December 2024

DUA ASSOCIATES

IN BRIEF

ANTICIPATED DEVELOPMENTS IN ARBITRATION LAW

A Reignited Debate

The recent judgment of the Hon'ble Supreme Court of India in Delhi Metro Rail Corporation Limited[1] (DMRCL), in exercise of its curative jurisdiction under Article 142[2], has reignited the debate about finality of arbitral awards and whether the objectives of Arbitration, inter alia speedy disposal and finality, are being frustrated in India.

In DMRCL, after the passing of a unanimous award by a 3 (three) member arbitral tribunal, the parties went through 5 (five) rounds of litigation before the Hon'ble Delhi High Court and the Supreme Court of India, before the award was finally set aside3 by the Supreme Court of India exercising its curative jurisdiction. The Supreme Court of India in DMRCL restored the parties to the position in which they were on the pronouncement of the judgment by the Division Bench of the Delhi High Court, thereby inter alia granting the parties liberty to invoke the arbitration clause for fresh adjudication of their claims and counter claims.

While the judgment in DMRCL was passed on April 10, 2024, during June 2024, the Department of Expenditure (Ministry of Finance, Government of India) issued an office memorandum with guidelines for arbitration and mediation in contracts of domestic public procurement4 by the government and its entities/ agencies [including central public sector enterprises (CPSEs), public sector banks (PSBs) etc. and government companies]. This memorandum inter alia indicated a shift from resorting to arbitration as a preferred method of dispute resolution in large contracts of the government, by specifically stating that arbitration, as a method of dispute resolution, should not be routinely included in large contracts.

Recent Developments

Recently, in November 2024, the Government of Karnataka has, vide a circular5, withdrawn an earlier circular6 issued by it pertaining to the incorporation of an arbitration clause in all government contracts, on the ground that it was resulting in a huge financial burden on the state exchequer.

There has thus, in recent months, been a shift from including arbitration agreements in government contracts. Parties, while contemplating the dispute resolution mechanism to be incorporated in a contract, generally carry out their own assessment of the desirability of inclusion of an arbitration agreement. While doing so, various factors have been hitherto considered by parties and their counsel, including the ever-evolving scope of a challenge to an arbitral award, as is available under Indian law, having a direct bearing on finality of the award.

While DMRCL may have once again drawn the attention of the various stakeholders to the nature of proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 (Arbitration Act, 1996), to arbitration practitioners, it has raised many further interesting questions pertaining to the second round of arbitration which parties may be relegated to, once an arbitral award is set aside.

Questions Raised and Anticipated Developments

As of today, not much guidance is available, whether under statute or by way of precedent, to answer the complicated questions that arise once an award is set side. In the author's view, these aspects may form the next set of substantial developments in

[1] Delhi Metro Rail Corporation Limited vs. Delhi Airport Metro Express Private Limited, (2024) 6 SCC 357

[2] Under Article 142 of the Constitution of India, the Supreme Court of India may pass any order as is necessary for doing complete justice in a matter pending before it.

[3] Under Section 34(1) of the Arbitration and Conciliation Act, 1996, recourse to a court against an arbitral award may be made only by an application for setting aside such award, in accordance with sub-section (2) and sub-section (3) of Section 34 of the Act.

[4] Office Memorandum bearing reference No. F.1/2/2024-PPD dated June 3, 2024.

[5] Circular No. LAW-LAC/198/2024 dated November 16, 2024.

[6] Circular No. LAW 273 LAC 2012(p) dated January 1, 2014.

arbitration law over the next few years which may consequently have a fundamental bearing on the perception of arbitration as a desired means of dispute resolution.

Once an award is set aside, parties and counsel are faced with various questions, inter alia:

- Whether the parties are to re-adjudicate their disputes before the same arbitrator or is a fresh tribunal to be constituted? If so, whether a fresh arbitration notice is required to be issued?

- If the parties are constrained to approach the appropriate court under Section 11 of the Arbitration Act, 1996, seeking appointment of an arbitrator, what is the scope of examination of the application by the said court? Is it the same as that stipulated in Section 11(6-A) of the Act and the most recent judgment of the Supreme Court of India in Krish Spinning7 or is it different?

- If a new arbitral tribunal is constituted, can the parties be permitted to expand the scope of the proceedings and raise claims/ counter claims which were not subject matter of the earlier proceedings?

- Do the new proceedings need to be continued from a particular stage of the earlier proceedings or completely afresh?

- Are the parties bound by their pleadings in the earlier proceedings and can the tribunal in the second round take cognizance of admissions made in the earlier proceedings either by way of pleadings or responses to cross examination?

- Whether the findings of the earlier tribunal, the courts exercising powers under Section 34 and Section 37 of the Arbitration Act, 1996 or the Supreme Court of India, while examining the validity of the arbitral award, are binding on the tribunal subsequently appointed?

In view of the express liberty granted to the parties to invoke the arbitration clause for fresh adjudication, the judgment in DMRCL has avoided further confusion on the way forward by restoring the parties to the position in which they were on the pronouncement of judgment of the Division Bench of the Delhi High Court, which had expressly granted liberty to invoke the arbitration clause for fresh adjudication of their claims and counter claims. Considering the lack of substantial jurisprudence on the matter, courts, while exercising their powers under Section 34 or Section 37[8] of the Arbitration Act, 1996, generally do not anticipate and do not provide for (whether on account of lack of statutory clarity or otherwise) the way forward once an award is set aside. This may result in further confusion and delays in the fresh arbitral proceedings instituted after an arbitral award is set aside.

The Department of Legal Affairs, which is presently in the process of considering further amendments to the Arbitration Act, 1996, had recently invited comments/ feedback from the public as a part of the public consultation exercise on the draft amendments. Interestingly, one of the proposed amendments to the Arbitration Act, 1996, by way of the Arbitration and Conciliation (Amendment) Bill, 2024 (2024 Amendment), is the insertion of subsection (7) to Section 34 of the Arbitration Act, 1996 which reads as follows:

"(7) Where the arbitral award is set aside in part, the Court or an appellate arbitral tribunal, as the case may be, may direct that the arbitral tribunal shall decide in a fixed time, only the issues on which the award has been set aside:

Provided that the said arbitral tribunal shall make the award on the said issues on the basis of existing records in the original arbitral award, unless the Court or an appellate arbitral tribunal, as the case may be, directs to the contrary:

Provided further that the arbitral tribunal shall be bound by the findings of the original arbitral award, which have not been set aside".

This 2024 Amendment, however, also only seems to provide for a situation where an arbitral award is set aside in part, and even then leaves open a lot of questions to be answered.

On the question of whether the parties are to institute fresh arbitration proceedings, once the award is set aside, the Supreme Court of India in McDermott9 has given some guidance and clarified that a court, while exercising power under Section 34 of the Arbitration Act, 1996, can only quash the award leaving the parties free to begin the arbitration again, if it is so desired. This has subsequently been followed by various high courts10 . The various other aspects, however, (few of which have been highlighted above) lack clarity. This may result in a situation where even if parties begin arbitration once again after an award is set aside, the number and scope of grounds for challenge of the second award would be far more complicated leading to further delays in the second award attaining finality.

Conclusion

While, over the last couple of decades, a substantial amount of jurisprudence has developed on the scope of proceedings under Section 34 of the Arbitration Act, 1996, and the nature of examination to be carried out by a court while exercising its jurisdiction under Section 34 of the Act, to set aside an arbitral award, it is reasonably anticipated that the next few years will see a large number of developments (both on the statutory and judicial fronts) on the fallout, implications and complications resulting from an arbitral award being set aside. Parties and counsel may need to keep a close eye on these developments, as and when they pan out, as they would need to form an integral aspect for parties and their counsel to take into consideration while discussing and negotiating the dispute resolution mechanism to be included in contracts and also while developing their dispute resolution strategy, once disputes have in fact arisen.

---

[7] *SBI General Insurance Co. Ltd. v. Krish Spinning, 2024 SCC OnLine SC 1754*

[8] Under which an appeal would lie against an order passed by a court under Section 34 on an application for setting aside of an award.

[10] *McDermott International Inc. vs. Burn Standard Co. Ltd. and ors. (2006) 11 SCC 181*

[10] *Steel Authority of India Limited vs. Indian Council of Arbitration and ors., 225(2015)DLT348 and Associated Constructions vs. Mormugoa Port Trust, 2010(3)ARBLR472 (Bom)*

This newsletter has been contributed by:

S.R Tejas, Partner, Dua Associates, Bengaluru

For further information contact:

S.R Tejas, Partner, Dua Associates, Bengaluru
Email: tejas@duaassociates.com

Stay connected with Dua Associates
www.duaassociates.com