

WHITE INDUSTRIES AUSTRALIA LIMITED v THE REPUBLIC OF INDIA

UNCITRAL ARBITRATION AWARD – 30 NOVEMBER 2011

Introduction

In *White Industries Australia Limited v The Republic of India* (Award of 30 November 2011),¹ an *ad hoc* arbitral constituted under the UNCITRAL Arbitration Rules (“the Tribunal”) upheld a claim brought under a bilateral investment treaty by the Claimant (“White”) that the Respondent (“ROI”) had failed to provide effective means for resisting an Indian party’s attempts to set aside a foreign ICC award (“the ICC Award”) in the Indian courts. The Tribunal had “*no difficulty*” in concluding that delays totalling more than nine years in determining whether or not the Indian courts had jurisdiction to entertain the challenge to the ICC Award constituted a breach of ROI’s obligations to secure effective means for enforcing awards covered by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“the New York Convention”). The Tribunal also concluded that the ICC Award was enforceable in India and that, when they came to decide the matter, the Indian courts would, acting reasonably and complying with ROI’s international obligations under the New York Convention, dismiss the challenge.

The facts

The underlying dispute

White, an Australian company, entered into a contract with Coal India, an Indian state-owned and –controlled company, for the provision of equipment, know-how and services in relation to a coal-exploitation project in Piparwar, Uttar Pradesh. The contract, concluded in 1989, provided among other things for White to receive a bonus if certain production and quality targets were met and to be subject to penalties if they were not. It also required White to establish an on-demand performance guarantee in favour of Coal India. The contract was governed by Indian law and provided for ICC arbitration in Paris.

Disputes arose: White claimed it was entitled to bonus payments whereas Coal India claimed it was entitled to penalty payments. Coal India cashed the guarantee to the tune of AUS\$2.7m. White commenced ICC arbitration in June 1999 seeking payment of the bonus to which it claimed to be entitled, reimbursement of the funds obtained pursuant to the guarantee, and various other sums. Coal India resisted the claims and counter-claimed for additional penalty payments and other sums totalling approximately AUS\$8m.

¹ Although not initially made public, the Award may now be accessed at various sites including <http://ilcurry.files.wordpress.com/2012/02/white-industries-award-ilcurry.pdf>.)

A hearing was held in Paris in May 2000. In October 2001, the tribunal invited the parties to make further submissions in relation to a number of points and noted that a further hearing would take place in Paris in January 2002. Coal India then wrote to the ICC requesting that the tribunal be reconstituted and the proceedings recommenced *de novo* on grounds that the tribunal's identification of the points on which it required further assistance gave rise to a serious apprehension of bias and/or the issues raised by those points were beyond the tribunal's terms of reference and the parties' pleaded cases. The ICC rejected Coal India's challenge and the further hearing went ahead as scheduled.

In May 2002, the ICC tribunal issued its Award. It found that Coal India was entitled to some penalty payments, that White was entitled to some bonus payments, and that White was entitled to recover the sums obtained under its bank guarantee. The result was that White was awarded approximately AUS\$4.1m.

Proceedings in India

On 6 September 2002, Coal India applied without notice to the Calcutta High Court to have the Award set aside. On 11 September 2002, White applied without notice to the New Delhi High Court to have the ICC award enforced. Subsequently, both parties became aware of the other's application.

Each set of proceedings moved forward very slowly and in fits and starts. Both parties sought to have the proceedings initiated by the other stayed pending determination of the ones they had commenced. White also applied unsuccessfully to have the Calcutta proceedings transferred to New Delhi in order for them to be determined together. By July 2004, the Appellate Division of the Calcutta High Court had dismissed White's application to have Coal India's challenge to the award rejected and White had appealed that decision to the Supreme Court of India. The Supreme Court subsequently set down the matter for a hearing in January 2007. In the meantime, in March 2006, the New Delhi High Court stayed White's enforcement action.

A two-member panel of the Supreme Court heard the appeal in January 2008 and referred the matter to a three-member panel. Despite several attempts by White to have the matter brought on, nothing further had happened by December 2009. White then notified ROI of a dispute under the bilateral investment treaty. Even by the time of the UNCITRAL arbitration hearing in September 2011, no date for the hearing of the appeal had been set down and no reasonable estimate of a hearing date was available.

The bilateral investment treaty

The bilateral investment treaty in question is the 1999 Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments ("the BIT"). It contains a detailed dispute resolution provision permitting investors of one State to sue the other State in respect of violations of the BIT. In the event, the prescribed form of dispute resolution was *ad hoc* UNCITRAL arbitration. The BIT also contains a number of provisions providing for substantive protection of investments by

nationals of one party within the state of the other including, as was relevant in these proceedings, those providing for fair and equitable treatment, most favoured nation status, protection against expropriation, and for the free transfer of funds.

White's claims and ROI's response

White presented a number of claims under the BIT. In summary only, they were:

- it satisfied the jurisdictional pre-requisites imposed by the BIT in that it was both an “investor” and that its claims in respect of its contractual rights, its rights in relation to the bank guarantee, and its rights under the ICC award were all “investments” as defined in the BIT.
- ROI had not accorded it fair and equitable treatment because ROI had frustrated its legitimate expectations, had permitted Coal India wrongfully to take and to retain the bank guarantee, and had subjected it to a “denial of justice”. The latter was said to arise as a result of, principally, the Indian courts’ improper exercise of jurisdiction in asserting the right to set aside foreign awards contrary to the New York Convention and the “shocking delay” in dealing with the parties’ competing applications.
- the delay in enforcement of the ICC Award constituted a breach of ROI’s obligation to secure “*effective means of asserting claims and enforcing rights with respect to investments*”. Although the BIT did not contain an “effective means” provision, White nevertheless claimed such protection on the basis that this measure was included in other bilateral investment treaties to which ROI was a party and White was, therefore, entitled to invoke those more favourable provisions on the basis of the most favoured nation provision in the BIT.
- ROI had expropriated its investments.
- ROI had breached the obligation to permit investors to transfer funds freely and without reasonably delay.

ROI disputed the Tribunal’s jurisdiction (on personal, subject-matter, and temporal grounds) and also disputed each of White’s substantive claims.

The Award

The Tribunal (comprising William Rowley QC as Chairman, the Hon. Charles Brower and Christopher Lau SC) was seated in London. It upheld its jurisdiction in respect of some but not all of White's claims. Relevantly, for present purposes, it held that White's contractual rights were an "investment" for the purposes of the BIT as were its rights under the ICC Award, but the latter only on the ground that those rights were incidental to or a "*crystallisation*" of its contractual rights and not because they constituted an investment in and of themselves. By contrast, the tribunal concluded that the bank guarantees themselves were not "investments" for the purposes of the BIT.

As for White's substantive claims, the Tribunal rejected all but one of them on their merits. It held that ROI had not violated any obligation to encourage and promote favourable investment conditions (which obligation the Tribunal concluded did not give rise to legal rights in any event), that ROI could not be held responsible for Coal India's conduct (including in respect of cashing the bank guarantee), that no legitimate expectations had been frustrated (in part because, on the facts, White could not have had any legitimate expectation either that the Indian courts would refuse to entertain challenges to foreign awards and/or that they would resolve such challenges speedily), and that the delays in the Indian courts and, indeed, those courts' preparedness to entertain challenges to New York Convention awards were not so egregious as to satisfy the very high threshold required to constitute a denial of justice as a matter of international law. (It would be fair to say that the Tribunal glossed over the latter point and restricted its analysis almost entirely to the question of delay. In a footnote, however, Arbitrator Brower made clear his view that the Indian courts' approach was inconsistent with the provisions of the New York Convention.) The Tribunal also rejected as misconceived the claims of expropriation and in relation to restrictions on the free transfer of funds.

The Tribunal upheld White's claim that it was entitled, by virtue of the most favoured nation provision in the BIT, to invoke the "effective means" standard and further upheld, but only in part, White's claim that ROI had not provided it with an effective means of asserting claims or enforcing rights. The Tribunal reviewed each of the domestic proceedings carefully. As to the enforcement proceedings began by White, the court concluded that although the procedural history was "*less than ideal*", that "*matters dragged on*", and that White's application remained unresolved more than nine years after it had been made, there was no breach of the "effective means" standard. The Tribunal placed much weight on the fact that White had not sought to appeal the March 2006 decision of the New Delhi High Court to stay those proceedings pending the decision of the Supreme Court on the challenge proceedings commenced by ROI in Calcutta. In the end, however, that conclusion was of little import since the Tribunal had "*no difficulty*" in concluding that the Indian courts' inability to deal within a reasonable time with White's jurisdictional objection to ROI's challenge to the ICC Award, while not amounting to a "denial of justice", did breach the "effective means" standard. The Tribunal, therefore, held that ROI was in breach of the BIT.

The Tribunal then turned to the question of compensation. As a matter of international law, and in accordance with the BIT, White was entitled to be restored to the position it would have been in had the breach of the BIT not occurred. However, ROI said that White was not entitled to any compensation since it could not demonstrate that the Indian courts would enforce the ICC Award. White said that it was clear that the Indian courts would enforce. This placed the Tribunal in the invidious position of having to determine itself what conclusion the Indian courts would reach. The Tribunal was obviously sensitive to the issues that this could give rise to and asked the parties whether they wished it to determine whether the ICC Award was enforceable in India. The parties gave the Tribunal the green light. The Tribunal, therefore, considered the merits of ROI's challenges to the Award against the framework of the grounds for resisting enforcement set out in Article V of the New York Convention and had little difficulty in rejecting all of those challenges as unfounded. The Tribunal did not shy away from the fact that some of those challenges required it to apply Indian law and for it to sit "*in effect, as an Indian court*" considering the matter from the perspective of Indian law.

The Tribunal concluded "*an Indian court, acting reasonably and complying with India's international obligations, would conclude that Coal India had not established that the Award ought to be set aside or not enforced.*" It, therefore, ordered that ROI should pay White the sums due under the ICC Award as well as interest thereon and the costs associated with the ICC arbitration proceedings.

Comment

The Award is interesting and important for a number of reasons. First, it appears to be the first investment treaty arbitration award against ROI. Many other claims have been brought but for a variety of reasons have not gone the distance. Since ROI is, it is believed, party to more than 80 bilateral investment treaties and there are frequent reports in the media of further claims being brought, this may be the first of many awards ROI has to deal with. This is so notwithstanding statements from official sources that ROI is considering excluding investor / State arbitration provisions from its future bilateral investment treaties.

Secondly, the Award may in fact have immediate and direct consequences. Lengthy and frustrating delays in enforcing foreign awards have been a tolerated incident of doing business in India. The Award will, however, encourage foreign investors operating under the protection of a bilateral investment treaty who hold a foreign arbitration award ordering their Indian counterparty to pay them to seek compensation from ROI in the event that there are any significant delays in enforcement. Since almost all of India's bilateral investment treaties will incorporate the "effective means" standard, whether expressly or by virtue of most favoured nation provisions, this possibility is likely to spark the interest of most investors operating in India.

Thirdly, the Award confirms the trend in recent international jurisprudence to treat arbitration awards as the crystallisation of contractual rights which fall to be protected as investments under bilateral investment treaties. This potentially gives a party that obtains an award but then encounters real difficulties in enforcing it against its contractual counterparty an additional and potentially more certain means of obtaining the sums awarded to it, not from its counterparty but from the State of nationality of that party.

Fourthly and finally, the Award is interesting for its subtle (or in the case of Arbitrator Brower, not so subtle) criticism of the approach taken by courts in India to challenges to foreign arbitration awards. This aspect of the Award may have some impact at the domestic level within India. The Supreme Court is presently considering the issue of intervention in foreign arbitrations (in *Bharat Aluminium v Kaiser Aluminium Technical Services*) and may well have an eye to the views expressed by the Tribunal or at least to the result and the legal and pecuniary ramifications it may have for ROI. It is also interesting to note that, in a recent decision, the Calcutta High Court rejected a challenge (coincidentally by Coal India) to an ICC Award issued in Geneva in favour of a Canadian party on grounds that such a challenge would, absent exceptional circumstances, be inconsistent with India's obligations under the New York Convention.

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