Key Takeaways

KHAITAN & CO Advocates since 1911 | Skadden

Contacts

Sanjeev Kapoor
Khaitan Partner
91.11.4151.5454
sanjeev.kapoor@khaitanco.com

David Kavanagh QC
Skadden Partner
44.20.7519.7288
david.kavanagh@skadden.com

Haigreve Khaitan
Khaitan Partner
91.22.6636.5000
haigreve.khaitan@khaitanco.com

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40 Bank Street
Canary Wharf
London, E14 5DS
44.20.7519.7000

Four Times Square
New York, NY 10036
212.735.3000

On 22 June 2017, Skadden and Khaitan & Co hosted a seminar titled "Investment Trends in India" at the Institute of Directors in London.

David Kavanagh QC, global co-head of Skadden's International Litigation and Arbitration Group, gave the introductory remarks. Mr. Kavanagh was joined on the panel by Sanjeev Kapoor and Haigreve Khaitan, both partners at Khaitan.

Status of India's Bilateral Investment Treaties (BITs)

Mr. Kavanagh provided background on India's July 2016 announcement that it intended to terminate 58 of its 83 BITs. With four new claims issued against it last year, he noted that India is one of the most frequent respondents in investment treaty arbitrations, which is likely the reason it revoked the BITs. India also redrafted its Model BIT in 2016 to severely limit the levels of protection available to foreign investors.

Whilst existing investments likely will remain protected under India's BITs by virtue of "sunset provisions," Mr. Kavanagh noted that there is an element of uncertainty regarding the status of future investments. He highlighted that India's revocation of its BITs not only adversely impacts future inbound foreign investments, but also removes protection from outbound Indian investments. Mr. Kavanagh indicated that European states are unlikely to engage with India's Model BIT, given its restrictive nature.

Profiling *Docomo*

Mr. Kapoor profiled the landmark case *NTT Docomo Inc. (Docomo) v. Tata Sons Limited (Tata)*. Docomo was jointly represented by Skadden and Khaitan.

The Contractual Agreement

The parties had signed a shareholder agreement, which provided that if Tata failed to meet certain key performance indicators, it would be obliged to find a buyer for Docomo's shares at either: (a) the fair market value of those shares as of 31 March 2014; or (b) 50 percent of the price at which Docomo purchased such shares, whichever was higher. Failing this, Tata would be required to arrange for the sale of the shares

at any price to any buyer and to indemnify Docomo for any shortfall. Tata objected to Docomo's reliance on this provision, arguing that the Foreign Exchange Management Act 1999 (FEMA) prohibited foreign investors from exiting a company on an assured return. Tata claimed that it would need special permission for such action from the Reserve Bank of India (RBI).

The Dispute Process

The dispute went to arbitration and an award was issued in Docomo's favour. This award recognised that: (a) the mechanism was intended to act as loss protection for Docomo; (b) India had already received funds through the investment; and (c) Tata could have undertaken performance through alternative means, in order to avoid any consequences under the FEMA. Docomo filed for enforcement of the award in the Delhi High Court and in New York. In addition, it applied to the Commercial Court in London for attachment of Tata's assets in the UK.

In April 2017, the Delhi High Court allowed Docomo's application to enforce the award. The court held that the award was in the nature of damages and therefore did not violate the FEMA provisions. It also noted that this did not violate Indian public policy.

Key Lessons

Mr. Kapoor detailed the various tools and strategies that had been engaged to achieve this result, both in the original arbitration and in the subsequent enforcement proceedings. He confirmed the importance of the application for damages as opposed to specific performance, given that damages are subject to significantly lighter regulation under the FEMA.

Mr. Kapoor discussed how this judgment is encouraging to investors in several respects. From filing to enforcement, the entire dispute took just 10 months to process, despite its many complexities. Remarkably, the award was recognised more quickly through the Indian court system than through the London court system. This decision solidifies the position that the Indian court is willing to distinguish between damages and enforcement of the underlying contract itself. The Delhi court proved able to act robustly when faced with both the RBI and public policy claims.

Commercial Reforms Under Prime Minister Modi

Mr. Khaitan outlined the regulatory and procedural changes made by the Modi administration to improve the ease of doing business in India. These include:

- abolishing the Foreign Investment Promotion Board;
- removing the requirement for foreign investors to obtain approval before investing via holding companies;
- allowing downstream investment payments through holding companies;
- allowing international investment in LLPs; and
- allowing deferred share purchase consideration from foreign investors.

The panel focused on the Indian government's treatment of tax in light of the Vodafone proceedings — noting the degree of uncertainty in the market. Mr. Khaitan clarified the current status of the amendment on indirect transfers: Indirect transfers outside of India shall not be subject to tax in India unless substantial value is derived from Indian assets. He also noted that investors can now have some certainty by applying to the Revenue for a binding "advance ruling" before making their investment.

He noted that the mood was optimistic in terms of creating new global opportunities, touching upon the shifts in approach under the new Insolvency Code, the new Goods and Sales Tax and the recent amendments to the Indian Arbitration Act.

Closing Remarks

The panel cautiously acknowledged that the regulatory regime surrounding foreign investment in India was moving in the right direction and that the U.K.-India trading relationship remained strong.