client alert

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cyril amarchand mangaldas
ahead of the curve

Lenders led by IDBI Bank recover damages from Haryana Government Toll Project

Over the last several years banks and financial institutions have pursued recovery of NPAs through several measures particularly the IBC. Disputes in the infrastructure sector pose a challenge for the lenders in recovering their dues. Whilst a project awarded to the concessionaire is effectively funded by the banks, disputes between the concession authority and the developer is at the risk and cost of the banks. In this situation it is useful if the lenders were to take control of the proceedings with a view to get to an acceptable outcome.

In this backdrop, we wish to share an update on a first of its kind arbitration (and subsequent proceedings), being successfully led by the CAM Team, on behalf of a consortium of 12 public sector banks ("**Senior Lenders**"), with IDBI Bank limited as the Lead Bank. In this arbitration the Senior Lenders claimed damages from the concession authority (for having substituted the concessionaire without protecting the Senior Lenders' dues, as is required in substitution agreements to secure the lenders) equivalent to the outstanding debt that could not be recovered from the concessionaire.

As a brief background to the dispute, in 2009, a Concession Agreement was entered into between HSIIDC and KMP Expressways Limited ("**KMP Expressways**") for development, operation and maintenance of the 135 km long Kundli-Manesar-Palwal ("**KMP**") Expressway in Haryana ("**Project**") to reduce the level of pollution in the NCR region. The Project was funded by the Senior Lenders with the toll from the project as the primary security. Further, a tripartite Substitution Agreement was executed between HSIIDC, KMP Expressways and IDBI Bank Limited to recognize and strengthen the Senior Lenders' security interest. The project was excessively delayed despite complete financial support from the Senior Lenders. In view of the excessive delays and large public interest involved in the Project, in January 2015 the Supreme Court (which was monitoring the Project as a part of the ongoing proceedings before it regarding decongesting the traffic and reducing the pollution level in the national capital) directed the government of Haryana to award the Project to a new concessionaire. However, in breach of its obligations under the Substitution Agreement, HSIIDC replaced the borrower without stipulating that the new concessionaire will take over the debt due to the Senior Lenders. The genesis of the dispute is this direct breach of the Substitution Agreement by HSIIDC, which defeated the Senior Lenders right to recover debt due from the toll receivables.

The Senior Lenders initiated arbitration proceedings against HSIIDC and KMP Expressways claiming damages for the loss suffered by the Senior Lenders due to HSIIDC's breach of the Substitution Agreement and consequent loss to the Senior Lenders of ability to recover debt due.

The Senior Lenders claimed that the quantum of damages was equivalent to the amount of debt due from the Concessionaire that the Senior Lenders could not recover due to the breach by HSIIDC. With no direct precedence in Indian law, the arbitral tribunal, comprising Justice (Retd.) R M Lodha, former Chief Justice of India, Justice (Retd.) K S P Radhakrishnan and Justice (Retd.) J Chelameswar, relied on foreign jurisprudence to award the entire principal outstanding along with interest, amounting to INR 1737.11 crores, as damages to the Senior Lenders. For the first time the debt due to the lenders from a concessionaire has been awarded as damages for the government authority's breach of contract.

The award was challenged by HSIIDC, however, the Delhi High Court upheld the award while recognizing that the arbitral tribunal had devised a novel method for determining the measure of damages. Thereafter, HSIIDC preferred an appeal, during the pendency of which the Delhi High Court deemed it appropriate to direct HSIIDC to deposit an amount of INR 600 crores in the escrow account of the Senior Lenders by way of an interim measure (in view of the HSIIDC's challenge to the award being dismissed). This order was challenged by HSIIDC before the Supreme Court, however, the Supreme Court upheld the order directing deposit. Therefore, HSIIDC has deposited INR 600 crores in the escrow account of the Senior Lenders. In addition, in the enforcement proceedings initiated by the Senior Lenders, the Delhi High Court had directed that as an interim measure all toll revenue would continue to be deposited in the escrow account of the Senior Lenders which can be withdrawn and utilized by the Senior Lenders. Accordingly, till date an amount of over INR 400 crores from the toll receivables has been received in the escrow account.

Till date the Senior Lenders have received more than INR 1000 crores in their escrow account from HSIIDC, a state entity. The remainder of the awarded amount, i.e., approximately INR 700 crores, will be recovered by the Senior Lenders in their enforcement proceedings once the Award is enforced by the Court. The case in point could well be a precedent to the lenders and other cases to adopt similar proceedings. It would be useful to note that the Supreme Court in *Rapid MetroRail Gurgaon Limited v. Haryana Mass Rapid Transport Corporation Limited & Ors.*, 2021 SCC OnLine SC 269, recognised the importance of protecting lenders rights as they are funding infrastructure projects. Justice D.Y. Chandrachud speaking for the bench held:

> *"Equally, financing arrangements entered into by financial institutions towards fulfilling infrastructure projects, based on the sanctity of the commercial contracts, are to be duly observed. This facet has to be emphasized since it embodies a vital element of public interest as well. Commentators have noted that, "[d]eterioration in loan recovery not only leads to higher provisions and diminished profitability but also constrains banks' lending capacity, thus affecting the economy adversely". Unless the dues which are assured to financial institutions as part of the arrangements which are envisaged in Concession Agreements are duly enforced, the structure of financing for infrastructure projects may well be in jeopardy."*

The aforesaid observation of the Supreme Court and the progress made by the lenders in this case due to the direction of the Delhi High Court in deposit of amounts to pay the creditors would reinforce confidence in lenders funding infrastructure projects which was a key consideration for intervention by the Supreme Court.

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