

# Kluwer Arbitration Blog

## How Many Bites of the Same Cherry Does it Take to Overturn an Arbitration Award? Unpacking the Indian Supreme Court's Decision in *Delhi Metro Rail Corporation v. Delhi Airport Metro Express Pvt. Ltd*

Sarthak Raizada · Wednesday, July 10th, 2024

While refusing to interfere with an award under [Section 68](#) of the English Arbitration Act, Justice Teare pithily [quipped](#) that “by choosing to resolve disputes by arbitration the parties clothe the tribunal with jurisdiction to make a ‘wrong’ finding of fact”. These observations made in the set-aside proceedings are rooted in the fundamental principle that parties who agree to arbitrate waive their right to seek a comprehensive judicial reevaluation of the issues presented to the arbitral tribunal.

However, the recent decision of the Indian Supreme Court (“Supreme Court”) in *Delhi Metro Rail Corporation (DMRC) v. Delhi Airport Metro Express Pvt. Ltd. (DAMEPL)* virtually eviscerates this principle. To fully understand how this unfolded, it is imperative to briefly delve into the procedural history of the case. DAMEPL had initiated arbitration against DMRC for a breach of contract. The arbitral tribunal (“Tribunal”) issued an award in favor of DAMEPL (“Award”). Dissatisfied, DMRC applied to set aside the Award under [Section 34](#) of the [Arbitration and Conciliation Act, 1996](#) (“A&C Act”) before a Delhi High Court (“DHC”) judge, who [dismissed](#) the challenge. However, upon DMRC’s appeal under [Section 37](#) of the A&C Act, a two-judge bench of the DHC (“Division Bench”) [reversed](#) the single DHC judge’s decision, concluding that the Tribunal had overlooked crucial evidence in determining the validity of the concession agreement termination.

The Supreme Court, on DAMEPL’s appeal, [reversed](#) the Division Bench’s judgment and reinstated the Tribunal’s Award (“Judgment in Appeal”). DMRC’s review of the Judgment in Appeal before the Supreme Court was also [dismissed](#) (“Review Order”). Despite these consecutive setbacks, DMRC did not relent. It filed a plea for curative relief before the Supreme Court against the Judgment in Appeal. In an unprecedented move, the Supreme Court allowed DMRC’s curative petition, overturned the Judgment in Appeal, and affirmed the Division Bench’s decision to set aside the Award. This final decision (“Final Judgment”) by the Supreme Court signifies a rare and substantial shift in its approach to reviewing awards and interpreting the A&C Act.

### Factual Background of the Dispute

In 2008, DMRC and DAMEPL entered into a concession agreement to build and operate a high-speed metro line. Shortly after starting operations, DAMEPL identified structural defects that compromised safety and impacted DAMEPL's contractual duties. DMRC was notified and DAMEPL's right to terminate the concession agreement if the issues were unresolved was iterated. Eventually, DAMEPL terminated the concession agreement, citing DMRC's failure to address the defects.

After being issued with the notice of termination, DMRC initiated arbitration proceedings. Meanwhile, DAMEPL and DMRC jointly applied to the Commissioner of Metro Railway Safety ("CMRS") to reopen the metro line for public use. For reference, CMRS is a statutory body created by the Metro Railways (Operation and Maintenance) Act, 2002 ("Metro Act") to assess the safety concerns involved in operating metro lines.

A few days later, the CMRS issued a sanction, imposing certain speed restrictions on the metro's operation. Finally, in July 2013, while the dispute regarding the termination remained unresolved, DMRC took over the assets and began operating the metro line.

Before the Tribunal, the central issue was whether DAMEPL had validly terminated the concession agreement. After reviewing the evidence, the Tribunal concluded that DAMEPL had validly terminated the concession agreement due to unresolved structural defects in the metro line, which significantly impacted DAMEPL's obligations. The Tribunal found that these defects compromised the structure's integrity, which remained unaddressed after the cure period. It dismissed DMRC's argument that the CMRS sanction indicated that the defects had been fixed, stating that neither the CMRS sanction nor the metro's continued operation were relevant to the legality of the termination. It was this disregard of the CMRS sanction by the Tribunal that became the basis of the challenge to the Award.

### **Analysis of the Supreme Court's Reasoning**

The Supreme Court tested the allegation regarding the Tribunal's disregard of the CMRS sanction under Section 34(2-A) of the A&C Act, which provides that an award may be set aside if it is vitiated by "patent illegality" on the face of the award. Section 34(2-A) is extracted below for reference:

*"(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:*

*Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence."*

Before dealing with this allegation, the Supreme Court first explained the patent illegality test as enunciated by the Supreme Court in two prior cases, *Associate Builders v. Delhi Development Authority* and *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*. In these two cases, the Supreme Court noted that the test of patent illegality vitiating an award can encompass a broad range of situations. For example, an award is considered patently illegal if it is "based on no

evidence at all” or if it “ignores vital evidence” in arriving at its decision.

In applying this test, the Supreme Court divided its analysis into two separate but interconnected parts. The first part addressed the issue of contractual interpretation and the second part focused on the purported exclusion of the CMRS sanction from consideration.

In this post, we focus on the second part of the Supreme Court’s analysis which begins at paragraph 55 of the Final Judgment.

### **Patent Illegality of the Award**

The Supreme Court strongly criticized the Tribunal for disregarding the CMRS sanction while addressing the issue of contract termination. The Supreme Court considered the CMRS sanction as a “vital piece of evidence” in determining whether DAMEPL’s reasons for terminating the concession agreement was valid. The Supreme Court supported this conclusion by way of a two-fold justification. First, it noted that DAMEPL had emphasized the safety of the metro line when it issued the notice to cure the defect to DMRC, indicating that safety was a central concern in the dispute. This made the safety of the metro line a direct issue between the parties. To bolster this finding, the Supreme Court canvassed the provisions of the Metro Act and held, at paragraph 63 of the Final Judgment, that the grant or refusal of sanction was directly connected to public safety. Based on these observations, the Supreme Court found it improper for both the Award and the Judgment in Appeal to ignore the significance of the CMRS sanction in the context of the termination issue. By ignoring this evidence, the Supreme Court ruled that the Award was rendered patently illegal.

### **Ignoring Vital Evidence: Use It or Leave It?**

There are three major concerns with the Supreme Court’s reasoning. First, its approach constitutes a radical invasion of a tribunal’s discretion to consider and assess matters of evidence. By re-opening and reviewing the evidence in the manner that it did, the Supreme Court essentially re-determined the factual issues involved in the dispute in violation of the proviso to Section 34(2-A). This re-determination weakens the core reason behind the parties’ choice to arbitrate instead of litigating their disputes. By agreeing to arbitration, a party forfeits the right to have a court decide the merits of the dispute including questions of fact, retaining only the limited ability to seek judicial review of the arbitrator’s decision in exceptional cases.

Second, it appears the Supreme Court failed to grasp the true nature of the dispute over the CMRS sanction. The real issue was whether the Tribunal was justified in giving insufficient weight to the CMRS sanction, rather than whether the Tribunal had overlooked the sanction entirely. The Supreme Court, however, conflated these points, erroneously treating it as the latter. In doing so, it failed to appreciate that the Tribunal had, in fact, considered the CMRS sanction and concluded it did not support DMRC’s claim that the defects were cured. Even the DHC judge approved the Tribunal’s view of the relevance and impact of CMRS sanction on the termination issue, while rejecting DMRC’s Section 34 challenge. In short, the issue was about the relevance of evidence, not that it was overlooked. In light of this, it is perplexing how the Supreme Court could have legitimately disturbed the Tribunal’s finding on the CMRS sanction, even if the Supreme Court felt

that a different view of the evidence was possible.

Additionally, there is a broader concern regarding the options available under the Supreme Court's current jurisprudence for challenging an award on the basis that a tribunal disregarded a vital piece of evidence. This concern is inspired by the judgment of the English Commercial Court ("ECC") in *UMS Holding Ltd & Ors v. Great Station Properties SA & Anr* ("UMS Holding") where an award was challenged under Section 68 of the English Arbitration Act on the ground that the tribunal overlooked the evidence on record. In dismissing the challenge, the ECC, while highlighting the practical problems associated with challenges that claim disregard of evidence by the tribunal, observed:

*"28. ...[failure] to have regard to evidence relied upon by one of the parties cannot be the subject matter of an allegation of a serious irregularity...[W]here a tribunal in its reasons has not referred to a piece of evidence which one party says is crucial the tribunal may have (i) considered it, but regarded it as not determinative, (ii) considered it, but assessed it as coming from an unreliable source, (iii) considered it, but misunderstood it or (iv) overlooked it... Were the court to seek to determine why the tribunal had not referred to certain evidence it would have to consider the entirety of the evidence...[And to] decide that the tribunal had overlooked certain evidence the court would have to conclude that the only inference to be drawn from the tribunal's failure to mention such evidence was that the tribunal had overlooked it. But the tribunal may have had a different view...of the evidence from that of the court and so the required inference cannot be drawn..."*

The rationale of *UMS Holding* clarifies that a tribunal, when writing an award, cannot be expected to refer to every piece of evidence in the record simply because one party considers it vital. As the ECC noted, this "approach to writing the reasons for an award [remains] different from the current practice of the courts when writing judgments". Acknowledging this disparity between the tribunal's discretion in award writing and the court's expectations for judgment writing is vital; it offers parties the freedom to resolve disputes efficiently and with specialized expertise and limited judicial intervention.

However, in *DAMEPL*, this freedom was compromised because the Supreme Court scrutinized the Award through a criterion that was more suited to judicial decisions. By doing so, the Supreme Court improperly imposed judicial expectations on the arbitral process, transforming the limited jurisdiction of the court under Section 34(2-A) of the A&C Act into a court of general appellate jurisdiction. As the Supreme Court explained in *Reliance Infrastructure Ltd. v. State of Goa*:

*"[t]he Arbitral Tribunal has taken a particular view of the evidence before it. If it were an appeal against the award, the approach of the Court could have been different but, not so while examining the award within the confines of Section 34 of the [A&C Act]"*.

Given this context, it seems prudent for the Supreme Court to reconsider the appropriateness of allowing parties to challenge an award on the basis that the tribunal has overlooked or disregarded essential evidence. The current liberal application of this test by courts leads to excessive litigation,

enabling parties to endlessly challenge an award.

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