriate 'Respondent' in an investment treaty dispute against India. Second, the decision confirms the applicability of the Indian Arbitration and Conciliation Act 1996 (the "**Act**") to investment treaty disputes. This opens up avenues for actions for enforcement, and possibly interim measures, before Indian Courts in investment arbitrations seated abroad.

LDA is a French national who invested in an Indian Company. This Indian Company was awarded a contract to maintain and operate certain berths in the Kolkata Port ("**the Project**") by the Board of Trustees of the Port of Kolkata ("**the Port Trust**"). This contract contains an arbitration clause and arbitration proceedings between the Port Trust and the Indian Company are currently underway ("**Contract Arbitration**"). LDA initiated a separate investment treaty claim under the 1997 India-France BIT ("**BIT Arbitration**"), naming the Republic of India, the State of West Bengal and the Port Trust as Respondents. India is not a signatory to the ICSID Convention and this BIT Arbitration is administered under the UNCITRAL Rules.

The Port Trust commenced proceedings under Section 45 of the Act before the Calcutta High Court seeking an injunction against LDA, prohibiting LDA from continuing with the BIT arbitration.

The Port Trust first argued that there was no "arbitration agreement" between Port Trust and LDA. On this basis, the Port Trust maintained that it could not be validly served with the Notice of Claim and, as a result the BIT Tribunal was precluded from treating the Port Trust as a party to the proceedings. Port Trust submitted that the Notice of Claim from LDA and subsequent correspondence were being given directly to the Port Trust as a Party to the proceedings. The Port Trust cited an extract from a correspondence by the BIT tribunal to the Port Trust from which it

appears that the tribunal treated the Port Trust as a Party to the proceedings.

The second argument was that the BIT arbitration was directly connected with the subject matter of the Contract Arbitration. The fulcrum of the second argument, whilst reminiscent of the SGS v. Pakistan saga, turned on the problem of parallel proceedings and the possibility of conflicting findings by the two tribunals. Since the Contract Arbitration was commenced first, the Port Trust submitted that the BIT arbitration, if allowed to continue, would result in multiplicity of proceedings, weighing heavily on the public entity's budget, and hence would be oppressive and vexatious for the Port Trust.

The first point addressed by the Court was whether it had the power to issue an anti-arbitration injunction under the Act. Interestingly enough, no argument was raised nor did the Court question the applicability of the Act to relationships arising out of international treaties. The Court straightaway assumed that the Act applied and analysed the background on anti-arbitration injunctions in India.

On the first argument by Port Trust, the Court adopted a restrictive approach to the BIT and noted that the BIT was only between France and India, i.e. two sovereign states, and does not include Port Trust as a Contracting Party to the BIT. While the Court recognized that the actions of Port Trust, as an organ of the State, could be attributed to the Indian State, this did not necessarily mean that the Port Trust could be named as a party in the BIT Arbitration. On this basis, the Court found that the Port Trust was not Party to the "arbitration agreement" under the BIT.

The Court recognised LAD's Notice of Claim under the BIT, which referred to Port Trust as an organ of the Union of India. In affirming that the Union of India might be responsible for the acts of the State of West Bengal and Port Trust, the Court cited the English Court of Appeal decision in *City of London v Sancheti City of London vs. Sancheti* (2009) 1 LLR 117, which recognised the relevant rules of attribution in International Law relating to State Responsibility. Hence, the Court accepted Port Trust's argument, i.e. although the Union of India would be responsible for the acts of Port Trust, this does not make Port Trust a Party to the arbitration agreement under the BIT.

In response to the second argument, the Court recognised and reiterated the theoretically well-entrenched distinction between Contract Claims and BIT Claims. After making this distinction, it proceeded to acknowledge the possibility that issues in the Contract Arbitration and the BIT Arbitration were likely to overlap. Expressing faith in the BIT tribunal, the Court was of the view that if a situation of conflict were to arise, the BIT tribunal would stay its proceeding till the conclusion of the Contract Arbitration.

In conclusion, the Court found that LDA could not proceed with the BIT Arbitration against the Port Trust on the ground that the Port Trust was not a party to the France-India BIT and not party to the arbitration agreement under it. Hence it concluded that LAD could not proceed with the BIT Arbitration against Port Trust.

Crucially, the case stands for the proposition that the Act applies to investment treaty disputes. In doing so, the Court has held that the Act, based on the UNCITRAL Model Law, governs all treaty arbitrations and hence confirmed that Indian Courts may not interfere with such investment claims, regardless of their civil jurisdiction.

Those familiar with the arbitration landscape of India might recall that the Supreme Court in *BALCO* decided that, unless expressly excluded, Part I of the Act will apply to arbitration

agreements providing for foreign seated arbitrations entered into before 6 September 2012. The Calcutta High Court did not have an opportunity to rule on the method of calculating the date of an arbitration agreement arising out of a BIT. Given that there are five other live publicly known investment treaty claims against India, some of which were commenced before 6 September 2012, it will be interesting to see the Courts' stance towards these arbitration proceedings, if and when they come before Indian Courts.

The decision also signals to arbitration practitioners that making the Indian State the sole Respondent in investment treaty claims is sufficient. Identifying its federal sub-constituents or organs is not only unnecessary, but might also result in wasteful expenditure through long court battles. This application for an anti-arbitration injunction is a classic example.

The decision to make federal sub-constituents co-Respondent to an investment treaty arbitration is not an easy one for investors. Since it is not unusual for the federal sub-constituent or organ to ultimately pay the amount awarded, these federal sub-constituents often wish to be part of the proceedings. On the other hand, there might be various reasons such as budgetary constraints and political tension for why the federal sub-constituents may resist being named as a party. This is evident when contrasting the position of East Kutai in *Churchill Mining v. Indonesia* with that of Port Trust. In the former, East Kutai, a regency East Kalimantan province of Indonesia, desired to be enjoined in the proceedings because the dispute, at its core, arose out of East Kutai's actions and hence it was best positioned to contribute to the proceedings. In the latter, Port Trust did not wish to be part of the arbitration proceedings because of budgetary constraints.

While the High Court granted the injunction, this does not necessarily mean that the decision is anti-arbitration: rather arguably it demonstrates that it is maturing in its attitude towards arbitration. The Court at various instances expressed confidence in the tribunal for the adjudication of issues of vital public interest and only ordered that the wrong party not be made Respondent. This decision also raises questions over the status of the State of West Bengal as second co-Respondent. The State of West Bengal was one of the Respondents to this court case and did not seek the relief sought by the Port Trust. However, this does not prevent the State of West Bengal from seeking similar relief from the arbitral tribunal.

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