

Understanding Bombay HC's decision to set aside arbitral award in BCCI v. DCHL

The Bombay High Court recently set aside an arbitral award that required the Indian Cricket Board/ BCCI to pay over INR 48 billion to Deccan Chronicle Holdings Limited (“DCHL”), its erstwhile IPL franchisee, towards damages for wrongful termination of the franchise agreement.

While setting aside the arbitral award, the Court was very careful in treading along the contours of a court's limited jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996, to interfere with an arbitral award. The Court summarised its reasons for interfering with the arbitral award by stating:

*“At the broadest level, there were three defaults – not paying players and others, creating charges on assets, and the insolvency event (the IFCI winding-up petition). The contract said the first two were curable; if uncured, they invited termination. The third could trigger immediate termination (leaving aside the fact that BCCI gave time to DCHL to have this resolved as well). **Not one of the three is convincingly shown to have been cured or not to exist. All three continued. The Award proceeded in places without reasons, in others by ignoring evidence, in yet others by wandering far afield from the contract, and in taking views that were not even possible. In doing so, it brushed aside objections about insufficient pleadings. It granted reliefs not even prayed for, and took views that were not possible, i.e. that no reasonable person could have done. Effectively, it rewarded the party in unquestionable breach of its contractual obligations. That is inconceivable and not even a possible view.**”*

BCCI was represented by the Cyril Amarchand Mangaldas team, led by Indranil Deshmukh, Partner, Adarsh Saxena, Partner, Rachyeta Shah, Principal Associate and Kartik Prasad, Senior Associate.



Incidentally, BCCI's challenge petition was filed online during the Covid-19 pandemic and the entire proceeding before the Court was conducted virtually. In its judgment, the Court has graciously complimented the team for being meticulous in compiling the records before the Court digitally, in an organised, methodical and accessible form. The Court noted that the same should serve as a template in all other matters.

Set out below are some key conclusions from the judgement:

Limited scope of interference by a Court with an arbitral award

A Court would be justified in interfering with an arbitral award if it finds that (i) the findings in the award are based on no evidence at all; (ii) the award ignores vital evidence; (iii) the findings in the award are based on documents taken

behind the back of the parties; (iv) the findings are not supported by reasons in the award; (v) in interpreting the contract, the arbitral tribunal has not taken a fair-minded and reasonable view i.e. if the view taken is one that is not even possible, or if the arbitrator wanders beyond the contract, that would amount to a 'patent illegality'.

On the other hand, a merit-based interference is proscribed. It is not permissible to set aside an award merely because on merits, another view was possible, or even preferable; or if a correctly invoked and stated law was erroneously applied. There can be no reappraisal of evidence. A reasonable and fair interpretation of the contract will invite no interference.

The principle of 'substantial compliance' is inapplicable in private contract law

The Court observed that there was a fundamental problem with the award proceeding on an "assumption that, notwithstanding what a contract says, contract law contemplates that the terms of a contract need not be exactly complied; 'substantial' compliance is enough... It injects unacceptable uncertainty and subjectivity to precisely stated contractual obligations. Specifically, it opens a Pandora's box of substantiality. How much is enough compliance? When is some compliance 'substantial' and when is it 'insubstantial'? If contracting parties agree on an amorphous or ambiguous level of compliance, they will say so. Usually, this will take the form of specifying compliance within a range: it could be a range of dates, or a scale of amounts." It was held that there is no principle of substantial compliance in private contract law.

Public Law requirement of fairness and reasonableness cannot be imported in private arbitration

The arbitrator had held that BCCI performs 'public functions' and had a public duty to act fairly and reasonably. The Court held that a "public duty to act fairly cannot be imported into a contract by a private law arbitral tribunal to effectively alter its terms so as to create an obligation on the so-called public-duty party that the contract does not envisage." Importantly, this was held to apply even to statutory contracts. In this regard, the Court drew a distinction between the power of a court and arbitral tribunal to invoke public law doctrines. It was held that a

court, especially a constitutional court, is not constrained in the same way as an arbitrator. "A writ court may well hold against a public body on a public law principle or by invoking Article 14; but an arbitrator, constrained as he or she is by the contract, has no such power." The Court relied on the judgment of the Supreme Court of India in *Avitel Post Studios Ltd. v. HSBC PI Holdings Ltd.*, 2020 SCC OnLine SC 656, where it was held that "serious allegations of fraud" arise *inter alia* **"in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or mala fide conduct, thus necessitating the hearing of the case by a writ court in which questions are raised, which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain."**

Deciding a dispute amiable compositeur

An *amiable compositeur* in arbitration law is an arbitrator empowered by the consensus of parties to settle a dispute on the basis of what is "equitable and good". In this regard, the Court held that commercial arbitrators are not entitled to settle a dispute by applying what they perceive as "fair and reasonable," absent specific authorisation in an arbitration agreement. This is in consonance with Section 28(2) of the Arbitration and Conciliation Act, 1996, and in keeping with the principle that an arbitrator is bound to implement contractual clauses and cannot go against them, based on his notions of equity and fairness. On this ground, the Court held that the award's finding of BCCI's termination to be unfairly discriminatory is a patent illegality.

The Court further held that the arbitrator's finding of other suggestions made by DCHL being more "appropriate and preferable" is outside the realm of contract law, especially in the absence of any finding that BCCI was "contractually bound" to accept such suggestions. The said finding was held to "fall foul of the jurisprudential interdiction against extra-contractual arbitral peregrinations" and amounted to wholesale rewriting of the contract.

Providing reasons for awarding damages

The Court held that when a break-up of claim amounts is provided by a claimant in arbitration, an "omnibus and undifferentiated award was not possible without reasons" under each head of the claim. The Court observed that for

each component, there was no discussion at all of any evidence, and there were no reasons at all for accepting any of the amounts awarded under any of the heads of claim. In this regard, the Court acknowledged that any award of general damages for breach requires some level of estimation or guesswork once a breach is proved. However, it was held that the same means that there must be reasons. Specifically, the area that is left to guesswork or estimation must be clearly identified and the basis of that estimation must also be returned as a finding. Importantly, the Court held that *“by its very nature, an arbitral award demands far greater attention to minutiae and detail than even a civil trial court.”*

Impact

All in all, the judgment is a very welcome one, since it sets out the manner in which an arbitral award has to be rendered. More importantly, it sets an important precedent in discouraging arbitrators from factoring in extraneous factors and importing public law principles while interpreting the provisions of commercial contracts. Further, the judgment establishes certainty in the domain of commercial agreements by saying that contractual obligations have to be fulfilled in letter and spirit, in accordance with the written contract, and not the arbitrator’s notion of fairness and compliance.

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