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India ADR Week 2023 Spotlight: Investor-State Disputes

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India ADR Week ("**IAW**") 2023 was hosted by the Mumbai Centre for International Arbitration ("**MCIA**") across three cities – Bengaluru, Delhi and Mumbai. Gathering over 700 attendees from a cross-section of the arbitration community, IAW featured more than 40 events over six days in a series of in-person and virtual panels. The breadth and diversity of the event set the stage for engaging and insightful discussions on a wide array of topics. Following a stream of investment-state disputes against India, issues around disputes involving state parties and investor-state disputes were the theme of several panel discussions at IAW.

In the 2020 Queen Mary Survey on Investment Arbitration, 81% of survey respondents expressed positive views of contract-based arbitration, and 72% expressed positive views of treaty-based arbitration to resolve investment disputes with states. There was a marked preference for arbitration (whether contractual or treaty-based) over other dispute resolution mechanisms such as mediation, direct negotiation, government intervention, and litigation in the host state's courts.

Yet, in India, foreign investors face escalating challenges in dispute resolution with both the Indian state and state-owned entities. This trend is driven by two key factors: (i) India's termination of its bilateral investment treaties ("**BITs**"), and (ii) difficulties which investors have faced enforcing investment arbitration awards in India. Cases like *Vodafone v. Union of India*[1], under the India-Netherlands BIT, and *Union of India v. Khaitan Holdings (Mauritius) Ltd & Ors*[2] 2019 SCC OnLine Del 6755, paras 35-36, *under the India-Mauritius BIT, exemplify this stance, with the Delhi High Court ruling that investment treaty awards are not governed by the Indian Arbitration and Conciliation Act 1996 ("**Indian Arbitration Act**") owing to India's commercial reservation to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"). Meanwhile, the Calcutta High Court asserted that the Indian Arbitration Act does apply to investment arbitration awards*[3]*. The split between the two high courts creates uncertainty for investors seeking to enforce their investment arbitration awards in India. Since India is not a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**"), if the position of the Indian courts is that the Indian Arbitration Act does not apply to investment arbitration awards, then foreign investors may not have any clear path for enforcing a treaty-based award in India.*

During IAW

The panel on "*Enforcement of Investor State Awards Against Indian-State*" delved into the complexities of enforcing investor-State awards in India. The discussion featured insights from Senior Advocate Zal Andhyrujina, Mr. Arvindaran Manoosegaran (Omnibridgeway), and Ms. Shreya Jain (Shardul Amarchand Mangaldas). The panelists examined how these challenges may strain India's relationship with foreign investors and potentially hamper future investment.

Ms. Jain shed light on the ticking clock for investments protected under India's terminated BITs, noting that the survival or sunset clauses (i.e. clauses that protect all investments made prior to a termination of an investment treaty for a certain period of time after the termination) in those treaties will expire in the next 5-7 years, making it even more challenging to bring claims against the Indian state or state-owned entities. Mr. Andhyrujina urged India to take cues from other countries' enforcement practices and floated the idea of India becoming a signatory to the ICSID Convention. Mr. Manoosegaran highlighted the real-world implications of weak enforcement policy but explained that those holding awards against India may also seek to target Indian assets overseas. He also revealed that enforcement difficulties are particularly concerning for third-party funders, steering them towards funding smaller awards rather than larger, more high-profile disputes with an overtly political angle.

In the panel on "*Unique Challenges of Disputes Involving States and State Parties*", panelists Ms. Sheila Ahuja (Allen & Overy), Ms. Lucia Raimanova (Allen & Overy), Salim Moollan KC (Brick Court Chambers), Ms. Zarina Chinoy (Shapoorji Pallonji) and Mr. Tarun Bhatia (Kroll) considered the practical challenges in resolving disputes with states and state-owned parties. Mr. Moollan and Ms. Chinoy addressed the well-known bureaucratic constraints affecting state officials, including complexities of multi-level decision-making and limited familiarity with ADR mechanisms. They noted that these can slow the decision-making process and make officials hesitant to consider dispute resolution methods outside of litigation in their own national courts. Mr. Moollan also suggested that the readiness of State officials to engage in arbitration varies by industry and recommended improved information-sharing among different governmental departments, citing Argentina as a case in point. Measures taken by Argentina to improve its ISDS framework have been previously discussed here.

Mr. Bhatia discussed the role which sanctions and state immunity play in the enforcement stage of arbitration awards. He indicated that the Indian state is becoming more aware of the potential exposure associated with award enforcement, including global asset searches and attachments. Ms. Raimanova highlighted the distinctions between commercial and investment arbitration when dealing with state-owned entities. She argued that commercial arbitration may be more favorable for investors because it is less politically sensitive, faces fewer jurisdictional objections, and is often easier to settle. She also noted that correspondence with state officials can sometimes help in resolving disputes, especially when these officials are not aware of their obligations under the BITs and are interested in preserving the investment climate of the country.

The panel concluded by agreeing on the importance of consulting legal and quantum experts as early as possible in the dispute resolution process. This early engagement, they suggested, allows for strategies informed by a range of professional perspectives.

Taking the discussion forward, the panel on "*Resolving disputes with Government and State-owned entities through Arbitration: Best Practices & Effective Strategies*", comprising of Ms. Gathi Prakash Karrah (Cyril Amarchand Mangaldas), Mr. Iyer Narayanan H (Hindustan Petroleum Corporation Limited), Mr. Oswald Dsouza (L&T), Ms. Bindi Dave (Wadia, Gandhy & Co.), Mr.

Gaurav Gulati (Accuracy) and Ms. Zarina Chinoy (Shapoorji Pallonji) deliberated upon the various means through which disputes with the Indian state may be resolved. Ms. Dave and Mr. Dsouza highlighted that delays before commercial courts result in continued preference for arbitration as a means of resolving disputes with the Indian state. Ms. Dave further noted a gradual shift within the Indian state towards institutional arbitration. Illustrating this point, she referenced requiring all future government contracts over INR 50 million (i.e. approximately USD 600,000) to include institutional arbitration clauses which provide for arbitration under the MCIA Rules.

Shifting gears, Ms. Chinoy discussed the challenges of mediating disputes with states and state-owned entities, given their fact and evidence-intensive nature. She praised the new Indian Mediation Act, 2023 ("**Mediation Act**"), which includes state and state-owned entities, but stated that structural changes are necessary before mediation becomes an effective alternative for state-involved disputes.

Mr. Narayanan H then shed light on public sector companies' generally favourable stance towards honouring arbitral awards when they deem the underlying claims legitimate. He brought attention to the role of the Vivad se Vishwas schemes, the government-introduced initiatives designed to encourage settlements by offering reduced payouts under specified conditions. According to these schemes, awards against the Indian state or its entities could be settled for 85% of the court-awarded amount, and 65% of the arbitral tribunal-awarded sums. Mr. Dsouza criticised this 65% settlement figure for sums awarded by the arbitral tribunal as being arbitrary and failing to account for the extensive time and resources that parties invest in the arbitration process before an award is secured.

Lastly, Mr. Gulati outlined various avenues for enhancing the arbitration process with the state. His recommendations included the appointment of subject-matter experts to the tribunal, streamlining document management processes, and establishing clear procedural guidelines and timelines.

Conclusion and Insights

The dialogues during IAW shed light on the nuanced complexities that characterise investor-state dispute resolution in India, covering a diverse range of topics from legal frameworks and judicial perspectives to actionable dispute resolution strategies. Noteworthy insights and recommendations emerging from these discussions include:

- A clear framework for the enforcement of investment treaty awards in India would significantly bolster investor trust by mitigating the prevailing uncertainty caused by conflicting judgments from the Delhi and Calcutta High Courts. This could be done through new legislation, or a definitive ruling by the Indian Supreme Court.
- The question remains whether India should consider becoming a signatory to the ICSID Convention. The protections outlined in the Indian Model BIT could potentially address India's reservations about the alleged investor-centric bias in the ICSID framework. However, given that India has terminated most of its BITs, this move would be meaningful only if India re-engages in BITs.
- Mediation needs more robust support as a dispute resolution mechanism for dealings with the Indian state and state-owned entities. Possible pathways could involve ratifying the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "**Singapore Convention on Mediation**"), incorporating mediation clauses in future BITs, and explicitly including investment disputes within the scope of the Mediation Act. While Section 2

of the Mediation Act, read with Section 2(1)(c) of the Indian Commercial Courts Act, 2015, covers commercial disputes of state and state-owned entities, a clarification that investment disputes are covered within this ambit may remove existing ambiguities, especially owing to the Delhi High Court rulings that do not categorise investment disputes as "*commercial*".

- A concerted effort to share information across various governmental departments regarding best practices in investor dispute resolution could be beneficial. A multi-departmental approach can enhance efficiency and ensure that consistent strategies are being employed in dispute resolution.

References

?1 2018 SCC OnLine Del 8842, paras 145-146

?2 2019 SCC OnLine Del 6755, paras 35-36

?3 *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & Ors*, 2014 SCC OnLine Cal 17695

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