

Delhi High Court dismisses RBI's objections upholding Docomo award (Docomo v Tata)

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Arbitration analysis: Durga Manda and Moazzam Khan of Nishith Desai consider the Delhi High Court's decision in Docomo v Tata in which the court dismissed the Reserve Bank of India's (RBI) objections to the enforcement of an LCIA award.

Original news

NTT Docomo Inc. v. Tata Sons Ltd, OMP (EFA)(Comm)7/2016 & IAs 14897/2016, 2585/2017 in the High Court of Delhi at New Delhi (not reported by Lexis®PSL)

Practical implications

The Delhi High Court (**DHC**), in its decision on 28 April 2017 allowed the enforcement of an LCIA arbitral award obtained by Docomo against Tata (**Award**), for a total sum of US\$1.7bn in damages. This award found Tata to be in breach of its obligations owed to Docomo regarding the sale of its shares in Tata Tele-services Ltd. (**TTSL**). The primary issue in dispute before the DHC was the legitimacy of RBI's objections to the Award's enforcement.

In summary, the High Court of Delhi found:

- the London Court of International Arbitration (**LCIA**) arbitral award granting US\$1.7bn as damages in favour of NTT Docomo Inc (**Docomo**) against Tata Sons Ltd (**Tata**) does not violate FEMA Guidelines
- US\$1.7bn was granted as damages and not purchase consideration for Docomo's Sale Shares; hence, pricing guidelines under FEMA for transfer of shares would not apply
- the RBI does not have any locus to intervene in an application seeking the enforcement of an arbitral award
- the consent terms jointly filed by Tata and Docomo, wherein Tata agreed to pay the entire award amount to Docomo, are legal and valid

The decision of the DHC is quite progressive since it stresses the importance of an Indian entity's ability to honour its commitment to a foreign entity in a commercial setting. The DHC recognized the delicate issue of a possible negative impact on Foreign Direct Investment and strategic international relations if the upkeep of such commitments is somehow prohibited. This sentiment also gives a nod towards India's international obligation to treat foreign investment fairly, undertaken in most of its Bilateral Investment Treaties.

Background

TTSL is a company incorporated in India for the sole purpose of advancing the Tata Group's presence in the Indian telecommunications sector. Docomo is a company incorporated in Japan and is a market leader in the Japanese telecommunication sector.

In 2008, Tata promoted TTSL to Docomo and the latter agreed to invest in TTSL by purchasing equity shares from existing shareholders in return. Accordingly, Tata, TTSL and Docomo (the **Parties**) entered into a Share Subscription Agreement (**SSA**) on 25 March 2009. The SSA provided that if TTSL failed to satisfy certain 'Second Key Performance Indicators', Docomo could initiate its exit by demanding that Tata find a buyer for its shares in TTSL at the Sale Price. This Sale Price was specifically defined as the higher of either: (a) the fair value of Docomo's shares as of 31 March 2014 or (b) 50% of the price at which Docomo purchased its shares.

TTSL was unable to demonstrate its compliance with the Second Key Performance Indicators and accordingly, a Trigger Notice initiating Docomo's exit from TTSL was served. Subsequently, Docomo issued a Sale Notice under the SSA to Tata and TTSL, requesting the former to find a buyer for its shares in TTSL within the stipulated period, i.e., by December 3, 2014. Tata was unable to find a suitable buyer and accordingly, a dispute arose between the Parties. This dispute primarily concerned the extent of Tata's obligation to find a buyer for Docomo's shares at the Sale Price. This dispute was referred to an LCIA administered arbitral tribunal (**Tribunal**) for final determination.

The Tribunal found in favour of Docomo and awarded it a total sum of US\$1.7bn in damages for Tata's breach of the SSA.

The tribunal's decision

The substance of the dispute referred to the Tribunal concerned the interpretation of Clause 5.7.2 of the SSA which stipulates the procedure for Docomo's exit from TTSL. The Tribunal found that Clause 5.7.2 primarily required Tata to find a 'buyer or buyers of the Sale Shares on the terms that Docomo receives the Sale Price' and that this obligation was unqualified and absolute. The Tribunal further determined that Clause 5.7.2 stipulated alternative methods of performance in the event that Tata was unable to find a buyer at the Sale Price, which included Tata's buy-back of Docomo's shares at the Sale Price. The Tribunal was satisfied from its interpretation of the SSA that both parties had agreed on an exit procedure which would mitigate losses to the greatest possible extent. In this regard, it held that:

'... [Tata] bore the risk that at the time of performance it was unable to find a willing buyer at the Sale Price because the market value of the Sale Shares had fallen. In that event, Tata might have been able to avoid a breach of its primary obligation by availing itself of one of the alternative methods of performance ... but if it was not able to do so, it remained in breach and was liable to pay Docomo damages'

The Tribunal further recognized that Tata's performance of its obligations under clause 5.7.2 of the SSA may be affected by extant foreign exchange guidelines issued by the RBI under the Foreign Exchange Management Act, 1999 (**FEMA Guidelines**). In essence, FEMA Guidelines prevented the sale of shares between a resident and non-resident at an assured price and instead, required the sale price to be determined by a fair market valuation exercise. Further, under FEMA Guidelines, the RBI had special discretion to permit such a transaction.

On the facts, the Tribunal found that Tata was unable to find a third-party buyer at the Sale Price and therefore, offered to buy-back Docomo's shares at the Sale Price. However, the RBI denied permission on February 20, 2015 when Tata approached it to exercise its special discretionary powers. Accordingly, Tata's primary argument before the Tribunal was that its obligation to buy back Docomo's shares was limited by law to a buy-back at the Fair Market Value (**FMV**). Therefore, in the event the FMV was lower than the Sale Price, Tata argued that it was legally bound to only pay the FMV.

The Tribunal rejected this argument. It found from the SSA's drafting history that the Parties were acutely aware of FEMA Guidelines' possible impact on Tata's performance of Clause 5.7.2, since Tata undertook an absolute obligation to ensure that Docomo's shares would be sold at the Sale Price. In this regard, the Tribunal found that the Parties never intended to subject Tata's performance of either its primary obligation to look for third-party buyers or alternative modes of its performance, to extant FEMA Guidelines. Rather, it characterized RBI's involvement as a *factual impediment* to Tata's performance of its obligations under Clause 5.7.2 of the SSA. This conclusion was supported by the fact that Tata had agreed to indemnify Docomo for any difference in the sale price of Docomo's shares in TTSL in the event that it was unable to buy them back at the assured rate. It was determined that this indemnity reflected a permitted transaction under FEMA Guidelines since any difference in the buy-price would be characterized as compensation paid by Tata for its inability to find a buyer at the Sale Price.

Accordingly, the Tribunal found Tata to be in breach of the SSA and ordered it to pay damages of US\$1.7bn. This figure reflects the amount Docomo would have received (along with interest), had its shares been bought by Docomo at the Sale Price. This amount also reflected the original guarantee made by Tata, ie—the guarantee to mitigate Docomo's losses by 50%. (**Award Amount**) for Tata's breach of the SSA. It is important to note that Docomo was *'itself not interested in retaining the share scrips'* and volunteered to *'return the share scrips as they were of no particular use to it'*.

The enforcement application before the DHC

Docomo approached the DHC under sections. 44, 46, 47 and 49 of the Arbitration and Conciliation Act, 1996 (the **Act**) for enforcement of the Award. In principle, Tata did not object to the Award's enforcement. In fact, it approached the RBI on 1 July 2016, requesting its permission to enforce the Award. Further, on 20 July 2016, Tata informed the DHC that it was ready to deposit the Award Amount through fixed deposit receipts. However, the RBI rejected Tata's request of 1 July 2016 and proceeded to try and implead itself into the enforcement proceedings by filing an Intervention Application (the **Application**).

Subsequently, on 25 February 2017, Tata and Docomo jointly filed consent terms (the **Consent Terms**) under Order XXIII Rule 3 of the Code of Civil Procedure 1908 (**CPC**). Under these Consent Terms, Docomo agreed to withdraw the enforcement proceedings initiated in India, England and the US, while Tata agreed to pay the entire Award amount, subject to any decision of the DHC on the RBI's Application.

Therefore, the primary issue before the DHC was to determine the RBI's Application's merit and any consequent effect it may have on the enforceability of the Award.

The RBI's Arguments

The RBI acknowledged that it was not party to the arbitration agreement between Tata and Docomo and argued that its locus to object to the Award's enforcement arises out of Order XXIII, Rules 3 and 4 of the CPC. According to the RBI, these provisions allow the relevant court to invalidate any consent terms which violate section. 23 of the Indian Contract Act (**ICA**). In essence, RBI argued that the consideration contemplated by the Consent Terms was unlawful since the Award violated extant FEMA Guidelines.

The RBI further argued that the Award's enforcement necessarily required the RBI's clearance (which was denied) and accordingly, its submissions on the enforceability of the Award ought to be heard by the DHC. Further, the RBI argued that the Consent Terms should not be effectuated since they involve an Award which violates Indian public policy, as it violates FEMA Guidelines.

Tata's and Docomo's Arguments

Docomo argued that RBI's Application had no locus, since only a party to an arbitration agreement could object to the enforcement of an award that arises out of the same.

Tata stated that it had no objection to the enforcement of the Award, and argued that FEMA Guidelines did not impact the award, as there was no '*blanket prohibition against the repatriation of monies to an entity outside India at a price not exceeding the [FMV]*' under the FEMA Guidelines.

The DHC's decision

The DHC agreed with Docomo and found that the RBI cannot implead itself in an award enforcement application when it was not a party to the arbitration agreement. It did, however, observe a gap in legislative drafting as, there was a hypothetical possibility of the RBI intervening in the execution proceedings of the award, if at that stage the relevant court directed that the payment of damages awarded by an arbitral tribunal ought to be subject to RBI approval. However, since there was no express provision that allowed the RBI to intervene in such proceedings, it cannot intervene even in such hypothetical situation.

The DHC continued to examine the validity of the Award via FEMA Guidelines. The DHC took special note of the fact that the Award directed Tata to pay *damages* to Docomo. The DHC examined the RBI's internal notes when it dealt with Tata's application for permission to enforce the award. It was evident that the RBI never considered Clause 5.7.2 of the SSA to have been invalidated by FEMA Guidelines. Rather, the RBI seemed to have conflated the payment of damages with the transfer of Docomo's shares to Tata at the Sale Price (the latter being hindered by FEMA Guidelines).

Accordingly, the DHC held that the RBI did not have the power to '*re-characterize*' the Award as one that involves an impermissible share transfer, when it was merely a direction to pay a specified amount of money as damages.

The DHC found that there was no provision of the SSA or the Award which violated FEMA Guidelines, and consequently, found it to be enforceable. It dismissed the RBI's Application, gave effect to the Consent Terms and directed the transfer of the monies deposited by Tata.

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