Dispute Resolution Hotline

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CAIRN V. INDIA – DOES CAIRN HAVE REMEDIES IN LIGHT OF INDIA'S ATTEMPTS TO REMOVE FUNDS FROM OVERSEAS INDIAN BANK ACCOUNTS

If a disputing party in an arbitration believes that receiving an arbitration award is a battle half won, wait until enforcement begins. The Cairn v. India[1] dispute is a classic example. (For a detailed analysis of the dispute, please click here).

BACKGROUND

On December 21, 2020, the international arbitral tribunal (Tribunal) constituted in the case of Cairn Energy Plc and Cairn UK Holdings Limited (collectively 'Cairn') v. The Republic of India held that India had failed to uphold its obligations under the 1994 Bilateral Investment Treaty between Republic of India and United Kingdom (India - UK BIT) and under international law, by imposing tax liability of □10,247 crore and adopting consequent measures taken to enforce the liability. The Tribunal ordered India to pay to Cairn INR 9,000 crore in damages for the 'total harm' suffered by Cairn as a result of India's breaches.

As first in the series of post-award developments, Cairn had reportedly initiated proceedings in courts of US, UK, France, Netherlands, Quebec and Singapore to enforce the award against India. Cairn can do so in jurisdictions where India has assets, and which recognise and enforce the award made in Netherlands. There are 160 such countries under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. India is a party to the Convention.

INDIA'S ATTEMPT TO REMOVE FUNDS FROM OVERSEAS BANKS

Reportedly, last week, the Indian Finance Ministry issued a guidance to state-run banks to withdraw funds from their nostro accounts. A nostro account is an account held by a bank in an overseas bank in the currency of that jurisdiction, for ease of carrying out foreign exchange transactions and international trade. This differs from, and is in addition to, Indian banks that have branches in these jurisdictions and are in any event amenable to the jurisdiction of the respective foreign courts. With this instruction, India has attempted to remove a key Indian asset type from Cairn's enforcement kitty.

DOES CAIRN HAVE REMEDIES?

Does Cairn have any remedies in the wake of such actions? Cairn can swiftly move the courts in the respective jurisdictions to freeze the overseas Indian bank accounts. Foreign courts can urgently restrain India from withdrawing the cash or engaging in any activity involving these accounts, if they perceive a real risk that such repatriation will leave Cairn empty handed when the award is enforced.

For instance, courts in the United Kingdom would consider if Cairn has a good arguable case, whether there is real risk that the award would go unsatisfied due to disposal of the funds by India if India is not restrained by a court order, and that it would be just and convenient in all circumstances to grant the injunction. Additionally, courts in the United Kingdom also assess if the injunction will result in disproportionate impact on India and have any effect on third parties. Similar provisions are available in the courts of other jurisdictions where Cairn has sought enforcement.

In response, India can possibly defend such actions on the basis that no case is made out for enforcement of the award under public policy of the jurisdiction. While it seems implausible, India may offer security in lieu of the restrain order.

For enforcement of awards in foreign jurisdictions (i.e. not in the defendant's jurisdiction), asset-tracing assumes a vital role in identifying eligible assets and securing their seizure. Seeking directions from courts against India for disclosure of assets in foreign jurisdictions could prove to be a critical remedy.

However, with respect to the nostro accounts, such injunction orders may not have any effect if the funds have already been withdrawn and repatriated to India. It will then rest with the Government of India, in its Indian accounts. This will compel Cairn to bring enforcement proceedings to India, if Cairn considers these funds critical for enforcement of the arbitral award.

The law in India on interim injunctions is highly developed and often used by parties, including foreign parties, to secure assets from disposal. A party seeking such injunction needs to satisfy to the court that a prima facie case exists to grant the injunction in favour of the applicant, the balance of convenience lies in favour of the applicant seeking the relief, and irreparable harm or injury will be caused in the event relief is not granted. These principles have evolved judicially for examining grant of urgent interim reliefs. Public interest has also evolved as an additional ground.

Courts also entertain ex-parte hearings in the event of urgency to grant interim injunctions. The caseload and pendency in Indian courts does not deter courts from hearing a matter if urgently circulated before the Court. In such cases, pending a full hearing, courts pass urgent ad-interim injunctions until the next date of hearing such that assets

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are not disposed by a defendant pending a full hearing on the matter. Indian case law is ripe with principles and circumstances in which such remedies can be granted.

However, the confusion surrounding enforceability of bilateral investment treaty arbitration awards in India[2] could pose difficulty in seeking injunctions in aid of enforcement of the award in the Cairn v. India dispute.[3]

WORLDWIDE FREEZING INJUNCTIONS - THE VIJAY MALLYA WAY

If a party seeks enforcement against another in several jurisdictions, the remedy of seeking a single order to freeze worldwide assets could be explored. These orders are not used often. However, they could prove to be beneficial and save time and costs, albeit with sufficient scrutiny on jurisdictional requirements and enforceability of such judgments. In 2017, in a case filed by Indian authorities against Vijay Mallya, the Karnataka Debt Recovery Tribunal in India had granted an order to freeze worldwide assets of Vijay Mallya. In the same year, a court in London recognised the Debt Recovery Tribunal's ruling and passed a freezing order directing attachments of Mallya's assets in the United Kingdom.

While filing of such an application in India for attachment of India's sovereign assets in other jurisdictions could be fraught with difficulties, it might be easier for a party to adopt other routes to obtain injunctions to freeze worldwide assets. If a worldwide freezing injunction is obtained in the court at the United Kingdom, such an injunction ought to be enforceable in Indian courts owing to reciprocity between India and United Kingdom to recognise and enforce the judgments passed in the respective countries. This applies equally to enforcement of the judgment of the United Kingdom courts in other countries which recognise these judgments. With some deep dive into the applicable laws, this route can also be explored to recognise judgments from countries with which India does not share reciprocity.

While India safeguards its assets from attachment in foreign jurisdictions and has remedies to defend against injunction proceedings, remedies are also available to Cairn to seek interim reliefs in various jurisdictions, including India. The strategic use of worldwide freezing injunctions from jurisdictions remains a key remedy in this case involving several jurisdictions.

– Kshama A. Loya & Moazzam Khan

You can direct your queries or comments to the authors

[1] Cairn Energy Plc and Cairn UK Holdings Limited v. The Republic of India, PCA Case No. 2016-7. Tribunal comprising Mr. Laurent Levy, Mr. Stanimir Alexandrov and Mr. J. Christopher Thomas QC (Cairn v. India)

[2] *BIT award enforcement at bay in India as Indian court rules out applicability of the Indian A&C Act, 1996'*, published by Kshama A. Loya and Moazzam Khan in the Asian Dispute Review, January 2020

[3] https://www.nishithdesai.com/information/news-storage/news-details/article/cairn-v-india-investment-treaty-arbitration.html

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