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Enforcement of Foreign Awards, the India-UAE BIT, and International Law

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The new bilateral investment treaty ("BIT") between India and the United Arab Emirates (UAE) entered into force on 31 August 2024 (replacing an earlier 2013 treaty between the two nations). Aside from generating optimism for future trade, it heralds good news in relation to concerns around enforcing investor-State awards in India—at least for this BIT. This is because, putting paid to previous contrary rulings of some Indian courts, the BIT states that awards issued under the BIT would be considered "commercial." This is of significance as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC") applies only to commercial relationships in light of the reservation made by India. And since India is not a party to the ICSID Convention, the NYC is the primary mode for enforcing a foreign award in India.

Another subtle development brought about by the BIT relates to India's unique requirement in Section 44 of its Arbitration and Conciliation Act, 1996 ("Arbitration Act") on the enforcement of foreign awards. In addition to the seat of arbitration being a Contracting State under the NYC, Section 44(b) stipulates one more condition, namely that the Indian Central Government must specifically notify the seat as a reciprocating territory. While such a notification ought not to be mandated, as things stand, India has not notified the UAE under Section 44, despite notifying the UAE in 2020 as a reciprocating territory for enforcement of UAE court judgments as commented on in a previous post.

Nevertheless, it appears that even without a notification, the BIT states that each party shall provide for the enforcement of an award "in accordance with its Law. For the avoidance of doubt, [this] shall not prevent the enforcement of an award in accordance with the New York Convention." The BIT's emphasis on enforcement under the NYC appears to do away with—at least insofar as the UAE is concerned—India's insistence on a notification, provided the arbitration is conducted in a NYC territory.

Such beneficial provisions did not find place in the old BIT between India and UAE. While India's Model BIT states that claims submitted to arbitration under that BIT shall be considered commercial, it is silent on enforcement under the NYC. This has prompted a reflection on four key issues: (1) India's obligations (and reservations) under these treaties; (2) how India has implemented these obligations in its national law; (3) how India's obligations should be construed under international law; and (4) how India's reservations to the NYC should be interpreted.

India's Obligations under the NYC

Article III of the New York Convention stipulates that each Contracting State "**shall recognize arbitral awards as binding and enforce them** in accordance with the rules of procedure of the territory where the award is relied upon . . .." (emphasis added).

The UAE acceded to the NYC in 2006. As a result, even without a notification under Section 44, India is bound by the NYC to recognise and enforce UAE-seated arbitral awards. This is in addition to India's obligation under the Agreement for Juridical and Judicial Cooperation in Civil and Commercial Matters for the Services of Summons, Judicial Documents, Commissions, Execution of Judgements and Arbitral Awards (1999 Agreement) to enforce UAE-seated arbitral awards.

India's Implementation of the NYC

India implemented the NYC through the Foreign Awards (Recognition and Enforcement) Act, 1961 ("FARE"). Section 2(b) of the FARE defined a "foreign award" as an award made in a territory that India declares by way of a notification as a territory to which the NYC applies in the Indian gazette. At that time, there were about 29 signatories to the NYC, and no website that assisted with ascertaining who these countries were. Years later, when the Arbitration Act was enacted, repealing FARE—the notification requirement was maintained. As far as we have been able to ascertain, there were no parliamentary discussions on whether it was still required.

Till date, India has notified only about 50 out of the approximately 172 parties to the NYC. The question then becomes whether the lack of such a notification would prevent the award's enforcement, even though the seat is a Contracting State to the NYC.

This is not just a theoretical possibility. The Gujarat High Court in *Swiss Singapore Overseas Enterprises v. M.V. "African Trader"* refused to refer parties to arbitration seated in Durban because South Africa was not notified as a reciprocating territory. South Africa had acceded to the NYC in 1976, and the Court's decision was issued almost 29 years later, in 2005. The Court said that an award which arose from such an arbitration would be "neither a foreign award nor domestic award," and therefore not enforceable. On that basis, the Court said the dispute ought not to be referred to arbitration. The Court did not engage with the applicant's (valid) argument that the award's future enforceability was irrelevant at the referral stage. In our view, even if India had not notified South Africa under Section 44(b), it was still possible for the award creditor to obtain enforcement anywhere else in the world where such a notification is not a requirement. Therefore, the lack of notification ought not to have stopped the Court from referring parties to arbitration.

How Should India's Obligations Be Construed under International Law

Being a party to the NYC, India is bound by its provisions under customary international law. Article 26 of the Vienna Convention on the Law of Treaties, 1969 ("VCLT") enshrines the principle of *pacta sunt servanda*, meaning every treaty is binding upon the parties to it and must be performed by them in good faith. Further, Article 27 of the VCLT says a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Although India is not a party to the VCLT, the Delhi High Court in *Director of Income Tax v. New Skies Satellite BV* said these articles represent obligations rooted in customary international law and will nevertheless apply in interpreting India's obligations under international law.

Accordingly, India is bound to give effect to the NYC (as well as the 1999 agreement between India and the UAE) and ought not to be entitled to invoke the notification requirement under

Section 44(b) to qualify its obligations under these treaties.

Interpreting India's Reciprocity Reservation

India's obligations under the NYC cannot be understood without regard to its reciprocity reservation. Paragraph 1.1 of the Guide to Practice on Reservations to Treaties (adopted by the International Law Commission in 2011), defines a reservation as any unilateral statement made by a state when signing or ratifying a treaty whereby the state purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state as commented on in a previous post.

Article I(1) of the NYC says it shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where recognition and enforcement is sought. Article I(3) however permits a Contracting State to declare on the basis of reciprocity that it will apply the NYC only to the recognition and enforcement of awards made in the territory of another Contracting State. India expressed a reciprocity reservation when becoming a party to the NYC by saying that it would apply the NYC "only to recognition and enforcement of awards made in the territory of another contracting State." (No such reservations exist for the 1999 treaty.)

Thus, while awards from non-NYC countries can ordinarily be enforced under the NYC, India's reciprocity reservation—as implemented in Section 44—exempts India from following that mechanism. (In *Badat & Co. v. East India Trading Co.*, the Supreme Court said that foreign awards and foreign judgments based upon awards emanating from non-NYC countries would be enforceable in India on the same grounds as they would be in England under common law on the principles of justice, equity, and good conscience. Of course, such enforcement will have to be by way of a suit on the award and not under the Arbitration Act.)

Paragraph 4.2.6 of the Guide to Practice on Reservations to Treaties provides that a State's reservations to a treaty must be interpreted in good faith, taking into account the intention of its author as reflected primarily in the text of the reservation, as well as the object and purpose of the treaty and the circumstances in which the reservation was formulated.

Object and purpose

The object and purpose of the NYC is to build an effective international legislative framework capable of practical application, and which would facilitate the recognition and enforcement of arbitral awards and agreements.[1)] India's reciprocity reservation must therefore be applied in good faith, keeping this object and purpose in mind. The notification requirement should not be seen as an *additional* procedural requirement without which the award cannot be enforced.

Circumstances in which the reservation was formulated

The Convention's drafting history notes that there were two alternative approaches that the NYC could have taken. The first was to apply the NYC to any award made abroad, regardless of whether it emanated from a Contracting State; the second was to enforce only those awards made in the territory of a contracting party. The NYC adopted a middle ground, by allowing a Contracting State to choose between the two. India's reciprocity reservation must thus be interpreted as an express choice against applying the NYC to awards from non-Contracting States, as opposed to a pre-condition for enforcement.

Conclusion

The notification requirement under Section 44(b) of the Arbitration Act ought to be seen as a rule of evidence, and not as one which creates additional procedural requirements. This would be the only sensible way to read the provision in light of India's obligations under the NYC and the 1999 treaty.

An amendment to the Arbitration Act to do away with the requirement for a notification is desirable and an easy fix for commercial arbitrations emanating from the UAE. In today's age, whether a jurisdiction is a Contracting State to the NYC or not can be ascertained from several websites such as the United Nations Treaty Collection. Unfortunately, the draft bill to amend the Arbitration Act, which was published last year, was silent on this.

As for investment arbitration, the BIT clarifies that claims submitted by an investor to arbitration under the BIT will be considered as commercial.

The views expressed herein are those of the authors and do not represent the views of their organisation.

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References

?1 Briner/Hamilton, *The History and General Purpose of the Convention: The Creation of an International Standard to Ensure the Effectiveness of Arbitration Agreements and Foreign Arbitral Awards*, in Gaillard/Di Pietro (eds), Enforcement of Arbitration Agreements and International Arbitration Awards – The New York Convention in Practice, Cameron May 2008, p.3. *See also* Christoph Liebscher, *Preliminary Remarks*, in Reinmar Wolff (ed), New York Convention: Article-by-Article Commentary (2nd ed.), pps. 1–24.