Dispute Resolution Hotline

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GUESSTIMATES IN ASSESSING DAMAGES BY THE ARBITRATOR A POSSIBILITY? DELHI HIGH COURT OPINES

- A division bench of the Delhi High Court held that arbitrators may use "*guesswork*" and "*rough and ready*" methods for calculating damages when precise quantification of losses is difficult, but not impossible.
- The court also held that under Section 34 of the Arbitration Act, courts have the authority to either uphold an entire award or set it aside. They cannot refer specific issues back to the arbitral tribunal for further deliberation unless there is an explicit request from the parties in accordance with Section 34(4) of the Arbitration Act.
- To minimise liability for delays in construction, contractors should formally request extensions of time when project timelines are at risk. As a measure of abundant caution, if delays are caused by certain contractors in a multi-contractor project, the remaining contractors must still notify the employer and seek the necessary adjustments to the project's overall timelines. Additionally, an aggrieved party should maintain documentation of losses to assist in damage quantification, even when a contract includes a liquidated damages clause.

In *Cobra Instalaciones Y Servicios, S.A. & Shyam Indus Power Solution Pvt. Ltd. (J.V.) ("**Cobra**") v Haryana Vidyut Prasaran Nigam Ltd. ("**HVPNL**")*,[1] a division bench of the Delhi High Court restored an arbitral award which had been partially set aside by a single judge. The award permitted a contractor to recover 50% of the sums retained by an employer as liquidated damages, acknowledging that the employer incurred loss even though it could not precisely quantify it. The division bench disagreed with the single judge's view that the Indian Supreme Court's findings, which allow use of "*guesswork*" or "*rough methods*" to estimate damages in such situations, are inapplicable to arbitrators.

FACTUAL BACKGROUND

In 2011, as part of an initiative to improve Haryana's infrastructure and power situation, the employer, HVPNL, invited bids on a turnkey basis for commencement of work on the Haryana Power System Improvement Project. The contractor, Cobra, was declared as the successful bidder and was awarded the contracts for five different projects.

Project G09, the contentious project for this case, had to be completed within 450 days from the date of commencement. The General Conditions of Contract ("**GCC**") for this project stipulated that liquidated damages would be payable to HVPNL in case of any delays by Cobra. Certain delays took place in the completion of the project, which could not entirely be attributed to Cobra. For instance, delay was also caused by another contractor who was responsible for setting the feeding / transmission lines. Cobra also made multiple requests for extensions for certain, but not all, sub-stations within the project. However, HVPNL imposed liquidated damages upon Cobra and deducted such sums from the running bills of Cobra. Similar issues also arose in the four other projects between Cobra and HVPNL.

Cobra initiated arbitration proceedings in 2016. The arbitrator issued two awards, with one award dealing with Project G09 ("**GO9 Award**") and the other dealing with the remaining four projects. In the GO9 Award, the arbitrator directed HVPNL to refund 50% of the amount retained by it as liquidated damages (approximately INR 70 million or USD 837,756) along with interest. The arbitrator relied on the Supreme Court's decision in *Construction and Design Services v Delhi Development Authority* ("**CDS**")[2]which permitted the use of "*rough and ready methods*" to assess damages in cases where quantification was complex, evidence was insufficient, and the project had a significant public interest in its execution. Notably, in *CDS*, the court employed the "*rough and ready method*" to determine damages and did not concern an arbitrator doing so. Although the arbitrator acknowledged that the damages could not be determined with precision, they concluded that HVPNL was entitled to some damages. Consequently, the arbitrator permitted HVPNL to retain 50% of the liquidated damages, utilising the "*rough methods*" outlined in *CDS*.

Both, HVPNL and Cobra challenged the GO9 Award under Section 34 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). The challenges were addressed and resolved in one judgment by a Single Judge of the Delhi High Court.[3] The Single Judge reversed the GO9 Award on the findings relating to liquidated damages and the interest payable. The judge also granted liberty to the parties to seek fresh reference to arbitration for the determination of this issue.

Cobra appealed the Single Judge's decision to a division bench of the Delhi High Court under Section 37 of the Arbitration Act, confining its contentions solely to the issue of liquidated damages.

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Cobra's Arguments	HVPNL's Arguments
First, HVPNL has not suffered any legal injury or loss to warrant the imposition of liquidated damages. The liquidated damages clause in the GCC did not state that these damages were genuine pre-estimates of losses likely to be suffered by HVPNL. HVPNL also failed to quantify the losses suffered by it, which is a pre-requisite for imposition of liquidated damages.	**First**, the Single Judge's decision is reasoned, just and should not be disturbed. The jurisdiction of the appellate court under Section 37 of the Arbitration Act does not extend to re-appreciation of evidence. Cobra's appeal attempts to impermissibly modify the award by contending that HVPNL should not be allowed to retain even the 50% of the liquidated damages permitted by the GO9 Award.
Second, the primary reason for the delay in the completion of the GO9 Project was not attributable to Cobra.	**Second**, timely completion of the project was the essence of the contract, and the delay in the completion of the GO9 Project was attributable to Cobra. HVPNL had brought the delay to the attention to Cobra on several occasions.
Third, the Single Judge's reasons for reversing the GO9 Award are erroneous. The arbitrator's reasoning did not have inconsistencies. Further, the Single Judge's observation that only the Supreme Court, and not the arbitrator, could apply the "rough methods" espoused in CDS is not substantiated by the CDS decision.	**Third**, the liquidated damages clause was a genuine pre-estimate of the loss or injury that HVPNL would suffer. Cobra had previously accepted the imposition of liquidated damages and only requested a deferment in payment. Thus, Cobra's current arguments against the payment of liquidated damages to HVPNL are mere afterthoughts. Furthermore, the tribunal is bound by the liquidated damages clause in the GCC and could only deviate from if it finds that the clause did not represent a genuine pre-estimate of the loss or injury. Consequently, HVPNL is entitled to retain 100% of the liquidated damages, not just the 50% directed in the GO9 Award. By setting aside this portion of the GO9 Award, the Single Judge has allowed the parties to readdress this issue before an arbitral tribunal.

JUDGMENT OF THE DIVISION BENCH

The Division Bench of the High Court identified the primary issue as whether the arbitrator's findings in the GO9 Award were supported by the evidence presented or if they were so perverse that no reasonable person could have reached the same conclusion.

The court concluded that the Single Judge erred in perceiving an inconsistency in the arbitrator's decision to award liquidated damages while being unable to quantify the exact losses suffered by HVPNL. The arbitrator determined that precisely quantifying the losses resulting from Cobra's delays was difficult (as opposed to impossible) due to delays caused by another contractor as well. Consequently, the arbitrator's approach to evenly distribute the losses between Cobra and the other contractor aligned with the "*rough methods*" endorsed by the Supreme Court in *CDS*.

The court determined that the arbitrator did not find that the total liquidated damages calculated according to the GCC represented a genuine pre-estimate of damages that HVPNL would incur if Cobra breached the contract. Therefore, the arbitrator was well within the bounds of law to employ a "*rough and ready method*" to award reasonable compensation for the losses / legal injury suffered by HVPNL. *CDS* did not restrict the use of "*rough methods*" and "*guesswork*" exclusively to the Supreme Court. These methods are also available to arbitrators and other courts to assess damages when evidence indicates that losses have occurred but detailed specifics are lacking.

Lastly, the court held that the Single Judge erred in directing the parties to agitate the issue of liquidated damages afresh before the arbitral tribunal. Under Section 34 of the Arbitration Act, a court has the authority to either uphold the award in its entirety or set it aside; it cannot refer issues back to the arbitral tribunal for reconsideration. The court found that the decision in *National Highways Authority of India v Trichy Thanjavur Expressway Ltd* ("**NHAI**"),[4] which permits a court to selectively set aside severable parts of an award, does not apply to the present case. *NHAI* elaborates on the court's powers under Section 34(4) of the Arbitration Act[5] to adjourn proceedings to allow the arbitral tribunal to resume arbitral proceedings or take other actions to eliminate the grounds for setting aside the award. However, the invocation of powers under Section 34(4) requires a party's prior request, which was not made in the present case.

Accordingly, the Division Bench overturned the Single Judge's decision and reinstated the GO9 Award in full, which mandated that HVPNL refund 50% of the liquidated damages it had retained.

CONCLUDING REMARKS

The decision of the Division Bench of the Delhi High Court is based on an established line of precedents which dictate that the arbitrator has considerable leeway in determining damages when it is shown that loss has been suffered but quantification is difficult due to lack of insight into granular details.[6] It also reinforced the position that reasonable damages, with the stipulated liquidated damages being the upper limit, can be granted if there is no evidence of actual loss suffered and they are not a genuine pre-estimate of loss.

However, it is unclear why the Division Bench concluded that findings of *NHAI* are inapplicable to the present case. To the extent that HVPNL was relying upon *NHAI* to argue that severable portions of an award may be selectively set aside, *NHAI* would be applicable to the facts of the present case. *NHAI* found that severable parts of an award may be set aside under Section 34, and not specifically Section 34(4), of the Arbitration Act. The Single Judge in the present case also did not rely on Section 34(4) of the Arbitration Act to adjourn proceedings to allow the arbitrator in the present case to take action to eliminate the grounds for setting aside the award. Instead, the Single Judge set aside a portion of the G09 Award and granted parties the liberty to seek a fresh reference to arbitration to decide that

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issue. Consequently, the Single Judge's decision to grant the parties liberty to seek a new arbitration reference regarding the issue of liquidated damages and interest seems to fall within the scope of powers granted to a court under Section 34 of the Arbitration Act.

In any event, this decision offers valuable insights for parties involved in construction contracts. To minimise liability for delays in construction, contractors should seek periodic and formal extensions of time, as required in the contract, when project timelines are at risk. As a measure of abundant caution, if delays are caused by some contractors in a multi-contractor project, it is advisable for the remaining contractors to promptly inform the employer and seek the necessary adjustments to the overall timelines of the project. Additionally, whenever possible, an aggrieved party should compile and maintain evidentiary material to document proof of losses incurred, which will aid in the quantification of damages, even in the presence of a liquidated damages clause in the contract.

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You can direct your queries or comments to the relevant member.

[1]Judgment dated 10 April 2024 in FAO(OS)(Comm) 195/2022 & CMAPPL. 32865/2022 (Delhi High Court).

[2]*Construction and Design Services v Delhi Development Authority*, (2015) 14 SCC 263.

[3]*Haryana Vidyut Prasaran NigamLtd. v Cobra Instalaciones Y Servicios, S.A. & ShyamIndus Power Solution Pvt. Ltd. (J.V.)*, 2022 SCC OnLine Del 1157.

[4]2023 SCC OnLine Del 5183.

[5]Section 34(4) of the Arbitration Act: "*On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.*"

[6]*Delhi Development Authority v Anand and Associates*, 2008 SCC OnLine Del 179; *Mahanagar Gas Ltd. v Babulal Uttamchand and Co.*, 2012 SCC OnLine Bom 1254; *Bata India Ltd. v Sagar Roy*, 2014 SCC OnLine Cal 17998.