

Tata-Docomo settlement-strong signals

Introduction

The Delhi High Court (“**DHC**”) delivered an important judgment in *NTT Docomo Inc. vs. Tata Sons Ltd.*,¹ in which it upheld an award delivered by an arbitral tribunal in London, directing Tata Sons Ltd. (“**Tata**”) to pay NTT Docomo (“**Docomo**”) INR 84.5 billion or about USD 1.34 billion² as damages. The judgment is a significant one as it drives home the issue of an Indian company honouring its contractual obligations with a foreign company.

This newsletter summarizes the key points discussed in the judgment that could impact contracts between an Indian and a non-resident party.

1. Facts

In 2009, Docomo and Tata executed a Shareholders Agreement (“**SHA**”) where the exit clauses entitled Docomo to exercise a put option if Tata failed to perform certain conditions. In that case it would be obligated to find buyers for Docomo’s shares at a sale price which was (i) the fair value of the shares as of March 31, 2014; or (ii) 50% of the price at which Docomo purchased the shares, whichever was higher. In 2014, consistent with the SHA provisions, Docomo issued a sale notice requiring Tata to comply with the above terms. Tata failed to respond to the notice within the specified time period and, as a result, a dispute arose between the parties which was referred to arbitration.

In the arbitration proceedings, Tata placed on record RBI’s letter dated February 20, 2015 wherein RBI refused Tata’s request to acquire Docomo’s shares at the agreed sale price, on the basis that the sale violated Regulation 9 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 (“**FEMA 20**”). FEMA 20 was amended several times subsequently. The amendment issued on May 23, 2014 specifically provided that in the event of a transfer of equity shares by a non-resident, valuation had to be done as per the international pricing methods and duly certified by a chartered accountant or a registered merchant banker. The amendment specifically stated that the non-resident investor is not guaranteed an assured exit price. According to Tata, this was not the case in the SHA which did provide a guaranteed return. In June 2016 after deliberating upon the issues raised by both parties, the tribunal delivered an award in favour of Docomo directing Tata to pay damages of USD 1.3 billion.

Consequently, Docomo filed a petition before DHC seeking enforcement and execution of the award. The DHC issued a notice to Tata seeking deposit of the awarded amount, which was done. On February 25, 2017 the parties settled the matter and recorded their consent terms before DHC. Accordingly, Tata agreed to pay the awarded amount with accrued interests, and further requested DHC to pass an order giving effect to the terms of consent.

¹ MANU/DE/1164/2017 passed on April 24, 2017

² 1 USD = about INR 64

Meanwhile, RBI filed an intervention application in the DHC proceedings on the grounds that the consent terms sought to be enforced were refused by RBI under FEMA 20 and its amendments, and its enforcement would violate the public policy of India. The DHC passed a final order wherein it dismissed the intervention petition and upheld the award passed by the tribunal.

2. Decision of the arbitral tribunal

It is necessary to examine the findings of the arbitral tribunal which gave a considered award on various issues identified by the parties, including the need for prior RBI approval as well as challenges in performance due to statutory constraints. The tribunal held that the exit clause contemplated two different methods of performance which meant the parties were aware of the limitations that could impede them from executing an option. Hence, an alternative was agreed. The obligation on Tata was to find a buyer for Docomo's sale shares on the stipulated price. Clearly, the intent would have been to avail an alternative which was possible, in fact and in law. The tribunal was of the firm view that "*Docomo had an unqualified right to a method of performance that did not violate applicable law. Performance did not require special permission of RBI since certain methods of performance were covered by general permissions*." Since Tata failed to perform, it breached the SHA thereby entitling Docomo to damages. Thus, the monetary award covered price for shares, accrued interest on that price and arbitral and legal costs.

3. DHC proceedings

As stated, the parties agreed to settle the matter and recorded their consent terms with the DHC. However, RBI had filed its intervention application prior to the parties reaching a consensus. DHC gave a fair chance to RBI to defend itself but raised a fundamental question about its *locus standi* since the RBI was not a party to the award. RBI contended that the effect of the award was to remit money overseas in foreign exchange, so its role cannot be negated. They further stipulated that the award provided that "FEMA regulations need not be looked into" and this was illegal and contrary to public policy of India. After hearing all the parties, the court concluded that:

- there is no statutory provision which permits a third party to intervene in judicial proceedings where it was not involved in the first place (RBI was not a part of arbitration proceedings)
- discussion of statutory powers and functions of a regulator in proceedings does not entitle that body to acquire *locus standi* to participate, without any corresponding legal provision
- foreign awards can be refused only to parties to an arbitration agreement and proceedings and RBI was not a party in it either
- if the legislature intended to include RBI in matters where the enforcement of an arbitral award would result in remitting money outside India, an express provision would have been clearly mentioned in the Arbitration and Conciliation Act, 1996 ("Act"). Since this was not the case, RBI was bound by the award.

RBI's second issue was regarding the effect of the contractual provision which, according to them, provided an "assured return" to a non-resident entity. Such guaranteed return was in express violation of FEMA 20 and the amendment of May 20, 2014 as discussed in section 1 above.

The DHC was of the view that the present SHA did not guarantee a “assured return” as the concept would apply when an overseas investor gets the principle amount along with a certain return. The court upheld the view of the Tribunal that the intent in the agreement was to protect Docomo from losing more than 50% of the investment due to a fall in market prices during the time of the actual sale of the shares. Such intent did not qualify as “assured return”.

4. The Impact

The settlement of the dispute, the process involved in reaching a conclusive end, despite RBI's intervention, ought to send a strong signal to the business world. *Firstly*, it evidences that India is committed to preserving fair arbitral awards by speedily discussing challenges to enforcement. Lack of closure in such cross-border disputes has in the past, given a negative reputation to the Indian-businesses as well as judicial processes. *Secondly*, by upholding an award in favour of a foreign company, the DHC has definitely sent a positive signal to foreign investors that the judicial process is not pro-Indians or anti-foreign investors; rather, by application of sound legal principles and reasons, it will do what is correct per Indian law. *Thirdly*, DHC has also taken a correct, though unusual position vis. a vis. RBI's intervention application. Despite the fact that the country's top bank tried to prevent enforcement, DHC did not allow it to happen. By questioning the *locus standi* of the RBI and coming to a reasoned conclusion and rejecting its intervention, the message is clear i.e. (a) only a party to an arbitral agreement can challenge enforcement; and (b) judiciary is independent and will not be cowed under pressure, even if that comes from the nation's top bank. In effect, this judgement will have significant value, should other third parties try to stall enforcement of arbitral awards by attempting to implead themselves and resist execution. *Fourthly*, by withdrawing the challenge to enforcement, Tata demonstrated its good will coupled with the commitment to honor its contractual obligations. This again is a positive and a reassuring signal to foreign investors *viz.*, Indian conglomerates can and do abide by signed contracts. Importantly, Tata did not burn bridges with Docomo thereby paving the way for possible future ventures as well. Hopefully, the amicable parting may also solidify Tata's endeavours to play an important role in the Indian telecom industry, either directly or maybe with another partner.

Conclusion

The judgement ought to boost investors' confidence in the Indian market. Of course, it is possible RBI may appeal to a higher court and, if that happens, final resolution may be delayed. In the meanwhile, by upholding the sanctity of a foreign arbitral award, the DHC has given a landmark judgement through which the message is loud and clear that the Indian judicial works effectively. Finally, in order to curtail further litigations by other companies, it may be prudent for RBI to establish a clear framework on the issue of shareholders' returns which should be fair and not detrimental for foreign companies investing in India.

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