On Shaky Ground

Some international arbitration cases that have gone against India highlight the uncertainty in the country's policy and regulatory framework.

By Dipak Mondal  Delhi  Print Edition: December 4, 2016  Story

The dispute between the Tata Group and Japan’s NTT DoCoMo over the latter’s exit from Tata Teleservices has taken yet another curious turn. What looked like just another corporate wrangling over terms of agreement has assumed larger significance. The government has now asked the Enforcement Directorate (ED), the agency that investigates money laundering and violation of Foreign Exchange Management Act, to look into the 2009 stake sale deal between the two firms.

Directorate (ED), the agency that investigates money laundering and violation of Foreign Exchange Management Act, this company blames PM Modi's demonetisation, Supreme Court, Brazilian govt.

US court orders appointment of trustee to oversee Nirav Modi's American companies

Delhi High Court summons Singh brothers for first time in Daiichi case

Illustration: Ajay Thakuri
The ED is investigating possible violation of FEMA rules when the Indian company sold a 26 per cent stake in its telecom unit to the Japanese company. This came after the London Court of Arbitration ordered Tata Sons to pay $1.17 billion to NTT DoCoMo for failing to buy back the latter’s stake as per the shareholders agreement between the two.

According to the agreement, Tatas were to find a buyer for DoCoMo’s stake in the company at 50 per cent of the acquired price or a fair market value, whichever is higher. The Tata Group failed to find a buyer for the Japanese company’s stake. It subsequently sought the Reserve Bank of India’s (RBI) permission to buy back at 50 per cent of the initial investment made by NTT DoCoMo, though the fair value of the shares were much lower. The RBI initially rejected the request citing FEMA rules but later agreed to allow the transaction. However, the Indian government blocked the transaction. This forced the Japanese company to take the arbitration route and it won an award at the London Court of Arbitration.

However, the government doesn’t seem to be in a mood to budge and allow Tata Sons to make the payment. Moreover, it has ordered ED investigation into the deal itself. Now, the Tatas have appealed against the London Court order.

The Tata Group is not the only Indian entity that recently got an unfavourable award. In another case, the Permanent Court of Arbitration (PCA) ruled against Antrix Corporation, the commercial arm of the Indian Space Research Organisation (ISRO), and asked it to pay $1 billion to Devas Multimedia for unilaterally terminating a contract that allowed the latter rights to use S-band spectrum. This ruling came after the International Chamber of Commerce’s (ICC) arbitration court had ordered Antrix to pay $657 million in 2015 for the same reason. In May 2016, the Singapore International Arbitration Centre (SIAC) passed an award against the former promoters of Ranbaxy Laboratories Ltd, Malvinder Mohan Singh and Shivinder Mohan Singh, asking them to pay compensation of...
Daiichi Sankyo when they sold their 35 per cent stake in Ranbaxy to the latter in 2008.

Why are domestic companies/entities constantly being dragged to international arbitration courts, where they are often getting unfavourable awards? Are they not carefully drafting commercial contracts or arbitration agreements? Can these situations (as in the case of Tata-DoCoMo) be avoided if domestic parties were more mindful of the 'public policy' of the country while drafting commercial contracts? Or are these symptoms of a bigger malaise? While on the face of it, some of the cases may look like an oversight on the parts of parties when it comes to commercial contracts or arbitration agreements, experts believe there's more to it than meets the eye.

The recent disputes, legal experts say, can be divided into three broad categories - disputes arising due to the government's policy flip-flop, mismatch in investor expectation, and (Indian) companies simply going rogue by not honouring contract obligations.

**Government Flip-flops**

Consider the example of the Antrix-Devas dispute. According to the agreement signed in January 2005 between ISRO's commercial arm Antrix and Devas Multimedia, the former would build and launch two satellites and lease the S-band spectrum to the latter. Devas was supposed to use this spectrum for providing Internet services (the S-band spectrum is the same frequency spectrum that is nowadays used by telecom companies for providing 4G services).

The Department of Space (DoS), which runs ISRO, had sought permission from the government by making a strong case for entering into the deal with Devas. While everything was going well with trials being conducted and infrastructure being created, a leaked CAG report pointing out irregularities in the deal resulting in huge losses to the government exchequer - set the cat among the pigeons.

The United Progressive Alliance (UPA) government abruptly decided to terminate the Antrix-Devas deal in 2011. Following the termination of the contract, Devas filed a claim before the International Chamber of Commerce (ICC), seeking either

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**BONES OF CONTENTION**

Issues in contract agreement that frequently lead to disputes

- Inability to provide timely exit to the investors (exit clause) by company/promoters
- Inability on the part of promoters to execute as per business plan
- Non-disclosure of material facts or misrepresentations by promoters to investors

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honouring of the agreement by Antrix, or a compensation of $1.6 billion plus interest at a rate to be decided by the tribunal.

Devas got a favourable judgement from the arbitration court, which ordered Antrix to pay $657 million in 2015. Later, the investors of Devas Multimedia - Telecom Ventures, Columbia Capital and Deutsche Telecom - filed another arbitration petition this time in PCA. Since Telecom Ventures is a Mauritius entity, it also invoked the Indo-Mauritius bilateral investment treaty (BIT) and managed to win a favourable award of $1 billion. Even as some experts contest CAG's claim of a scam in the deal, they blame the government’s flip-flop recently for the unfavourable awards against Antrix.

“Many of the big-ticket arbitration awards going against Indian entities is on account of the (previous) UPA government going back on its promises or overreaching the terms of the contract”

Indeed, Cairn Energy is a case in point. The British oil and gas exploration giant has accused the Indian government of breaching the UK-India BIT norms by retrospectively changing rules to tax the company's internal restructuring of the India unit. It has approached the international arbitration court, seeking $5.6 billion compensation from the Indian government.

Cairn Energy has argued that when the company conducted the restructuring, there was no capital gains on such activities. It has harped on the BIT clause that puts the onus on the Indian government to give its investments in the country 'fair and

SITESH MUKHERJEE, Partner, Dispute Resolution, Trilegal (Photo: VIVAN MEHRA)

“Many of the big-ticket arbitration awards going against Indian entities is on account of the (previous) UPA government going back on its promises or overreaching the terms of the contract”

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The Indian government has already got an unfavourable award in an international arbitral court in the White Industries case in 2011. An Australian entity, White Industries had successfully argued that it did not have any “effective” channels to protect its investment in violation of the provisions in the India-Australia BIT. After the verdict in the case, which was followed by a flurry of such disputes related to breach of BIT clauses, experts have been saying that India needs to review its investment treaties. They believe that the BITs are tilted in favour of foreign investors, negating the sovereign powers of the country.

Mismatch of Expectation-Performance

Some of the corporate disputes arise because of inflated expectations from a partnership at the time of entering the contract. In the Tata-DoCoMo case, experts believe both the partners must have projected much better revenue from the telecom venture and, therefore, did not possibly deliberate on regulatory issues before putting the (now) contentious clause in the contract. Naresh Thacker, Partner at Economic Laws Practice, a Mumbai-based legal firm, says it is a clear case of Tatas overpitching themselves. However, he believes it is more a regulatory issue than an issue of flawed drafting of commercial contract.

"FIPB policy was not one of the clearest documents. There were ambiguities with regards to rules on (call and put) options on such investments,” says Thacker. However, he believes both the parties could have approached the regulator on this particular aspect and understood its position on the issue before entering into any sort of contract.

Pallavi Shroff, Managing Partner at law firm Shardul Amarchand Mangaldas & Co, while refusing to comment on the Supreme Court, Brazilian govt, US court orders, trustee to oversee Nirav Modi’s, American companies, Daiichi-Ranbaxy, Singh brothers for first time in Daiichi case, The company blames, PM, Modi’s demonetisation, Supreme Court, Malvinder Singh /12
arbitral award amount. "The broader issue here is whether you allow a foreign investor, who has come through the foreign direct investment route, to take a guaranteed return. These are equity investments and the investor should be ready to take the market risk inherent in equity investment, or else it should use the external commercial borrowing (ECB) route," she says.

But how long can the government prevent Tatas from paying DoCoMo? Can the government stop DoCoMo from enforcing the arbitration award in India? India is a signatory of the New York Convention, which sets the rules for recognition and enforcement of foreign arbitral awards. The convention rules allow a country to block enforcement of an international arbitral award if the order is contrary to the 'public policy' of the country.

However, Mukherjee of Trilegal says that Tatas can overcome the (regulatory) impediment by paying a penalty. "I don't think the government has a say in the issue because it is no more a case of Tatas wanting to honour the contract. Tatas have an award against them and, therefore, it is just a matter of paying the money as ordered by court," says Mukherjee.

When asked if the company could have been more mindful of the FEMA or FDI rules before drafting a shareholder's agreement, a Tata Sons executive on the condition of anonymity said: "In hindsight you can say we could have been more careful, but at the moment we are not thinking of what we could have done but what we should do now to get out of the situation."

A mail to Tata Sons did not elicit any response.

**Breach of Trust**

The third category of disputes is mainly due to one of the partner's clear violation of contract terms or breach of trust (as perceived by the other partner). In these cases, the government or regulator has little or no role to play in the dispute, neither is there an issue of unrealistic business projection going horribly wrong.

For example, Daiichi had argued before the international arbitration court that Ranbaxy promoters - Malvinder and Shivinder Singh - had at the time of selling their stakes concealed the fact that the US food and drug regulator was investigating the company for falsifying data related to manufacturing and distribution of drugs. The Japanese company in 2013 was slapped a penalty of $500 million by the US drug regulator after it found Ranbaxy misrepresenting and concealing data. While it paid the penalty, Daiichi moved the Singapore International Arbitration Centre seeking concealment of data. While it paid the penalty, Daiichi moved the Supreme Court, Brazilian govt...
The ongoing dispute between McDonald's and Vikram Bakshi, the former managing director of the joint venture entity Connaught Plaza Restaurants Pvt Ltd (CPRPL), has shades of both breach of terms of contract - with each side accusing the opposite party of breaching the terms of contract - and mismatch of expectation with real financial performance. Vikram Bakshi, a 50 per cent partner in CPRPL (McDonald's being the other partner), alleges that the US company terminated the JV (thus relieving him of MD's post as per the contract) without even giving him a notice. McDonald's says it acted once it found Bakshi leasing out his property to a rival company, and indulging in financial discrepancies and bungling. Bakshi has refuted the charges.

Beyond the Contracts

Once the JV is over, the contract agreement allows McDonald's to exercise the call option and buy back 50 per cent shares of Bakshi on a valuation based on a predetermined formula. However, the argument from Bakshi's side is that the formula was based on a projection of 25 years. Terminating the contract before that would force Bakshi to exit at a very lower valuation. While he had moved the Company Law Board against his termination, McDonald's had moved the London Court of International Arbitration. Bakshi subsequently moved the Delhi High Court seeking a stay on international arbitration sought by McDonald's in December 2014. Initially, the HC put a stay on arbitration but in a recent order the same court has stated that McDonald's was within its rights to go for arbitration in London.

The Numbers Game

26 per cent
The stake DoCoMo had bought in Tata Teleservices in 2009. The company wanted Tatas to buyback its shares at ₹58 (against a market price of ₹23)

$5.6 billion
The amount Cairn Energy is seeking from the government of India as compensation for the loss incurred by it due to retrospective taxation

$500 million
The penalty slapped by US FDA on Daiichi for Ranbaxy's violation of regulatory norms

₹2.4 lakh crore
Initial loss to the government exchequer (estimated by CAG) from the Antrix-Devas deal

₹1,255 crore
Expenditure incurred by Antrix in providing S-band spectrum to Devas against revenue realisation of ₹121 crore
a need to draft the contracts within the regulatory and policy framework to avoid commercial disputes.

There are many grey areas in commercial contracts that frequently lead to disputes. Amit Vyas, Founding Partner at Vertices Partners, a Mumbai-based law firm, says often the inability to provide timely exit to investors (exit clause) by company/promoters, inability on the part of promoters to execute as per business plan and non-disclosure of material facts by promoters to investor lead to disputes. Parties must be uncompromising about these terms if they want to avoid disputes in futures or unfavourable arbitration awards. Often companies avoid putting tough clauses in order not to displease a prospective investor or partner. This can prove costly in future.

A lot of disputes can be amicably settled if the parties also pay more attention while drafting arbitration clauses. Devesh Juvekar, Partner at Rajani Associates, a Mumbai-based full service law firm, says that least attention is paid to (drafting of) arbitration clauses. "Most of the time it's a copy-paste job," he says. While honouring terms of commercial contracts and arbitration agreements are crucial, consistency in government policies and certainty of regulatory framework also helps in controlling unnecessary commercial and corporate disputes. Besides, the government needs to reduce delays in arbitrations and create a more conducive environment for timely enforcement of international arbitral awards if it wants to project India as a business-friendly country.
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