

## Dispute Resolution Hotline

March 25, 2009

### IN A "STATE" OF SHOCK - COURT UPHOLDS MAMMOTH DAMAGES AGAINST THE STATE!

The Bombay High Court ("Court") has upheld the award of huge damages by the arbitrators against the Maharashtra State Electricity Distribution Co Ltd ("MSEDCL") in its recent landmark decision<sup>1</sup>. The Court upheld an award of the arbitrator directing MSEDCL to shell out damages to the tune of 185 Crores plus interest at the rate of 10% as compensation to a private firm DSL Enterprises ("DSL") for breach of a contract ("Award"). The Court cited corruption at the relevant levels as the cause of the breach and held that the Award was good in law and grant of such huge damages were needed to compensate DSL who had been victimized because of the maleficent acts of the officers of the State. The fact that ultimately the money would be coughed out from State coffers did not deter the determined Court from upholding the Award. Never before had the arbitrators and the courts been so bold in their approach towards grant of damages and this case displays a paradigm shift in the attitude of courts towards the same.

#### THE BACKGROUND:

DSL had to install a "Low Tension Load Management System" at 47,987 locations across Maharashtra for improving the rural distribution of electricity network of the State Electricity Boards in India under the Work Order executed between DSL and Maharashtra State Electricity Board ("MSEB")<sup>2</sup> on March 27, 1997. DSL installed 17,294 panels, manufactured 14,206 more panels and procured more raw material for the panels. MSEDCL defaulted in providing the exact locations of the panels and sidelined the constant reminders sent by DSL. Following this DSL terminated the contract on April 21, 1999 and invoked arbitration as per the agreement between the parties on the grounds that MSEDCL had breached the contract.

An award of Rs. 1,85,97,86,399/- with an interest at the rate of 10% per annum from the date of the Award till realization was passed in favor of DSL at the arbitration proceedings. MSEDCL challenged the Award and alleged it to be against the law governing the parties with regard to the breach and damages awarded.

The Court held that the corrupt government officers were responsible for the breach. In fact the Court was keen on recovering the amount by way of damages from the corrupt officers' earnings and benefits and said that the public needn't pay for their wrong doings. The Court also imposed an additional Rs 1,00,000/- as litigation costs in favour of DSL stating that MSEDCL had challenged the award without any justifiable ground wasting public resources with the sole motive of delaying the inevitable payment under the Award.

#### ARE THE ARBITRATORS JUSTIFIED?

The Court took note of the principle that "*damages grantable in construction contracts based upon different formulae in different circumstances, having regard to the facts and circumstances of a particular case "would eminently" fall within the domain of the arbitrator*"<sup>3</sup> and the scope of interference with such an award is extremely narrow.

The measure of damages when there is an available market is relatively well known. But when there is no available market for the goods especially when goods are made to order, the measure of damages depend on the loss suffered by the aggrieved party upon breach by the defaulting party. The claim for damages by way of rents lost by DSL was evaluated carefully by the arbitrators trying to draw a balanced situation putting DSL in a position where the contract was not breached and all the panels had been installed and rented for the period of ten years. Since the panels were made specifically for MSEDCL there was no open market to mitigate the damages by sale in the open market. In the light of this, Court held that the Award did not call for the Court's interference and MSEDCL is merely trying to delay the payment to DSL on frivolous grounds.

#### CONCLUSION:

Finally, this case has led to the much awaited facelift in the attitude of the courts while dealing with damages and cost of litigation awarded. Though the public coffers will feel the strain due to this Award, nonetheless the judgment sets the precedent for cases where even private individuals can hope for fair and equitable damages being granted. Also, grant of substantial amount as costs of litigation over and above mammoth damages was commonplace in foreign jurisdictions but not in India. This judgment leaves us optimistic that Indian courts will continue this trend and litigants especially, foreign investors may look forward to a fair and equitable approach of the courts while dealing with damages and costs of litigation.

- Ranjana Adhikari, Shafaq Uraizee-Sapre & Vyapak Desai

1. Maharashtra State Electricity Distribution v DSL Enterprises Pvt.

Ltd. <http://bombayhighcourt.nic.in/data/judgements/2009/OSARBP58204.pdf>

2. Under a transfer scheme, the rights and liabilities under the contract were transferred to MSEDCL

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