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NPAC's Arbitration Review: Delhi HC sets aside arbitral award passed in the Airport Metro Express dispute

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Introduction

Recently, the Division Bench of the Delhi High Court in *Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Private Limited* [FAO (OS) (COMM) 58/2018 & CM Nos. 13434/2018, 17581/2018 & 31531/2018], has partially set aside an arbitral award under Section 37 of the Arbitration and Conciliation Act, 1996 (**Act**).

In the recent past, the Courts in India have consistently upheld the validity of awards passed by arbitral tribunals, and the scope for interference has been substantially narrowed. In the instant case, the Delhi High Court departed from the usually practice,

and observed that there were serious irregularities with the arbitral award, which were too obvious and apparent to be ignored as inconsequential.

Resultantly, save and except one finding of the arbitral tribunal, the Delhi High Court set aside the award, and granted liberty to the parties to invoke the arbitration clause again for a fresh adjudication of their claims and counter-claims.

Background to the Dispute

The dispute arises out a Concessionaire Agreement (**Agreement**), entered between Delhi Metro Rail Corporation Ltd. (**Delhi Metro Corporation**) and Delhi Airport Metro Express Private Limited (**Delhi Airport Metro Limited**) for the construction, operation and maintenance of the Delhi Airport Metro Express Line (**Airport Express**).

The public-private partnership was entered for providing high speed metro connectivity. Under the Agreement, the Delhi Metro Corporation had to undertake clearances and bear the costs relating to acquisition of land and construction of all civil structures like tunnels, viaducts, etc., while the design, supply, installation, testing and commissioning of various railway systems were to be provided by Delhi Airport Metro Limited, as a private partner.

Dispute arose in relation to the operation of the Airport Express. More specifically, on 22 March 2012, the Delhi Airport Metro Limited requested Delhi Metro Corporation to arrange for a joint inspection of viaducts and bearings, before the expiry of the defect liability period of the civil contractors as contemplated under the Agreement.

Subsequently, on May 23, 2012, Delhi Airport Metro Limited once again wrote to Delhi Metro Corporation highlighting serious design and quality issues with regard to installation of viaducts bearings: such as signs of girders having sunk at some locations causing deformation and cracks. Operations of the Airport Express were eventually suspended on July 8, 2012.

On July 9, 2012, Delhi Airport Metro Limited invoked the provisions of the Agreement and set out a non-exhaustive list of defects to be cured by Delhi Metro Corporation within a period of 90 days, and stated that a failure would triggered an event of default under the Agreement. Delhi Metro Corporation denied any contrary assertions and invoked the conciliation mechanism stipulated under the Agreement.

Subsequently, upon obtaining certification from the Commissioner of Metro Road Safety (**Safety Certificate**), Delhi Airport Metro Limited resumed their operations on January 22, 2013 however, shortly thereafter, addressed a letter calling upon Delhi Metro

Corporation to take over the project and the assets by close of business hours of June 30, 2013. Since July 1, 2013 the Airport Express operations are being handled by Delhi Metro Corporation.

On May 11, 2017, an arbitral award held that the termination notice issued by Delhi Airport Metro Limited was valid; Delhi Metro Limited had failed to cure the breach within the period specified under Agreement; and consequently, Delhi Airport Metro Limited was entitled to receive termination payment and interest under the Agreement (**Award**).

Delhi Metro Limited assailed the Award before the Single Judge under Section 34 of the Act. The learned Single Judge upheld the Award. Delhi Metro Corporation appealed this judgment before the Division Bench of the Delhi High Court under Section 37 of the Act.

Judgment of the Court

Submissions were advanced with respect to the following issues.

- *First*, whether participating in the reconciliation process and operating the metro line after terminating the Agreement resulted in a waiver of Delhi Airport Metro Limited's right to terminate the Agreement;
- *Second*, whether the termination notice was validly issued and the Award correctly decided that Delhi Metro Corporation had not taken effective steps for removal of defects thereby causing 'material adverse effect' on Delhi Airport Express Limited; and
- *Third*, whether the termination payment and interest on such payment was correctly computed by the arbitral tribunal.

Waiver of Termination Notice by Election and Conduct

The Award had held that Delhi Metro Express Limited had not withdrawn or waived its right to terminate the Agreement by election and conduct.

The Division Bench refrained from interfering with this finding recorded in the Award, as such findings were based on the conduct of Delhi Metro Express Limited, including the letters written by them, which had made it clear that their participation in the conciliation proceedings and re-commencement of the metro line were 'without prejudice' to their rights.

The Division Bench held that it would be difficult to hold that the Award was flawed on the issue of waiver and as such cannot be corrected under the limited jurisdiction and scrutiny available while assailing a challenge to an arbitral award.

Termination of the Agreement

The Delhi High Court noted that the arbitral tribunal had relied upon two conflicting effective dates of termination. In the first portion of the Award, the tribunal upheld the termination notice dated October 8, 2012. However, in the second portion of the Award, the tribunal referred to January 7, 2013 as the date of termination.

The Division Bench observed that the date of termination was crucial to understand if Delhi Metro Corporation had cured or taken effective steps to cure the defects within the period specified in the Agreement, and opined that the conflicting dates of termination could, therefore, materially change the outcome of the findings by the arbitral tribunal.

The Division Bench also appreciated the fact that the Safety Certificate which permitting re-starting of the Airport Express *albeit* with certain conditions, including a reduced speed limit, essentially related to whether or not the defects in the viaducts had been repaired or effective steps for repair had been undertaken by Delhi Metro Corporation.

Consequently, it was held that the arbitral tribunal had incorrectly held that the Safety Certificate was not relevant and inconsequential without providing any reasons. The Division Bench further opined that the Safety Certificate was granted after due verification of the civil structure, and held that its validity was not capable of submission to arbitration and hence, vital evidence had been ignored by the arbitral tribunal.

Computation of termination payment

As per the Agreement, Delhi Metro Corporation was liable to pay the (i) debt due; and (ii) 130% of the adjusted equity due to an event of default resulting from their default. Conversely, the Agreement prescribed that Delhi Metro Corporation was liable to pay 80% of the debt due to a similar default on behalf of the Delhi Airport Express Limited. The dispute pertained to the definition of adjusted equity.

While the promoters of Delhi Airport Express Limited advanced Rs. 685 crores as the share application money, however, subsequently, through a board resolution, the same was converted as a 'subordinate debt' in its books of accounts. However, Delhi Airport Express Limited contended that the share application money be treated as equity in order to avail of the 130% of adjusted equity as a part of the termination payment. The arbitral tribunal acceded to treating the same as adjusted equity.

The Delhi High Court set aside the finding of the arbitral tribunal and held that in spite of overwhelming and material evidence to the contrary, the Award treated the amounts

as equity while ignoring that the share application money was converted as subordinate debt by clear choice and election. It was further observed that Delhi Airport Express Limited had intentionally and deliberately opted to convert the share application money into subordinate debt to protect and insulate itself in the event they ran into a default, and the payment was to be made in lieu of such default

Relying on the principles set out by the Supreme Court in the case of *Associate Builders v. Delhi Development Authority* [(2015) 3 SCC 49], the Delhi High Court set aside the findings of the arbitral tribunal on the ground of irrationality and held that no reasonable person in the given circumstances would have arrived at such a conclusion.

Computation of the interest on termination payment

While Article 36.2.6.1 of the Agreement stipulated that where an award is for payment of money, no interest shall be payable on whole or any part of money till award is made. On the contrary, Article 29.8 of the Agreement prescribed that a termination payment from Delhi Metro Corporation becomes due and payable within 30 days of demand by Delhi Airport Express Limited, failing which interest is payable at SBI PLR [*SBI PLR refers to the State Bank of India's prime lending rate*] plus two per cent for the period of delay on such amount. Delhi Metro Corporation had contended that the interest pursuant to Article 29.8 was not payable considering the restriction in Article 36.2.6.1.

The Delhi High Court refused to interfere in the findings of the Award in this aspect and observed that since the award on termination payment, including the payment of adjusted equity is being set aside, a finding on the interest payment would become infructuous.

In view of the above, the Division Bench of the Delhi High Court entirely set aside the Award except to the extent where it upheld the arbitral tribunal's finding that Delhi Airport Express Limited had not waived its rights to terminate the Agreement.

Practical Implications

There have been series of judgments by the Supreme Court, as well as various High Courts, where courts have adopted a least intervention approach, consistent with the international standards while hearing a challenge to an arbitral award. In fact, recently in the case of *National Highway Authority of India v. BSC-RBM-PATI Joint Venture* [FAO (OS) (COMM) 107/2017 & CM No.s 18458-59/2017], the Delhi High Court held that it is not for the court to re-appraise the evidence and reconsider factual findings on the merits of an arbitral award. However, there cannot be an absolute rule, and the Delhi High Court has correctly intervened in this matter by holding that:

- Glaring and obvious errors on the face of an arbitral award are grounds for setting aside of an arbitral award;
- Non-consideration of vital evidence and defiance of logic in an arbitral award entitle the courts to consider setting aside of an arbitral award;
- An arbitral award should not be perverse or irrational, i.e., findings based on no evidence, or the arbitral tribunal takes into account something irrelevant to the decision or ignores the vital evidence in arriving at the decision;
- An arbitral award is perverse and irrational if no reasonable person would have arrived at the same decision.

This is a well-reasoned judgment which explains that the Award suffers from perversity, irrationality and patent illegality in the form of ambivalence as to the date of termination as well as non-consideration of vital evidence.

This judgment serves as a good reminder that when there are glaring errors, unfounded interpretations and perverse findings in an arbitral award, courts cannot turn a blind eye to them. In such exceptional situations, courts can intervene in the findings of the arbitral tribunal and set aside arbitral awards.

Delhi Airport Express Limited has filed an appeal against the instant judgment before the Supreme Court and it remains to be seen whether the Supreme Court will uphold the findings of the Division Bench of the Delhi High Court.

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