

Riders to invoking 'sovereign immunity'

SUDIPTO DEY

New Delhi, 19 July

For India to invoke “sovereign” or “state” immunity to safeguard its foreign assets, which are under threat of getting seized in the intensifying legal battle with Cairn Energy, may come with several riders.

Experts point out that the Indian government has to first satisfy the French court that the properties or assets that are under consideration are being used to dispense the state’s sovereign functions. As a result, assets such as embassy buildings cannot be attached.

However, for properties owned by the Indian state that are used for commercial purposes, the “state immunity” defence will not be available, said Prabhash Ranjan, senior assistant professor, Faculty of Legal Studies, South Asian University.

The other challenge would be to establish that properties owned by Indian public sector units that Cairn Energy may look to attach belong to public sector enterprises that are separate legal entities from the Indian state. “India will have to convince the foreign courts where such attachment proceedings are taking place that these PSUs are not Indian state’s ‘alter ego,’” said Ranjan.

Earlier this month, a French court permitted Cairn Energy to freeze several India-owned assets in Paris for executing the \$1.2-billion international arbitral award in the decade-long tax dispute.

Ajay Thomas, an independent arbitrator, pointed out that “sovereign/state immunity” from execution is only a procedural bar to the enforcement of



an award. “Reliance on state immunity (successfully or otherwise) does not alter the fact that non-compliance of the award might detract from current efforts of the government to promote India as an attractive destination for FDI (foreign direct investment),” he said.

The United National Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, also called the New York Convention (NYC), provides for the enforcement of arbitral awards in 168 countries. Experts pointed out that the NYC does not recognise “state/sovereign immunity” as a ground to refuse the enforcement of an award. Also, courts in countries that are party to the NYC are free to

refuse or accept enforcement of a foreign award in their territory, even if the award is under challenge at the seat of arbitration.

In March this year, India contested the stand taken by the Permanent Court of Arbitration at The Hague in the tax dispute with Cairn Energy.

Kshama A Loya, leader, investor state disputes practice at Nishith Desai Associates, pointed out that French courts are known to follow a delocalised approach where decisions on

enforcement are taken independent of the pending challenge at the seat of the arbitration.

Experts said the NYC doesn’t have much role when it comes to attaching assets if a country fails to comply with the arbitral award. “The attachment of assets would be governed according to the laws of state immunity, which would be based on the domestic laws of the country where the investor seeks to execute the arbitral award,” said Ranjan.

India could, however, use certain provisions in the NYC to challenge the award on limited grounds, such as procedural irregularities and public policy, experts added.

Though its appeal against the award before the Dutch court is pending, in the absence of the award being set aside or stayed, India may well be running a hopeless race, feel many in the legal fraternity. “Since all proceedings under the arbitration regime would lead India to a dead end, it is perhaps time for the government to think creatively about invoking alternative remedies,” said Alok Tiwari, advocate, AT Lit & Law.

Ranjan is of the view that in the larger national interest, India should consider complying with the award, or arriving at some sort of settlement against corporations that have won bilateral investment treaty cases against the country.

SAFEGUARDING FOREIGN ASSETS: India's best bet is to get a stay from the appeals court on the \$1.2 billion-award and intensity efforts for mutually agreeable commercial settlement