IN THE NAME OF THE KING

Judgment

DISTRICT COURT OF THE HAGUE

Commercial affairs division

Case number: C/09/635775 / HA ZA 22-819

Judgment of 25 January 2023

in the matter of

THE REPUBLIC OF INDIA of New Delhi, India,
plaintiff,
hereinafter: India,
represented by: T.L. Claassens LLM of Rotterdam,

versus

KHAITAN HOLDINGS (MAURAITIUS) LIMITED of Ebene, Mauritius,
Defendant
hereinafter: KHML,
represented by: M.C. van Leyenhorst LLM of Leiden.

1. The course of the proceedings

1.1. The course of the proceedings is evidenced by:
- the summons of 15 July 2022, with exhibits;
- the motion seeking litigation in stages of KHML;
- the reply to the motion seeking litigation in stages, with exhibits;
- the court's decision of 26 October 2022, ruling that the parties may first and separately address the admissibility of India's claim;
- KHML's motion for the court to rule India's claim inadmissible;
- the statement of defence regarding the admissibility of India's claim.

1.2. Finally, a date was scheduled for judgment to be rendered.

2. The facts

2.1. On 1 October 2013 KHML commenced arbitration proceedings against India under the Bilateral Investment Treaty between Mauritius and India (hereinafter: the arbitration proceedings). The arbitration proceedings are governed by the UNCITRAL Arbitration Rules 1976 (hereinafter: the UNCITRAL Rules). The place of arbitration is The Hague.

2.2. The arbitration proceedings relate to the issue of a 2G spectrum licence for mobile telecommunication in India to the company Loop Telecom Private Limited (hereinafter Loop

Telecom) and the subsequent withdrawal of that licence. KHML is the holder of 26% of the shares in Loop Telecom.

2.3. India appointed Professor Brigitte Stern (hereinafter: Stern) as a member of the arbitral tribunal in the arbitration proceedings. KHML appointed Mr. Francis Xavier (hereinafter: Xavier) in that same capacity. Subsequently, Stern and Xavier jointly appointed Professor Campbell McLachlan QC (hereinafter: McLachlan) as the third member of the arbitral tribunal.

2.4. India challenged the jurisdiction of the arbitral tribunal on four grounds. The arbitral tribunal rejected India's challenge of its jurisdiction in its 'Decision on Jurisdiction' of 9 December 2021. This decision will hereinafter be referred to as 'the arbitral award on jurisdiction'. The arbitral tribunal unanimously rejected two of India's challenges of its jurisdiction. India's other two challenges of the tribunal's jurisdiction were rejected by a majority consisting of the arbitrators Xavier and McLachlan.

2.5. On 1 February 2022 India filed an application for the recusal of Xavier (in English referred to as 'Challenge') with the President of the International Court of Justice.

2.6. On 15 April 2022 the President of the International Court of Justice ruled that there were justifiable doubts as to Xavier's impartiality within the meaning of article 10 (1) of the UNCITRAL Rules, and for that reason upheld the challenge. This judgment was phrased as follows:

"I conclude that there are justifiable doubts as to Mr. Xavier's impartiality. I therefore consider that the Challenge should be upheld. "

The President of the International Court of Justice arrived at this decision on account of fact that Xavier had failed to mention that the law firm he is associated with had, in a different case, assisted a procedural counterparty of India. The other circumstances raised by India for challenging Xavier were not addressed by the President of the International Court of Justice.

3. **The dispute with respect to the admissibility of India's claim**

3.1. India requests the court, by provisionally enforceable judgment to the extent possible, to set aside the arbitral award on jurisdiction and to order KHML to pay the costs of the proceedings.

3.2. India takes the position that it has a cause of action. It has explained that position as follows. The main rule states that proceedings seeking to have an arbitral award on jurisdiction set aside can, in principle, be brought only simultaneously with proceedings seeking to have a subsequent final award, or partial award, set side. In this case, however, derogating from this main rule is justified. The arbitral decision on the issue of jurisdiction was in fact made by Xavier alone, since he had the casting vote in said decision. Xavier was subsequently removed from his position as arbitrator, on account of justifiable doubts about his impartiality and independence. As a result, the arbitral award is defective in that it contains an inherent and irreparable flaw of so fundamental a nature, and the principles of due process of law have consequently been violated to such an extent, that India could not reasonably be required to continue the arbitration proceedings on that basis and incur costs. Doing so would constitute a breach of procedural economy.

3.3. KHML argues on several grounds that India should be declared inadmissible in its claim.

3.4. To the extent relevant, the parties' positions will be discussed in greater detail below.

4. The assessment of the case

4.1. The arbitration proceedings to which this case relates were instituted before 1 January 2015. It therefore follows from section IV (2) of the Arbitration Law (Modernisation) Act (Bulletin of Acts and Decrees 2014/200) that articles 1020 - 1073 of the Dutch Code of Civil Procedure (DCCP), as these were reading until 1 January 2015, apply.

4.2. Pursuant to article 1064 (2) in conjunction with article 1058 (1) (b) DCCP (as these were reading until 1 January 2015), an action seeking to have an arbitral award set aside falls within the jurisdiction of the court for the district of the place of arbitration. The place of arbitration is The Hague. The court therefore has jurisdiction to hear and determine India's claim.

4.3. Article 1052 (4) DCCP (as it was reading until 1 January 2015) provides that a motion challenging the decision by which the arbitral tribunal declares that it has jurisdiction can only be filed together with a motion challenging a subsequent full or partial final award. It is further more provided in article 1064 (4) DCCP (as it was reading until 1 January 2015), that an action to have an interim arbitral award set aside may only be brought together with an action to have the full or partial final arbitral award set aside.

4.4. Thus, the legal system states that no separate and interim setting aside of an arbitral interim award may be demanded (such as an arbitral award in which the arbitral tribunal has assumed jurisdiction), an issue which for that matter is not in dispute between the parties. However, the parties do disagree on the question as to whether certain circumstances may cause this legal system to be deviated from. KHML takes the position that this is never possible, whereas India argues that, under special circumstances, doing so is an option, thereby referring to the judgment given by the Breda District Court's on 27 February 2001, ECLI:NL:RBBRE:2001:AE0837.

4.5. The court considers as follows in this regard. The aforementioned legal system was in part chosen to avoid any procedural complications that may arise from the simultaneous further hearing of the arbitral proceedings by arbitrators, after an interim award has been rendered by them, and of the hearing of the action to have the award set aside by the ordinary court (cf. Supreme Court 20 June 2003, ECLI:NL:HR:2003:AF6207, ground 4.2.) The possible adverse consequences of this legal system for a party to arbitration proceedings may be overcome, because, once the final arbitral award has been rendered, it is still possible for that party to challenge the preceding arbitral interim awards (cf. District Court of The Hague, 27 June 2007, ECLI:NL:HR:2007:BJ9723). If there is any scope at all for separately demanding the setting aside of an arbitral interim award, such is the case in very exceptional cases only. There is no question of this here.

Commented [MvL1]: This reference contains a typo in the original. It should be RBSGR (i.e. the The Hague District Court rather than the Supreme Court).

4.6. In the arbitration proceedings between KHML and India, Xavier was removed from his position as arbitrator because it was held that Xavier's failure to disclose previous activities of the law firm he is associated with cause there to be 'justifiable doubts' about his impartiality and independence. It justified the challenge but, in the court's view, does not constitute a ground for deviating from the legal system. The above is not altered by the circumstance that Xavier's vote was decisive for two of India's jurisdictional challenges. The court furthermore notes that McLachlan too consented to the dismissal of all of India's challenges of the tribunal's jurisdiction.

4.7. In view of the above, the court will declare India's claim inadmissible.

4.8. As the unsuccessful party, India will be ordered to pay the costs of the proceedings. These are assessed to date on the part of KHML at:

- court fee	EUR 676
- attorney's fees	EUR 1,126 (2 points x rate II at EUR 563 per point)
total amount due	EUR 1,802

4.9. KHML has also demanded that India be ordered to pay the usual subsequent costs. According to established case law, an order for costs is also enforceable with respect to the subsequent costs (cf. Supreme Court 19 March 2010, ECLI:NL:HR:2010:BL1116, ground 3.5 and Supreme Court 14 February 2014, ECLI:NL:HR:2014:335, ground 3.2). This case law must be understood to mean that an order to pay the costs of the proceedings includes an order to pay the subsequent costs as well. There is therefore no reason for a separate mentioning of the subsequent costs in the order for costs.

5. The decision

The district court:

5.1. declares India's claim against KHML inadmissible;

5.2. orders India to pay the costs of the proceedings, estimated to date at EUR 1,802 on the part of KHML.

This judgment was rendered by P. Dondorp, judge, and pronounced in open court on 25 January 2023.

(signatures)

(district court's stamp)
Certified as a true copy
25 January 2023

The clerk of the court