Columns

The Arbitration Practitioner's Series by MKBAC: The fragile enforceability of BIT awards against India

This article aims to offer a balanced examination of the limitations surrounding the enforcement of BIT awards against the Indian State.



Abhisaar Bairagi, Milind Sharma, Ausaf Ayyub

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Bilateral Investment Treaties (BITs) offer foreign investors a framework of legal safeguards devised to advance cross-border investment. Primary among these safeguards is access to investor–state dispute settlement (ISDS), usually through international arbitration.

In the context of Indian BITs, investors frequently face the reality that obtaining a favourable arbitral award may only be the beginning of a significantly more complex and challenging enforcement process.

This article aims to offer a balanced examination of the limitations surrounding the enforcement of BIT awards against the Indian State. It considers key factors such as India's decision not to sign the International Centre for Settlement of Investment

Disputes Convention, 1965 (ICSID Convention), its interpretative stance under Article I (3) of the New York Convention 1958 and the increasing reliance on sovereign immunity defences in foreign courts.

ICSID Convention: A closed door for enforcement in India

Generally, investment treaty awards are executed under the ICSID Convention. However, India is not a signatory to the ICSID Convention. As a result, BIT awards are non-enforceable against India under the ICSID Convention, and parties turn to alternative avenues.

The New York Convention: A partial pathway with reservations

In the absence of recourse under the ICSID Convention, foreign investors often pursue enforcement of BIT awards against Indian State under the New York Convention, incorporated as Part II of the A&C Act**.** However, India has exercised two significant reservations under Article I (3) of the Convention:

I. **Commercial reservation** – Only those arbitral awards which deal with disputes that are considered 'commercial' under Indian law are enforceable under Part II of the A&C Act.

II. **Reciprocity reservation** – Only those arbitral awards which are made in countries that are reciprocally notified by India under Section 44(b) of the A&C Act are enforceable.

It is pertinent to note that both these requirements are independent of each other and are cumulative prerequisites. The failure to satisfy any of these requirements would mean that the award cannot be enforced under Part II of the A&C Act.

Are BIT disputes "commercial" under Indian law?

In *Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS*, the High Court of Calcutta applied Part II of the A&C Act to a BIT dispute by granting an anti-arbitration injunction under Section 45 of the A&C Act. However, the issue pertaining to the nature of BIT arbitration, specifically whether disputes under BIT could be characterised as commercial, was not deliberated upon by the Court.

This issue fell for consideration before the High Court of Delhi in *Union of India v. Vodafone Group PLC*, wherein the Court held that BIT disputes are not "commercial" under the Indian laws, as the cause of action for the same arise from state guarantees governed by public international law and not from private commercial agreements. The Court differentiated the judgment of the High Court of Calcutta in *Board of Trustees* on the basis that it did not address the question of whether the BIT arbitration in question qualified as commercial in terms of India's reservation under Article 1(3) of the New York Convention.

This view was reaffirmed by another coordinate bench of the High Court of Delhi in *Union of India v. Khaitan Holdings (Mauritius) Limited*, thereby supporting the

proposition that BIT arbitrations are not enforceable under Part II of the A&C Act.

However, the Model BIT issued in 2016 by the Department of Economic Affairs, Government of India stipulates that any disputes arising under its provisions shall be characterised as commercial in nature. In fact, the India-UAE and India-Uzbekistan BITs, which are based on the 2016 Model BIT, expressly grant 'commercial' nature to all disputes arising thereunder. Article 28.5 of the India-UAE and Article 29.5 of India-Uzbekistan BITs provides that disputes arising under the treaty shall be considered to arise out of a commercial relationship or transaction for the purpose of the New York Convention.

These developments raise a compelling interpretative question: should disputes arising under the earlier BITs, including those premised on the 1993 Model BIT, also be recognised as 'commercial' for the purposes of the New York Convention? Should these express clauses be considered as waiver of India's reservation under Article 1(3) of the New York Convention?

It could be argued that the amendments introduced in the 2016 Model BIT simply clarify the original intent of earlier treaties and the courts should have classified BIT disputes under previous treaties as commercial in nature.

Reciprocity reservation and the notification requirement

Even if a BIT dispute is given a commercial character, the enforcement under the New York Convention is still subject to the reciprocity requirement under Section 44(b) of the A&C Act.

The requirement to notify under Section 44(b) of the A&C Act is not a mere procedural requirement, but has significant ramifications on the recognition of the award. The High Court of Gujarat in *Swiss Singapore Overseas Enterprises v. MV African Trader* refused to recognise an award made in South Africa for lack of notification under Section 44(b) of the A&C Act. A similar view was adopted by the High Court of Bombay in *Lu Qin (Hong Kong) Company v. Cornos Steels Pvt Ltd* with respect to an award from China since it was not notified at the time when the award was delivered.

Taking the India–UAE BIT as an example, while the treaty expressly provides that disputes thereunder will be considered 'commercial' and although UAE has been notified as a reciprocating territory under Section 44A of the Code of Civil Procedure, 1908, it has not yet been notified as a reciprocating country under Section 44(b) of the A&C Act. The non-notification of UAE could impact the enforceability of an otherwise enforceable award in India, despite the dispute being characterised as 'commercial'.

Sovereign immunity: The emerging global obstacle

In addition to India's domestic hurdles, foreign investors now face resistance to enforcement from foreign courts on the ground of sovereign immunity. Recent judgments from the UK and Australia demonstrate this growing trend.

In *CC/Devas (Mauritius) Ltd v. Republic of India*, the Commercial Court in London upheld India's sovereign immunity objection under the UK State Immunity Act, 1978. The Court held that the mere ratification of the New York Convention by India does not amount to a waiver of its sovereign immunity. The Court referred to the drafting history of the Convention and cited academic commentary in support of its conclusion that the Convention was never intended to override sovereign immunity.

Similarly, in *Republic of India v. CCDM Holdings LLC*, the Federal Court of Australia upheld India's objection to the jurisdiction of the Australian courts against enforcement of the award on the ground of state immunity. It held that the annulment which gave rise to the claim was neither based on nor arose from a commercial relationship as it was a pure executive decision based upon public policy of India. The Court referred to Article 20(1) of the Vienna Convention on the Law of Treaties to hold that the effect of India's reservation under the New York Convention would be that the reservation results in modification of the treaty for both the contracting state and the accepting state. This being the position, Australia and India have no obligation towards each other to enforce awards under New York Convention which are not commercial in nature.

In contrast, the Delhi High Court in *KLA Const. Technologies v. Embassy of Islamic Republic of Afghanistan* adopted a more pro-enforcement stance by rejecting the defence of sovereign immunity against enforcement of the award. It held that an arbitration agreement in a commercial contract is an implied waiver by the foreign state of its sovereign immunity under Section 86(3) of the Code of Civil Procedure, 1908.

Conclusion: A system in need of reform

While these procedural and jurisdictional difficulties are often viewed as impediments to enforcement, they sometimes reflect India's intent to maintain control over how disputes involving its sovereign interests are resolved.

The explicit description of BIT disputes as 'commercial' under India's 2016 Model BIT and in treaties such as the India–UAE and India-Uzbekistan BITs marks a welcome development from the standpoint of legal clarity and investor confidence. Yet, evolving jurisprudence on sovereign immunity in foreign jurisdictions - such as the decisions by courts in the UK and Australia refusing enforcement on that basis - signals a growing tension that could undermine these improvements.

Abhisaar Bairagi is a Partner, Milind Sharma is a Principal Associate and Ausaf Ayyubi is an Associate at Khaitan & Co.

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