

Dispute Resolution Hotline

October 07, 2020

VODAFONE INVESTMENT TREATY ARBITRATION AWARD –PART III Enforcing an investment treaty award in India – challenges and solutions

INTRODUCTION¹

The Vodafone award could bolster investor confidence in initiating disputes under international investment agreements (IIAs) or bilateral investment treaties (BITs), against retrospective tax amendments or other government measures adopted by India. However, the ultimate destination of any arbitration proceeding is enforcement of the arbitral award.

In India, the journey to this destination may not be an easy one. We have closely tracked the approach of Indian courts to enforcement of treaty awards as part of our extensive practice in enforcement of foreign arbitral awards in India. Problems could arise both in terms of the applicable legal regime and the time involved in conducting these proceedings. Despite the favourable award, Vodafone could face a hurdle in enforcement of the treaty award in India considering uncertainty in the Indian legal regime. Navigating this road requires strategy, and exploring effective alternate remedies. This article assesses the fate of enforcement of a treaty awards, in the event India refuses to make a settlement or pay compensation.

VODAFONE AWARD: CHALLENGE IN SINGAPORE

An international arbitral award arising out of a treaty dispute is binding on the parties to the dispute. However, the award could face two additional hurdles before the investor can reap its benefits. Firstly, the award can be challenged at the seat of the arbitration. Secondly, the enforcement of the arbitral award can be resisted in the country where enforcement is sought. This would be where State assets are located, most often the Host State.

In Vodafone case, the arbitration was administered under the UNCITRAL Arbitration Rules as agreed under the India – Netherlands BIT, at the Permanent Court of Arbitration in The Hague. The Permanent Court of Arbitration provides case administration support in arbitrations under the UNCITRAL Arbitration Rules, in particular in cases involving a State. However, the legal seat of the arbitration was agreed to be Singapore. The seat attracts the legal jurisdiction of courts of the seat.

As such, if Government of India decides to challenge the award, it can only do so before the High Court of Singapore under the Singapore International Arbitration Act. Once the challenge is pending at the seat, courts in other countries where enforcement could be sought against Indian assets could refrain from enforcing the award until the challenge is decided, and the award becomes final and binding. In the event the challenge is dismissed, Vodafone could file proceedings in Indian courts to enforce the award.

ENFORCEMENT OF A TREATY AWARD IN INDIA: NOT AN EASY ROAD

The case of India is peculiar. India is not a signatory to the ICSID Convention. Resultantly, India is not covered under the delocalized regime that offers immunity to ICSID awards from challenge in national courts. Additionally, India is deprived of a regime that makes ICSID awards automatically enforceable in signatory jurisdictions.

India is a party to the New York Convention on Recognition & Enforcement of Foreign Awards (NYC). In India, the mechanism for enforcement of domestic and foreign arbitral awards is contained in the Arbitration & Conciliation Act, 1996 (A&C Act). However, in two cases,² Indian courts have held that the Indian A&C Act applies only to arbitrations which are considered 'commercial' under Indian law. This has fuelled uncertainty as to which law applies to enforcement of treaty awards in India.

The first of these cases originated in the proceedings filed by GOI against Vodafone Plc. in High Court of Delhi (High Court) in 2018 to restrain investment treaty arbitration, initiated by Vodafone Plc. under the India – United Kingdom BIT (Vodafone Plc. court proceedings). In this case, the High Court stated that while acceding to the NYC, India made a reservation to apply the Convention "*only to differences arising out of legal relationship that are considered commercial under the national law*". Though the BIT constituted an arbitration agreement between a private investor and the host State, yet it was neither an international commercial arbitration governed by the A&C Act nor a domestic arbitration.

The Court held that investment arbitration disputes are fundamentally different from commercial disputes as the cause of action (whether contractual or not) is grounded on State guarantees and assurances (and are not commercial in nature). In the Court's obiter, investment treaty awards may not satisfy the 'commercial' test in order to qualify for enforcement under the Indian A&C Act, since these arbitrations find their roots in public international law, administrative law and State obligations. Please see our analysis of the Vodafone Delhi High Court decision here.³

In another case of Union of India v. Khaitan Holdings (Mauritius) Limited & Ors.⁴ (that followed the Vodafone ruling and involved a similar anti-arbitration injunction to restrain the foreign investor from continuing investment treaty

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arbitration proceedings), the Court held that arbitral proceedings under a BIT is a separate specie of arbitration. It is outside the purview of A&C Act which only covers commercial arbitration. This is a preliminary judgment in the interim application. It would be interesting to see if the High Court continues to hold the same view after hearing all the parties on merits. Please see our analysis of the Khaitan Holdings Delhi High Court decision here.⁵

DO FOREIGN INVESTORS HAVE OTHER OPTIONS TO ENFORCE TREATY AWARDS AGAINST INDIA?

The position of the High Court creates uncertainty in the legal framework that would apply to enforcement of a treaty award if brought in India. Until such time that they are set aside or varied by the Supreme Court, any party applying for enforcement of a BIT award under the A&C Act would first have to over-come the jurisdiction hurdle as laid down by these decisions, i.e. the inapplicability of the A&C Act to BIT arbitration. Although other High Courts are not bound to abide by decision of the Delhi High Court, these decisions would certainly hold a persuasive value and until a contrary ruling is rendered, would be a part of the law of the land.

The mechanisms for execution of a foreign decree / judgment of a Court are provided in Code of Civil Procedure, 1908. It is pertinent to note that BIT awards cannot be treated as a decree or foreign judgment for the purposes of execution under the CPC in India – since they are neither a “judgment” as defined under the CPC nor have they been delivered by a “Court” as defined in the CPC. Thus, this also is not a viable option for a party seeking to enforce a BIT Award against India.

A legitimate avenue open to foreign investors holding a favourable treaty award is to identify Indian assets that are located outside India, preferably in a jurisdiction which has an established, recognised, tried and tested mechanism for the enforcement of BIT Awards. We have advised investors in cases involving identification of relevant assets of the Host State in other jurisdictions, and have additionally analysed the legal regimes of countries such as Singapore and the United Kingdom where enforcement can be sought without similar hurdles as in India.

Other countries with robust international arbitration framework such as France, Germany, Australia and Japan are signatories to the ICSID Convention. They have rarely witnessed cases involving enforcement of any investment treaty awards. Yet, in light of the recent trend of Indian courts to push the A&C Act away from investment treaty awards, award creditors can locate assets in the aforesaid countries, considering that they are signatories to the NYC and have a well-developed legislative framework to exercise jurisdiction over challenge and enforcement of investment treaty awards. We have advised investors on locating assets of the sovereign State prior to initiation of treaty arbitration, to ring-fence the risks of resistance to enforcement at the early stages of the dispute.

WAY FORWARD FOR INDIA

The questions on enforcement of BIT awards in India would have been moot if India had signed and ratified the ICSID Convention. Being a member of the ICSID Convention would mean un-resistible enforceability of the award in signatory jurisdictions.

As the position stands today, unless the Supreme Court of India overturns this decision of the Indian courts regarding non-applicability of the A&C Act to investment treaty arbitrations, the situation would remain bleak. The other alternate would be for the legislature to either amend the A&C Act to include enforcement of BIT Awards within its scope or to establish an entire regime afresh dedicated solely to investment protection, like several other countries. However, this is not devoid of challenges.

Until a legislation is in place, the Supreme Court of India bears the burden of several foreign investors, investment treaties, sovereign states and well, the fastest growing economy in the world as it promises a stable legislative and regulatory framework for foreign investment.

DO FOREIGN INVESTORS HAVE OPTIONS TO PROTECT INVESTMENTS ALONGSIDE OR IN ABSENCE OF TREATIES IN INDIA?

Is political risk insurance a viable mechanism for protection of foreign investment? How does political risk insurance operate to protect foreign investors in a situation involving investment treaties or in absence of investment treaties?

To understand the interplay between political risk insurance and investment protection under treaties, stay tuned for Part IV of our series tomorrow.

– Kshama Loya Modani & Vyapak Desai

You can direct your queries or comments to the authors

¹ This article is largely an adaptation of the article titled '*BIT award enforcement at bay in India as Indian court rules out applicability of the Indian A&C Act, 1996*', published by Kshama A. Loya and Moazzam Khan in the Asian Dispute Review, January 2020.

² Union of India v. Vodafone Group PLC United Kingdom & Anr.; Union of India v. Khaitan Holdings (Mauritius) Limited & Ors.

³ http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/vodafone-case-a-bit-more-arbitration-friendly.html?no_cache=1&cHash=6d8d3f6c97a84bd120895dbf87ecd464

⁴ CS (OS) 46/2019 I.As. 1235/2019 & 1238/2019 dated January 29, 2019

⁵ http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/vodafone-case-a-bit-more-arbitration-friendly.html?no_cache=1&cHash=6d8d3f6c97a84bd120895dbf87ecd464

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