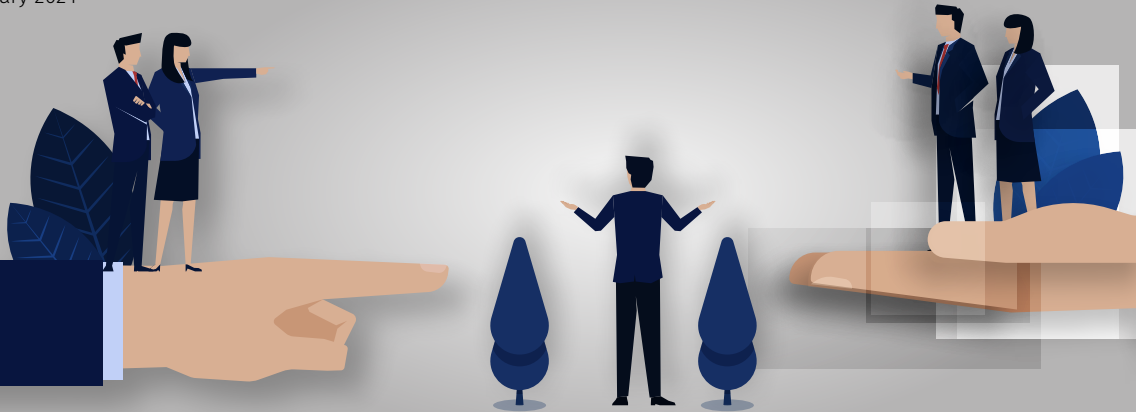


February 2024



## High Court of Delhi partially sets aside an award under Section 34 of the Arbitration and Conciliation Act, 1996 insofar as it held that the Respondent was in breach of the contract but failed to award damages to the Petitioner<sup>1</sup>

### Brief Facts

MBL Infrastructures Limited (“**Petitioner**”) was awarded a tender by the Delhi Metro Railway Corporation (“**Respondent**”) for construction of a station and accordingly furnished performance bank guarantees. The Petitioner was handed over the construction site partially after a delay of six months. Subsequently, the Petitioner requested for the remaining plot to be handed over, which was denied by the Respondent. The Respondent, thereafter, issued a notice to the Petitioner for *inter alia* the failure to adhere to the work programs. The Petitioner denied this, asserting that there was no delay on its part. Consequently, the Respondent terminated the contract and encashed the bank guarantees. The matter was referred to arbitration.

In its award dated 6 March 2020, the tribunal *inter alia* held that the delay was on the part of the Respondent, that the Respondent was in breach of the contract and thus, the termination of the contract and encashment of the performance bank guarantees were illegal and unjustified. However, the tribunal dismissed the claims of the Petitioner for damages, loss of profits, interest and costs.

Aggrieved by the rejection of its aforesaid claims, the Petitioner filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (“**Act**”) before the High Court of Delhi (“**Court**”). The Petitioner sought to set aside the award insofar as it rejected its claims for *inter alia* damages and loss of profits, despite holding that the Respondent was in breach of the contract.

### Issue

Whether the tribunal rightly rejected the Petitioner’s claims for damages, loss of profits, interest and costs?

### Judgment

The Court reiterated the well settled position that a court does not sit in appeal over an arbitral award and it may only interfere on the limited grounds provided under Section 34(2)(b)(ii) of the Act, i.e., if the award is against public policy, which includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality and existence of patent illegality in the award. The Court thereafter, analysed each rejected claim of the Petitioner as follows:

#### **Damages on idling of machines and loss of overheads, and loss of profits**

The Court observed that the tribunal had held that: (i) the delay in completion of the project was attributable to the Respondent; (ii) there were surplus workers deployed by the Petitioner; and (iii) the termination of the contract and the forfeiture of performance security by the

### In this Issue

**Brief Facts**

**Issue**

**Judgment**

**Analysis**





Respondent was not in terms of the contract. However, the tribunal refused to award damages to the Petitioner by relying upon the terms of the contract, which only entitled the Petitioner to seek extensions in case of delays.

The Court held that despite the tribunal holding that there is a delay on the part of Respondent as also wrongful termination of the contract, the tribunal was incorrect in not awarding damages to the Petitioner, which is a patent illegality. The Court held that the tribunal incorrectly relied on the clauses, which restricted the Petitioner from claiming damages since such clauses: (i) are not in public interest; (ii) are in violation of Section 23 read with Sections 55 and 73 of the Indian Contract Act, 1872; and (iii) cannot restrain the tribunal from awarding damages. It was further observed that since the contract had been terminated, the Petitioner could not take the recourse of seeking extension of time. Accordingly, the award merited interference since it shocked the conscience of the Court.

The Court further held that the contract cannot prohibit the Petitioner from claiming loss of profits in case of wrongful termination. Since the Petitioner had placed on record certain material pertaining to the loss of profits suffered by it, the Court held that the tribunal had wrongly rejected the claim for loss of profits by relying on the clause that purportedly prevented the Petitioner from seeking monetary compensation / damages.

#### **Financial loss due to loss of commercial reputation**

The Court held that the tribunal had rightly rejected this claim since the Petitioner had failed to demonstrate that it had suffered actual loss / damages on account of loss of commercial reputation.

#### **Costs of arbitration and interest**

The Court held that the tribunal had rightly relied upon the contractual clauses, which provided that the parties shall bear their respective costs and that the parties shall not be entitled to pre-suit and *pendente lite* interest. The tribunal, being a creature of contract, had to act in accordance with the terms of the contract and had rightly rejected the claims for interest.

#### **Setting aside v. modifying award**

The Court reiterated the settled principles that various claims of an award can be severed and set aside, insofar as the same are perverse or illegal. However, the same needs to be contrasted with the modification of an award, where the court makes certain changes / modifications, such as modifying the amount of damages / interest etc. The purpose behind not allowing modification is that modification requires an appreciation of evidence, which is not allowed under Section 34 of the Act.

In view of the aforesaid analysis, the Court set aside the award insofar as it rejected the claims for damages and loss of profits, and remitted the same to the tribunal to decide afresh. However, the award required no interference insofar as it rejected the claims for financial loss due to reputational harm, costs and interest.

#### **Analysis**

The Court's decision reiterates the settled principles of law that an award passed by an arbitral tribunal ought not to be interfered with on a routine basis. However, if the award suffers from patent illegality or is contrary to public policy / fundamental policy of Indian law, the same may be set aside. It further highlights that while the tribunal is a creature of contract and has to decide the dispute in terms thereof, the tribunal can read down provisions of the contract which are contrary to public policy.

## In this Issue

**Brief Facts**

**Issue**

**Judgment**

**Analysis**





It further reiterates the distinction between setting aside an award (or a part thereof) and the modification of an award, holding that while a court has the power to set aside and sever a part of the award, it has no power to modify the award.

Accordingly, the aforesaid decision is a good example of the court exercising its jurisdiction to carve out portions of an award which are contrary to public policy, while not intruding upon the overall sanctity given to the arbitral process.

## In this Issue

**Brief Facts**

**Issue**

**Judgment**

**Analysis**

## Endnote

1 Authored by Aashish Gupta, Partner and Aditya Thyagarajan, Associate; *MBL Infrastructures Limited v. Delhi Metro Rail Corporation*, O.M.P. (COMM) No. 311/2021, High Court of Delhi, 2023 SCC OnLine Del 8044, judgment dated 12 December 2023.

**Coram:** Chandra Dhari Singh, J.

## PRACTICE AREA EXPERTS

### Pallavi Shroff

Managing Partner and  
National Practice Head Dispute Resolution  
+91 98100 99911  
E: pallavi.shroff@AMSShardul.com

### Tejas Karia

Partner and Head, Arbitration Practice  
sub-group  
+91 98107 98570  
E: tejas.karia@AMSShardul.com

### Anirudh Das

Partner  
+91 98100 98329  
E: anirudh.das@AMSShardul.com

### Aashish Gupta

Partner  
+91 98189 19857  
E: aashish.gupta@AMSShardul.com

### Siddhartha Datta

Partner  
+91 90070 68488  
E: siddhartha.datta@AMSShardul.com

### Ila Kapoor

Partner  
+91 98717 92737  
E: ila.kapoor@AMSShardul.com

### Binsy Susan

Partner  
+91 96500 80397  
E: binsy.susan@AMSShardul.com

### Smarika Singh

Partner  
+91 97170 98075  
E: smarika.singh@AMSShardul.com

### Shruti Sabharwal

Partner  
+91 98107 46183  
E: shruti.sabharwal@AMSShardul.com

### Karan Joseph

Partner  
+91 98452 11270  
E: karan.joseph@AMSShardul.com

### Bikram Chaudhuri

Partner  
+91 84339 48356  
E: bikram.chaudhuri@AMSShardul.com

### Shreya Gupta

Partner  
+91 99305 43295  
E: shreya.gupta@AMSShardul.com

### Aditya Mukherjee

Partner  
+91 98717 92744  
E: aditya.mukherjee@AMSShardul.com

### Suhani Dwivedi

Partner  
+91 99039 08399  
E: suhani.dwivedi@AMSShardul.com

### Saifur Rahman Faridi

Partner  
+917042398852  
E: saifur.faridi@AMSShardul.com

### Akshay Sharma

Partner  
+91 70423 98854  
E: akshay.sharma@AMSShardul.com

### Kanika Goenka

Partner  
+91 98330 13343  
E: kanika.goenka@AMSShardul.com

## Disclaimer

This is intended for general information purposes only. It is not a substitute for legal advice and is not the final opinion of the Firm. Readers should consult lawyers at the Firm for any specific legal or factual questions.