Dispute Resolution Hotline

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DELHI HIGH COURT TAKES A BITE OFF VODAFONE'S BIT CLAIM (INDIA V VODAFONE)

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Arbitration analysis: Moazzam Khan, co-head of international dispute resolution practice and Kshama Loya, a senior member of the same team at Nishith Desai Associates consider the recent decision in India v Vodafone Group PLC UK in which the Delhi High Court held that a foreign investor cannot be permitted to pursue multiple claims challenging the same action of the host State under diverse BITs through different corporate entities in the same vertical chain. The Delhi High Court re- ferred to the 'group of companies' doctrine to fasten economic identity upon parties in the dual claims, in addition to assessing identity of claims, cause of action and reliefs in the investment treaty arbitration proceedings.

ORIGINAL NEWS

Union of India v Vodafone Group PLC United Kingdom and Anor, I.A.9460/2017 in CS(OS) No. 383/2017; order dated August 22, 2017 (not reported by Lexis®Nexis UK)

The Delhi High Court held that:

- multiple claims cannot be permitted by corporate entities in a single vertical chain - against the same measure of the host State – under various bilateral investment treaties / bilateral invest- ment promotion and protection agreements('BIT / BIPA')
- anti-arbitration injunction can be issued against a forum having exclusive jurisdiction if the pro- ceedings are oppressive, vexatious and result in abuse of process

WHAT IS THE BACKGROUND TO THIS DECISION?

The claim under India-Netherlands BIPA

Vodafone Group PLC, UK ('Vodafone' or the 'Defendants') is the parent company of several subsidiaries. On April 17, 2014, Vodafone International Holdings BV ('VIHBV'), a subsidiary of the Defendants, initiated arbi- tration proceedings against the Republic of India ('India' or the 'Plaintiff') under the India-Netherlands BIPA.

The claim challenged retrospective amendment of Section 195 of the Indian Income Tax Act read with Sec- tion 119 of the Indian Finance Act, 2012 by the Indian government, to bring VIHBV under the tax-liability net for acquisition of stake in an Indian company. The retrospective amendment was carried out by the Indian Parliament after the Supreme Court of India quashed the tax-demand.

The claim under India-United Kingdom BIPA

During pendency of arbitration proceedings under the India-Netherlands BIPA, the Defendants initiated arbi- tration against India on January 24, 2017 under the India-United Kingdom BIPA ('India-UK BIPA'). The De- fendants challenged the same actions of the Republic of India under the aforesaid proceedings ie retrospec- tive amendment of Section 195 of the Indian Income Tax Act read with Section 119 of the Indian Finance Act, 2012.

India filed a suit before the Delhi High Court (the 'Court') seeking an anti-arbitration injunction against the Defendants for the initiation of proceedings under the India-UK BIPA.

WHAT DID THE DELHI HIGH COURT DECIDE?

The Court, by virtue of an ex-parte interim order, restrained the Defendants from initiating or continuing arbi- tration proceedings under the India-UK BIPA. The reasoning of the Court is encapsulated below.

Vertical chain of entities

At the outset, the Court recognised that several corporate entities may exist in a vertical chain controlled by a single investor. In the wake of a violative measure by the host State, multiple treaties may procedurally allow the entities in the chain to bring claims against the host State; in effect permitting the controlling investor to bring multiple claims against a host State from several stand-points in the vertical chain.

The Court acknowledged that this would constitute abuse of legal rights by the investor. The Court relied on the case of Orascom *TMT Investments S.à r.l. v People's Democratic Republic of* Algeria (ICSID Case No. ARB/12/35) —Award dated 31 May 2017, wherein it was held that permitting such claims would result in the risk of multiple proceedings, multiple recoveries, conflicting decisions and waste of resources. This would also conflict with

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promotion of economic development of the host State where claims have been initiated for protection of investment.

Group of companies

The Court sought to take recourse from the group-of-companies doctrine to establish identity of parties in the parallel claims under the BITs. The Court relied on the decision of the English court in the case of *DHN Food Distributors Ltd and Ors v London Borough of Tower Hamlets* [1976] 3 ALL ER 462, 467 (relied on by the Delhi High Court in *Pankaj Aluminium Industries Pvt. Ltd v M/s. Bharat Aluminium Company Ltd* (2011) IV AD (Delhi) 212 (not reported by Lexis®Nexis UK)), wherein it was acknowledged that there was a general tendency to ignore separate legal entities of various companies within a group, and to look at the economic entity of the whole group. Relying on the aforesaid doctrine, the Court stated that the Defendants and their subsidiary VIHBV seemed to constitute a single economic entity and form a part of the same group being run, governed and managed by the same set of shareholders.

Identity of cause of action & reliefs

The Court assessed the reliefs sought by the Defendants and VIHBV in their respective claims under the India-Netherlands BIPA and the India-UK BIPA. The Court acknowledged that the relief sought was starkly identical ie the parties sought declaration of a breach of BIT by India on account of retrospective amendment to the Indian Income Tax Act read with the Indian Finance Act, 2012. The Court held that there was not only duplication of parties and issues, but also the identity of relief in the parallel proceedings.

Anti-(treaty) arbitration injunctions

The Court relied on the of landmark judgment *Modi Entertainment Networks v WSG Cricket Pte Ltd* (2003) 4 SCC 341 (not reported by Lexis®Nexis UK), enunciating principles for grant of anti-suit injunctions. It held that an injunction can be passed by a court of natural jurisdiction ie India in the instant case, to restrain a party from initiating proceedings in a foreign forum, albeit being forum of choice and exclusive jurisdiction, if the said forum is oppressive or vexatious. The Court also stated that India is the natural forum for litigation of the Defendants' claim against the Plaintiff.

Abuse of process

The Court held that in the wake of the economic identity of parties, identical causes of action being the ret- rospective amendment of legislation by India and identity of relief prayed for in the parallel proceedings un- der the India-Netherlands BIPA and the India-UK BIPA, the Court held a prima facie view that initiation of independent proceedings under the two BITs constituted abuse of process of law at the hands of the De- fendants, both on account of the Defendants' themselves and through their subsidiaries. The Court consid- ered it inequitable and unjust to permit the Defendants from continuing the arbitration under the India-UK BIT.

PRACTICAL IMPLICATIONS

Anti-arbitration injunctions (more so investment treaty arbitrations) go a long way in damaging a pro-arbitration and an international business-friendly reputation that India is striving to painstakingly build. Nevertheless, the principle on which the judgment is delivered is sound and has been gaining popularity the world over. Initiation of multiple proceedings under different BITs by entities forming part of the same group of companies, raising virtually identical complaints would amount to abuse of process of law.

One does wonder whether it would have been more prudent to allow the arbitral tribunal to determine its own jurisdiction, in light of this very objection raised by India in the arbitration proceedings. After all, even in the instant case, the Court does note that it was an investment treaty award in *Orascom v Algeria* which had laid down that initiation of multiple proceedings under different BITs, such as in the present circumstances, would tantamount to abuse of process of law.

Considering this remains an ex-parte interim order, it will be interesting to follow how this case develops if and when the Vodafone entities enter appearance and set out their formal defence.

– Kshama A. Loya & Moazzam Khan
You can direct your queries or comments to the authors

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