

**Union of India v. Vodafone Group PLC United Kingdom & Anr.<sup>1</sup> (May 7, 2018)****INTRODUCTION**

1. In a recent ruling, the Delhi High Court dismissed a suit filed by the Union of India (“**UOI**”) against Vodafone Group PLC United Kingdom & Anr. (“**Vodafone UK**”), in relation to two arbitrations initiated under the India- Netherlands Bilateral Investment Protection Agreement (“**India-Netherlands BIPA**”) and the India-United Kingdom Bilateral Investment Protection Agreement (“**India-UK BIPA**”) respectively. UOI sought a permanent injunction against the defendants from pursuing the second arbitration under the India-UK BIPA. UOI alleged abuse of process as the defendants were allegedly seeking the same reliefs under the India-UK BIPA, as had already been sought under the India-Netherlands BIPA.

**BACKGROUND**

2. In 2012, the Supreme Court discharged Vodafone International Holdings BV, a company incorporated in Netherlands (“**VIHBV**”), of the tax liability imposed on it by the Income Tax Department. VIHBV issued a Notice of Dispute dated 17 April 2012 and a Notice of Arbitration dated 17 April 2014 under the India- Netherlands Bilateral Investment Protection Agreement (“**India-Netherlands BIPA**”) against the Union of India (“**UOI**”). Subsequently, Vodafone UK issued a Notice of Dispute dated 15 June 2015 and a Notice of Arbitration dated 24 January 2017 under the India-United Kingdom Bilateral Investment Protection Agreement (“**India-UK BIPA**”).
3. Through the correspondence exchanged between Vodafone UK and UOI, Vodafone UK contended that the second arbitration had been initiated, considering UOI’s objection to the jurisdiction of the tribunal under the India-Netherlands BIPA. UOI alleged that Vodafone UK’s attempt to institute the second arbitration under the India-UK BIPA was an abuse of process. Following the directions of the appointing authority i.e. the President of the International Court of Justice, On 7 September 2017, the UOI appointed its arbitrator under the India-UK BIPA.
4. UOI filed a suit before the Delhi High Court (“**High Court**”) and *inter alia*, sought a permanent injunction against Vodafone UK from initiating arbitration proceedings under the India-UK BIPA. Pertinently, Vodafone UK challenged the jurisdiction of the High Court to determine the dispute.

**FINDINGS*****Plea of Absence of Jurisdiction of the court***

5. The High Court observed that in the present circumstances, the cause of action partly arose within the jurisdiction of the court i.e. Vodafone UK made investments in India, held economic interests in India, and conducted business in India.
6. Referring to *Pankaj Aluminium*<sup>2</sup> and *DHN Food*<sup>3</sup>, the High Court examined the doctrine of ‘*single economic entity*’. The court observed that even if a company is incorporated under the laws of another state, it would continue to have its rights and obligations governed by the domestic law of the state of incorporation as per the principles of international law. The High Court concluded that the Vodafone UK, VIHBV, and its Indian subsidiary constituted one ‘single economic entity’.
7. Relying further upon the Supreme Court ruling in *Modi Entertainment*<sup>4</sup>, the High Court concurred that it had jurisdiction over Vodafone UK *in personam* and over the subject matter of the dispute.

***Jurisdiction of the court to deal with BIPA arbitrations and Powers of the court to execute a BIPA award***

8. The High Court concluded that an “*the agreement to arbitrate between an investor and a host State is contractual inasmuch as it is not itself a treaty but flows from the treaty provisions which is justiciable in accordance with the principles of international law and there is no threshold bar or inherent lack of jurisdiction in the court to deal with BIPA Arbitrations*”.

<sup>1</sup> *Union of India v. Vodafone Group PLC United Kingdom & Anr.*, 2018 SCC OnLine Del 8842

<sup>2</sup> *Pankaj Aluminium Industries Pvt. Ltd. v. Bharat Aluminium Company Ltd.*, 2011 IV AD (Delhi) 212

<sup>3</sup> *DHN Food Distributors Ltd. v. London Borough of Tower Hamlets*, [1976] 3 All ER 462

<sup>4</sup> *Modi Entertainment Network v. W.S.G. Cricket Pte Ltd.*, (2003) 4 SCC 341.

9. The High Court observed that the Bilateral Investment Protection Agreement (“BIPA”) is neither an ‘international commercial arbitration’ nor a domestic arbitration under the Arbitration and Conciliation Act, 1996 (“the Act”), and that investment arbitration stems from public international law. Upon conjointly reading the Vienna Convention on the Laws of Treaties (“VCLT”) and customary international law with the Model Text for the Indian Bilateral Investment Treaty dated 16 December 2015, the High Court observed that the intent of BIPA is to protect private investors from expropriation by the foreign state.
10. However, while considering the jurisdiction of the High Court to execute an award passed against the State under a BIPA, the High Court clarified that it was devoid of powers to execute a BIPA award against the State.

#### **Right of the courts to restrain vexatious proceedings**

11. The High Court held that courts in India retain jurisdiction to restrain international treaty arbitrations which are oppressive, inequitable, vexatious and which constitute an abuse of the legal process.
12. Relying upon *McDonalds India*<sup>5</sup> and the *British Caribbean*<sup>6</sup>, the High Court concurred that “as a matter of self-restraint, a National Court would generally not exercise jurisdiction where the subject matter of the dispute would be governed by an investment treaty having its own dispute resolution mechanism, except if there are compelling circumstances and the Court has been approached in good faith and there is no alternative efficacious remedy available”.
13. Testing the given facts in light of the judicial pronouncements, the High Court held that that the mere filing of multiple claims by entities in the same vertical corporate chain regarding the same measure shall not be construed as vexatious.
14. The amicus curiae appointed by the High Court suggested the consolidation of proceedings to mitigate the abuse of process. Aligning with the views of the amicus curiae, the High Court observed that consolidating the proceedings under the India-Netherlands BIPA and the India-UK BIPA would eliminate the risk of conflicting awards and ensure that that the same relief is not granted twice.

#### **Applicability of kompetenz-kompetenz and the doctrine of election of remedy**

15. While examining the principles of *kompetenz-kompetenz*, the High Court concluded that “it should apply the principle of *kompetenz-kompetenz* with full rigour as India-United Kingdom BIPA arbitral tribunal would be better placed to assess the scope of the two BIPA arbitration proceedings and the likelihood of parallel proceedings and abuse of process”.
16. The High Court examined the doctrine of election of remedy and held that UOI elected its remedy to raise the issue of abuse of process before the tribunal constituted under the India-Netherlands BIPA and therefore it could not have prematurely approached the courts in India.

#### **CONCLUSION**

17. Based on the above findings, the court dismissed the suit and application, and granted liberty to the UOI to raise the issue of abuse of process before the tribunal constituted under the India-UK BIPA. The court directed the tribunal under the India-UK BIPA to consider the undertaking made by Vodafone UK before the Delhi HC, to consolidate the two proceedings, in the event the UOI consented to the same. The court also vacated the *ex parte injunction* dated 22 August 2017, passed in relation to the disputes.

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<sup>5</sup> *McDonald's India Private Limited v. Vikram Bakshi*, 2016 (4) ArbLR 250 (Delhi)

<sup>6</sup> *British Caribbean Bank Limited v. The Attorney General of Belize*, [2013] CCJ 4 (AJ)