11-2023

Special Challenges in Execution of Arbitral Awards in Public Private Partnerships

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SPECIAL CHALLENGES IN EXECUTION OF ARBITRAL AWARDS IN INDIA IN PUBLIC PRIVATE PARTNERSHIPS: A TRADE PERSPECTIVE

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Abstract

With around 47 million pending cases at various stages of Indian judiciary and one of the lowest levels of judges per million of population in the world, India's arbitration regime presents a ray of hope for millions of Indians who face the prospect of justice being denied to them due to inordinate delays caused by a clogged judicial pipeline. The enactment of the Arbitration and Conciliation Act, 1996 was presented as a viable alternative to resolve commercial disputes in a timely manner. This paper uses a case study to discuss how arbitration in India has not fulfilled the timeliness promise and in turn, has detrimentally affected trade and investments, making the system an inefficient alternative to the contentious and long drawn litigations.

The study of the DMRC dispute is distinguished because it involves a public-private partnership and is exceptional for two reasons. First, being the first public-private partnership project in metro rail infrastructure in the country, the extraordinary delay in execution of the arbitral award alone highlights the need to create a level-playing field when government is involved as a party. Second, the case showcases glaring loopholes in India's existing arbitration regime which has allowed courts to unduly intrude and cause inordinate delays at every stage of the process, as a result of which, the amount of interest accumulated eventually outstripped the principal sum initially claimed by DMRC's private partner in the project. For instance, it took ten months to constitute an arbitration panel, 68 hearings to pass an arbitral award which culminated in 4.5 years from the date of invocation of arbitration clause by DMRC, several layers of appeal, most of which favored one party, and the execution of the award is still pending!! The paper concludes by recommending plausible solutions to strengthen India's arbitration laws, so that the DMRC fiasco does not get repeated in future at perilous costs borne by foreign and Indian private investors.

Keywords: Arbitration, DMRC Case, Infrastructure, Arbitration and Conciliation Act 1996, Misuse Doctrine, government abuse doctrine, public-private partnerships.

SPECIAL CHALLENGES IN EXECUTION OF ARBITRAL AWARDS IN INDIA IN PUBLIC PRIVATE PARTNERSHIPS: A TRADE PERSPECTIVE

Srividhya Ragavan* & Niraj Kumar Seth**

BACKGROUND

Arbitration was conceived as an alternative system of dispute redressal to save judicial time. In India, the judiciary takes an enormously long time to resolve disputes. Thus, the conception of arbitration as a tool for timely resolution of disputes was to achieve a particular goal. The goal of the arbitration regime is and should be to attract and promote foreign and private investors by alleviating the malaise attributed to the judicial system. The goal of establishing an arbitration regime with sophistication to attract Foreign Direct Investment ('FDI') comports with India's graduation as a liberalized economy and is consistent with its membership of the World Trade Organization. To achieve this goal, timeliness and ease-of-doing business are important ingredients for international as well as Indian investors to invest in India without fear of tying their investments unfairly because of an archaic and delay-prone system. Thus, while the judicial system should have inroads into arbitration to preserve due process and natural justice, it is imminent for the arbitration system to not suffer the same malice that the Indian judiciary suffers from, it being delay, which not only diverts judicial time but also actively discourages private investors. As such, the state of the arbitration system in India behooves the government to act, and to act fast. That is the reason for the recently constituted Expert Committee under the chairmanship of Dr. T. K. Vishwanathan to amend the *Arbitration and Conciliation Act of India, 1996* ('Expert Committee').

From the vantage of third parties, the delays of the system, both judicial and arbitral, seem to be exacerbated when the government is involved as a party. Globally, when the government is involved as a party to a dispute, the project typically tends to be of high value, involves taxpayers' money as interest accrued, time, or, often, as investment. Often, private-public partnerships involve projects such as highway construction, public

transport, health care and such others that are essential to establishing good infrastructure, resolving critical issues such as climate change, and to fulfill government's duty of ensuring public welfare. Thus, arbitrations involving public-private partnership represents a special scenario that is different from say, India seated ad-hoc arbitrations or the general pervasive execution delays that seem to characterize the Indian commercial arbitration regime. Interest accumulated from delays in public-private partnerships implicate tax-payer monies and debilitate and disincentivize private investors from engaging in important public-private partnerships that can contribute to the growth of the nation. Hence, the system has a strong burden to ensure that disputes involving government parties, particularly in public-private partnerships are not only resolved in a timely fashion but also in a manner that does not reek of government abuse of position. Vicariously, that burden to set-up such a system has been passed on to the Expert Committee in India.

This case-note focuses on arbitrations as a tool to resolve disputes where public-private partnerships are involved. In order to do so, the note focusses on one particular case, namely, *Delhi Airport Metro Express Private Limited v Delhi Metro Rail Corporation*[1] as an example to highlight the involved issues. This case has been carefully chosen considering that the investor is not even a foreign investor. Any goal for reform should appreciate that when Indian investors are deterred, foreign investors will be deterred many times over as it makes conducting business in India, cumbersome.

As trade experts, we believe that this case demonstrates how trade and the benefits that it can yield to a country can be derailed by sloppiness from another area of law, arbitration, in this case. For instance, infrastructure is an important aspect in India and

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[1] *See generally Delhi Metro Rail Corporation Ltd. v Delhi Airport Metro Express Private Limited* ['*DMRC Cases*']; *See also Delhi Metro Rail Corporation Limited v Delhi Airport Metro Express Private Limited*, O.M.P. (COMM.) 307/2017 (Del. 2017) ['*DMRC Single Judge*']; *See also Delhi Metro Rail Corporation Ltd. v Delhi Airport Metro Express Private Limited*, FAO(OS) (COMM) 58/2018 (Del. 2019) [*'DMRC Division Bench'*]; *See also Delhi Airport Metro Express Pvt Ltd v Delhi Metro Rail Corporation Ltd*, SLP (C) No. 4115 of 2019 (Sup. Ct. 2021) ['*DMRC SLP*'].

leaving the country without a proper mechanism to resolve disputes in a highly contentious area such as infrastructure does not comport with India's larger global trade posture. We believe that this one case represents a classic example of some of the woes that pervade the system, especially in high-value private-public partnerships. The conclusion notes that, while it may be well-intentioned, the arbitration regime in India is a quagmire that has led parties/investors myopically into rabbit-holes, not only defying the objective of the created system but also, in the process, undermining the stature of India's ability to play in the global arena. Personally, we believe it has not only eroded the rationale for arbitration itself but has also diminished the stature of the judicial system.

I. THE PROJECT & ARBITRATION

i. The Project:

The present case involved a Build Operate and Transfer ('BOT') project for High-Speed Metro Rail Line (*'Project'*), supposed to run over a stretch of approximately 23 kilometres ('KM') between New Delhi and Dwarka, originally intending to cover the entire distance at a peak speed of 120 KMPH. The 23 KM stretch included an underground tunnel section for two-third of the total distance, i.e., 16 KMs, and the rest one-third, i.e., 7 KMs consisted of overhead viaducts. Delhi Metro Rail Corporation (*'DMRC'*), a joint venture of the Government of India ('*GOI'*) and the Government of National Capital Territory of Delhi ('*GNCTD*'), was entrusted with the preparation of a Detailed Project Report ('*DPR'*) for the project. The DPR prepared by the DMRC received the final approval by the Ministry of Urban Development ('*MOUD'*), GOI in April 2007. The project was to be implemented as a Public Private Partnership ('*PPP*') model, in which land acquisition, appointment of consultants, securing of regulatory clearances, and all civil work except those of depot buildings, were to be undertaken by DMRC, while the balance systems such as track, signalling, etc were to be implemented by the chosen bidder, who was to be the private partner of DMRC.

After the process of international competitive bidding, initiated by DMRC, concluded, a consortium formed as a joint venture was declared as the successful bidder, which, then, incorporated a Special Purpose Vehicle named as Delhi Airport Metro Express Private Limited ('*DAMEPL*'). Without going into further details, the dispute relates to the viaduct

section of the project, which is the superstructure above the bearings that holds the metro tracks together. On 22 March 2012, DAMEPL requested DMRC to arrange for a joint inspection of viaduct and its bearings before the expiry of the Defect Liability Period ('*DLP*') of DMRC's civil contractors. Further, on 23 May 2012, DAMEPL notified to DMRC a serious design and quality issue with installation of viaduct bearings and the consequent sinking of girders at some locations leading to deformation or cracks. DAMEPL alleged a long list of flaws in the construction stage which was a part of the contractual duty that DMRC had to fulfil, such as cracks in girders, variance in degree of width in repairing of cracks from the standards adopted by Indian Railways, unsatisfactory inspection and repair, twists in girders which DMRC admitted to, incorrect gaps between girders as well as between girders and shear keys, cracks on top of the girders, mis-location of bearings which necessitated a recasting of bearing pedestals, and inaccessibility of bearings for repair and inspection due to jacketing. Under the agreement, DAMEPL was entitled to terminate the agreement after giving a 90 days' notice in writing to DMRC upon occurrence and continuation of any of the "DMRC Events of Default," unless any such event had occurred as a result of "Concessionaire Event of Default" (the Concessionaire was DAMEPL) or a *Force Majeure* event. Dissatisfied with the progress, DAMEPL terminated the agreement with DMRC by its letter ('Termination Letter'), dated 8 October 2012 and requested for payment of the termination amount. Consequently, DMRC invoked arbitration by its letter dated 23 October 2012 under the Arbitration and Conciliation Act, 1996 ('*ACA*').[2] An arbitration panel was constituted on 8 August 2013, over nine months after invocation of arbitration by DMRC.

ii. Constitution of the Arbitration Panel:

Under Article 36 of the Concession Agreement ('*Agreement*') between parties, DMRC had been *unilaterally* empowered to suggest a panel of engineers with requisite qualifications and professional experience relevant to the field to which the contract relates. The appointment was required to be made within a period of 30 days from the date of receipt of written notice or demand of appointment of arbitrators from either party. The panel shall be constituted from either currently serving or retired engineers of

[2] *See generally* The Arbitration and Conciliation Act 1996.

government departments or from the public sector. In case of disputes involving a claim exceeding INR 15 lakhs, three arbitrators shall be appointed out of a panel of five suggested by DMRC, one each by the concessionaire and DMRC respectively, with the third being chosen by the two so appointed. There could be no objection if the arbitrator so appointed was an official of DMRC of the rank of Junior Administrative Grade and above. Interestingly, the question of "Whether retired employees are rendered ineligible to act as arbitrators in cases involving their former employers" is being considered before a Constitution Bench of the Supreme Court.[3] Notably, this may be a good question for the Expert Committee to consider and then provide some suggested language for arbitration clauses for parties to emulate as a guideline or regulation.

Meanwhile, with New Delhi as the jurisdiction, the agreement between DMRC and DAMEPL noted that the arbitration award was construed to be *final and binding on both parties.* The Arbitration Tribunal ('*Tribunal*') was constituted on 8 August 2013 and held its first hearing on 6 September 2013, and the proceedings were governed by the ACA.[4]

iii. Arbitral Award:

The arbitral award was passed 4.5 years after the invocation of the arbitration proceedings and in favor of DAMEPL. The Tribunal concluded that the defects disabled DAMEPL from operating the project in accordance with the agreement, causing material adverse effects on the performance of their obligations. Further, DMRC's failure to cure the defects or take effective steps to cure defects during the cure period constituted a material breach, resulting in the Tribunal upholding the termination. The Tribunal awarded termination payment to DAMEPL (Article 29 of the Agreement) at INR 2,782.33 crores, exclusive of pre-award interest at the State Bank of India's Prime Lending Rate plus 2% accrued from 7 August 2013 (including the 30 days after the demand of termination payment by DAMEPL). Other heads of damages, totalling to INR 210.16 crores, included operational expenses of the metro line from 7 January 2013 to 30 June 2013, charges offsetting wrongful encashment of bank guarantee by DMRC and reimbursement of security deposits paid to various agencies by DAMEPL during project operations. The

[3] *See Central Organisation for Railway Electrification v. M/S ECI SPIC SMO MCML (JV),* (2020) 14 SCC 712

[4] ACA (n 2).

total award amounted to INR 4662.59 crores, including INR 2945.55 crores as principal amount, and INR 1717.04 crores as pre-award interest from 7 August 2013, which was 30 days after the demand of Termination Payment by DAMEPL on 8 July 2013, and until the date of the award, i.e., 11 May 2017. Furthermore, the Tribunal noted that the continued operation of the metro line under hazardous conditions of defects was risky and was contrary to public interest especially in light of the support from the officers of Indian Railways who unequivocally testified that, had Indian Railways been in the place of DMRC, they would have ceased operating the line. DMRC as the government party had an obligation to ensure that public safety is not threatened on account of its defective civil work.

Unfortunately, there is no record of DMRC exhaustively considering public safety obligations in the case.

II. ROLLER COASTER RIDE OF THE ARBITRATION AWARD IN INDIA

Having received an arbitral award in their favor, the natural next step for DAMEPL was to enforce the award in court (which would be to certify its finality on factual and legal questions) and then, have it executed (which would be to ensure that any financial payment under the award is done within a reasonable period). Notably, it may be worth for the Expert Committee to delineate enforcement from execution, to prevent courts from re-engaging on questions that should achieve finality at the arbitration stage.

In this case, considering that New Delhi was the preferred seat of arbitration for the parties, the award was sought to be enforced at the High Court of New Delhi.

i. Under § 34 of the ACA before a Single Judge Bench, Delhi High Court:[5]

DMRC filed a petition under § 34 of the ACA seeking toset-aside the arbitral award dated 11 May 2017 before the single judge bench of the Delhi High Court ('Single Judge Bench'). Meanwhile, DAMEPL filed a petition under § 9 of the ACA, seeking interim measures, including requiring DMRC to deposit an amount of INR 3,502.62 crores, being 75% of the amount awarded, pending the execution of the Arbitral Award. The payment of 75% was considered as a mechanism to remedy delays that pervaded execution of arbitral awards

[5] ibid, s 34. .

involving government ministries/departments or public sector undertakings by the National Institution for Transforming India ('*NITI-Aayog'*).[6] The Single Judge Bench referred favourably to the arbitral award, specifically considering that a technical tribunal deliberated upon each of the alleged defects in the civil and repair work, along with evidence of parties and expert witnesses, before concluding that DMRC had breached the agreement. It upheld the termination notice given by DAMEPL as satisfying the ingredients of Article 29 of the Agreement. It directed DMRC to deposit 75% of the amount into the escrow account of DAMEPL within a period of four weeks from the date of the judgement.

ii. The Division Bench of Delhi High Court exceeding its scope of review on appeal!:

Following the single-judge bench decision, DMRC filed an intra-court appeal under § 37 of ACA read with §13 of the Commercial Courts, Commercial Division, and Commercial Appellate Division of the High Court's Act 2015. Under the said provisions, a party aggrieved by the judgement of a High Court based on an application to set aside an arbitral award may file an appeal to the Appellate Division of that High Court. More interestingly, at *this* stage, a government party, being DMRC, raised substantive questions that had not been raised before. The division bench of the Delhi High Court ('Division Bench') seemingly engaged in those questions, presumably to the detriment of the project, not to mention the consequential additional time, delay, and interest accrued over the award-amount owed to DAMEPL.

It is interesting that during this time, there was no study commissioned by the government to appreciate the financial and other benefits of having an infrastructural project running at full capacity versus the cost/benefit of unduly delaying the execution

[6] *See generally* NITI Aayog, *Measures to Revive the Construction Sector* (No. N-14070/14/2016 – PPPAU, 2016) ("NITI Aayog"). (being an office memorandum issued by NITI Aayog mandating the government ministries/departments/PSUs to pay an amount equal to 75% of the Arbitral Award to the Contractor/Concessionaire against a bank guarantee before challenging such an award passed by the Arbitration Tribunal in favour of the Contractor/Concessionaire in courts of law, subject to the final order of the court in the matter under challenge). NITI-Ayog is the apex public policy think tank of the Government of India, and the nodal agency tasked with catalysing economic development, and fostering cooperative federalism through the involvement of State Governments of India in the economic policy-making process.

of an arbitral award in a project involving public-private partnership. Basically, had DMRC fulfilled its job of curing the defects and worked with the joint venture partner to run the metro line in good capacity, would it not have been more economically viable in terms of financial gain and also in terms of instituting a great infrastructure that actually helps with the electorates for the government, instead of spending more than 10 years fighting DAMEPL since 23.10.2012, when DMRC invoked the arbitration clause in the concession agreement? Perhaps, these are the types of studies that the GOI should commission in order to determine whether continued appeals of an arbitral award are worth the time and effort, especially when a project could be run in a manner that showcases India and its infrastructural capability to the globe.

In any event, before the Division bench, DMRC raised the issue of whether participation in the reconciliation process amounted to a waiver of DAMEPL's right to terminate the agreement? DMRC further raised arguably factual questions for the *first time,* such as whether the cure period was 90 days from the issue of the cure notice or 180 days. Similarly, DMRC raised the issue of whether the imposed speed restrictions amounted to *material adverse effect on* DAMEPL. The speed restriction issue is *fact-based* and the Tribunal had already engaged on the issue, based on evidence, to reject DMRC's contention that obtaining Commissioner of Metro Rail Safety's ('CMRS') certification deemed that the defects were cured.[7]

Thus, DMRC raised *new* questions at this stage of appeal and surprisingly, the Division Bench seems to have engaged in it! For instance, on the cure period, the Division Bench observed that the Tribunal's finding was "confusing and contradictory," giving DMRC a breath of air to further appeal and delay a public works project! Also, the Division Bench found the Tribunal's explanation deficient as to how and in what way the speed restriction imposed would amount to material adverse effect on DAMEPL. The Division Bench

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[7] THE METRO RAILWAYS (OPERATION AND MAINTENANCE) ACT, 2002, §7, 8, 14 & 15, No. 60 (implicating the Commissioner of Metro Rail Safety (hereinafter *CMRS*) with duties which include under § 8 to inspect operational fitness of metro railway for public carriage, which cannot be opened for public carriage of passengers under § 14 except with the previous approval of the Central Government which entails under §15 a report from CMRS as a pre-condition for approval); *see also* THE OPENING OF DELHI METRO RAILWAY FOR PUBLIC CARRIAGE OF PASSENGERS RULES, 2002, §23, G.S.R. 816(E), Central Government Rules, 2002 (India),.(providing that CMRS may also sanction opening of the Delhi Metro Railway for public carriage of passengers, besides the Central Government).

further delved into the ability of a Tribunal to consider CMRS certification, a point that does not seem to have been contentious as such.

The Division Bench set-aside several findings of the Tribunal as "entirely fallacious, absurd and perverse."[8] It did so based on the tests and parameters elucidated in *Associate Builders v Delhi Development Authority*.[9] In gist, the Division Bench held that the award suffered from perversity, irrationality, and patent illegality.[10]

The fact is that § 5 of the ACA bars courts from intervening with an arbitration award except on the grounds enunciated in §s 34(2)(a) & (b) of the ACA. Also, § 34 (2)(b)(ii) of the ACA provides that an arbitral award may be set aside by the court if the award conflicts with the public policy of India.[11] Using objective criterion set-forth by the various judgements of Supreme Court, the Division Bench made an arguably uncalled for subjective decision on the question of whether the arbitral award objectively violated public policy.[12]

Arguably, the Division Bench's setting-aside of the award went against §34 (2A) of the ACA which enunciates that courts can set-aside an arbitral award if they find that the award is vitiated by patent illegality and adds that an arbitral award cannot be set-aside merely on ground of an erroneous application of law or by reappreciation of evidence. Moreover, to initiate a set-aside under the ACA, the requester must issue due prior notice under §34 and the statute requires such petitions to be expeditiously dealt with within a

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[8] ACA (n 2)§ 28(1)(a) & (3) (mandating that the tribunal shall decide the dispute based on the contract terms and trade usages).

[9] *Associate Builders v Delhi Development Authority,* (2015) 3 SCC 49 (Sup. Ct. 2014).

[10] *DMRS Division Bench* (n 1). .

[11] *See* ACA (n 2)§ 34(2)(b) (providing under Explanation 1 that an award is in conflict with the public policy if it is fraudulent or corrupt, if it violates § 75 or § 81 of ACA, if it contravenes fundamental policy of Indian law, or conflicts with the basic notions of morality or justice); *See also* ACA (n 2)§ 34(2A) (providing that "arbitral award may …. be set aside by the Court if …. vitiated by patent illegality appearing on the face of the award. However, an Award cannot be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence").

[12] *See Associate Builders* (n 9); *See also Renusagar Power Company Limited v General Electric Company*, 1994 Supp (1) SCC 644; *See also ONGC Limited v Saw Pipes Limited*, (2003) 5 SCC 705; *See also Hindustan Zink Limited v Friends Coal Carbonisation*, (2006) 4 SCC 445; *See also Centrotrade Minerals & Metals Inc. v Hindustan Copper Limited*, (2006) 11 SCC 245 ; *See also DDA v R.S. Sharma and Company*, (2008) 13 SCC 80; *See also J.G. Engineers (P) Limited v Union of India*, (2011) 5 SCC 758; *see also Union of India v Col. L.S.N. Murthy*, (2012) 1 SCC 718 (outlining the criterion to determine public policy as including fair, reasonable and objective decisions, comporting with principles of *audi alteram partem*; lack of perversity or irrationality and in accordance with the substantive Indian law, and contract terms and trade usage.).

year from the date of such notice. In all, the Division Bench's decision was rendered on 15 January 2019, a good 1.5 years after the issuance of the award on 11 May 2017.

Notably, §34 of the ACA advocates against judicial interference with an arbitral awards and explicitly restrains the judicial instinct to (re)appreciate matters of fact or decided questions of law, an exercise that the Division Bench unabashedly indulged in at the cost and time of one of the parties. It, thus, largely promoted delaying tactics of the other party, the government in this case, at the expense of tax payers' money.[13] The fact is that the courts have limited powers under § 34 of the ACA, a point more fully explained in the footnote.[14] It is important for courts to be mindful of the fact that high-value disputes are globally closely watched by investors. Straying onto exotic legal territories with disregard to questions of *res judicata* or engaging in factual questions on appeal can raise questions of efficiency and propriety of the court processes in India.

Now, the Expert Committee has the hard task of clearly delineating the role of courts for arbitration to succeed as a viable dispute resolution mechanism. That is, the powers of courts to modify partly, substantially, or fully, or alternatively, set-aside an award, should be clearly delineated with clear deeming provisions, when unclear questions emerge after one level of appeal. The courts' thresholds on appeal and who carries the burden of proof on such appeals, and what is the standard by which courts can measure that proof at each stage of appeal needs clarification by the Expert Committee. It is also worth for the Expert

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[13] ibid.

[14] *See McDermott International Inc. v Burn Standard Company Limited and Ors*., (2006) 11 SCC 181 (ruling that the supervisory role of the Court under the statute is merely to ensure fairness, preventing fraud, bias, etc., and that the court cannot correct errors of arbitration but can quash the award leaving parties free to arbitrate again, if they desire. The court's interference is conceived to be minimum and limited); *See also Hindustan Zinc Ltd* (n 12) (holding that Appellate Bench of the High Court cannot recalculate under when it had failed to interfere initially); *See also R. S. Jiwani v Ircon International Ltd*., (2009) SCC OnLine Bom 2021 ((applying the doctrine of severability and partial validity, subject to the conditions that the portions of claims or counter claims are capable of being severed and separated from the rest and not when the decisions on issues are inter-connected and bifurcation would alter the scope of the award); *See also J. C. Budhiraja v Chairman, Orissa Mining Corporation*, (2008) 2 SCC 444 (ruling that if part of the award is set-aside, the rest is valid); *See also Central Warehousing Corporation v A. S. A Transport*, (2007) SCC OnLine Mad 972 (holding that set-asides leave parties to begin arbitration again, if so desired); *See also Bharti Cellular Limited v Department of Telecommunication*, (2012) SCC OnLine Del 4846 ; *See also State Trading Corporation of India Ltd. v M/S Toepfer International Asia Pte Ltd.* (2014) SCC OnLine Del 3426; *See also DDA v Bharadwaj Brothers*, (2014) SCC OnLine Del 1581; *See also Puri Construction Pvt. Ltd. v Larsen and Toubro Ltd. and Another*, (2015) SCC Online Delhi 9126 (limiting Court's power to modify, amend and rectify the award); *See also Kinnari Mullick and Anr. v Ghanshyam Das Damani*, (2018) 11 SCC 328 (holding that power of the Court under § 34(4) to adjourn the proceedings to allow arbitral proceedings to eliminate grounds for setting aside the arbitral award can be exercised only in limited cases with written request and a notice as pre-conditions).

Committee to consider whether a government abuse, abuse of process, or even a misuse doctrine or provision should be established, a point discussed in the next segment, with higher burden of proof on the appellant to prevent parties from raising the same questions at several levels.

iii. Special Leave Petition before the Supreme Court of India

The Constitution of India, under Article 136, grants the Supreme Court the discretion to grant a Special Leave Petition (*'SLP'*) to appeal from any judgement or order in any cause or matter passed or made by any court or tribunal in the territory of India. Under Article 136, an SLP may be granted by the court in disputes where a substantial constitutional question of law is implicated or where gross injustice is apparent. Under §37 of ACA, a second appeal from an appellate order is prohibited except to the Supreme Court. Hence, when the Division Bench judgement raised questions about the arbitral award, DAMEPL filed an SLP in the Supreme Court, seeking to restore the sanctity of the arbitral award.

As such, the Supreme Court has stressed on the need for judicial restraint while examining the validity of arbitral awards and generally advocated for minimal judicial scrutiny.[15] In this case, wisely, the Supreme Court refused to indulge or interfere with the award on the fact-based questions relating to cure period and whether it is 90 or 180 days from the date of cure notice. Specifically, reacting to the Division Bench decision, the Court observed that the finding of the Tribunal that the defects were not cured is one of fact, which cannot be interfered with by the Court. Indeed, the Supreme Court emphatically disagreed with the conclusion of the Division Bench that the award was vitiated by reason of perversity and added that the Division Bench indulged in fact-finding, thus, declaring the conclusion of the Division Bench on the question of patent illegality of the award, erroneous.

iv. Review Petition before the Supreme Court:[16]

[15] *See Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)*, (2019) 15 SCC 131 (implicating 'Public Policy' expressions in §s 74 and 81 with § 34 reprimanding the lower court for its indulgence with the arbitral award).

[16] *See Delhi Metro Rail Corporation Ltd. v Delhi Airport Metro Express Pvt. Ltd.,* Review Petition (c) No. 1158-1159/2021 (Sup. Ct. 2021) [*'DMRC Review Petition'*]..

Article 137 of the Constitution of India empowers the Supreme Court to review any judgement pronounced or order made by it in exceptional circumstances on limited grounds such as, discovery of new evidence not accessible to parties earlier, to cure mistakes/ error apparent on the face of the record, or for any such sufficient reason. As the SLP judgement was delivered against DMRC, it immediately filed a review petition against that judgement. The petition, however, was dismissed by an order dated 23 November 2021.

v. Execution Petition under §36, ACA:[17]

By this time, the SLP filed by DAMEPL was allowed by the Supreme Court, thus overturning the Division Bench judgement that had set aside the award.[18] Also, the review petition filed by DMRC in the Supreme Court from the judgement of the above SLP was dismissed, which signified the finality of the award.

Immediately and rightly, DAMEPL initiated an execution proceeding under § 36 of ACA in the Delhi High Court as that was the court of execution under the Agreement.[19] In the Delhi High Court, DMRC repeatedly sought to defer the proceedings on grounds that fresh equity infusion or rights subscription by its shareholders was required to execute the award. However, the two principal shareholders of DMRC, namely, the GOI and the GNCTD, failed to reach a consensus. The two shareholders, both government entities, neither provided statutory empowerment for the attachment of DMRC's assets to discharge the award amount nor did they extend sovereign guarantees to DMRC to enable it to raise loans from banks and financial institutions.[20]

Consequently, it raised the question of the need for lifting the corporate veil to find a way to hold the shareholders accountable to execute the arbitral award and to break the impasse which was not merely causing delay but also resulting in accumulated interest. Hence, the Delhi High Court ordered that the Ministry of Housing and Urban Affairs, GOI('Ministry of Housing') and GNCTD be impleaded in the proceeding to expedite the

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[17] *See Delhi Airport Metro Express Private Limited v Delhi Metro Rail Corporation Ltd.,* OMP (ENF.) (COMM.) 145/2021 (Del. 2022) [*'DMRC 2022 Execution Petition*']..

[18] *See DMRC SLP* (n 1)..

[19] *See* ACA (n 2)§ 34.

[20] *See* THE METRO RAILWAYS ACT (N 7)(requiring central government prior approval to attach metro rail property).

execution.[21] Both, the GOI and GNCTD, vehemently opposed the lifting of corporate veil, asserting that, holding a shareholder liable for the dues of a corporate entity would fly in the face of the limited liability principle.

Indeed, case laws such as *Balmer Lawrie & Co. Ltd. v Saraswathi Chemicals Proprietors Saraswathi Leather Chemicals (P) Ltd.*,[22] clearly establish that corporate veil could be lifted under *extraordinary circumstances* by the courts. Indeed, the compendium of precedents left the court with a singular question of whether this particular instance of undue delay in executing an arbitral award qualified as an "extraordinary circumstance." The Delhi High Court unfortunately did not indulge at this time to determine the constituents and circumstances qualifying as "extraordinary." Typically, extraordinary circumstances are defined as those that are perilous to the public, the other party(ies) involved, public policy, or, that compromise fundamental principles of justice. When a party, the government in this case, unduly appeals and delays the execution of an arbitral award in a manner calculated to leave a private investor to suffer the consequences, including the accumulation of interest, it should qualify as an "extraordinary circumstance" ***absolutely*** warranting the lifting the corporate veil. Indeed, such a reading comports with existing precedents. For instance, in *Bhatia Industries & Infrastructure Limited v. Asian Natural Resources (India) Limited*, the Supreme Court concluded that the veil of corporate personality could be lifted in arbitration execution proceedings.[23] In any case, DMRC itself provided the opening for lifting the corporate veil when it implicated permissions from the GOI to utilise the funds held by it.[24] *That alone,* implicates a new party and warrants lifting the veil.

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[21] *See Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Ltd.,* OMP (ENF.)(COMM.) 145/2021 (Del. 2023) ['*DMRC 2023 Execution Order*'].

[22] *See Balwant Rai Saluja & Anr. v AIR India Limited & Ors.*, (2014) 9 SCC 407 (ruling that the doctrine of piercing of corporate veil stands as an exception to the principle that a company is a legal entity, separate and distinct from its shareholders, with its own legal rights and obligations, and the doctrine should be applied when it is evident that the company was camouflaging the persons exercising control over it for the purpose of avoiding liability).

[23] *See Balmer Lawrie & Co. Ltd. v. Saraswathi Chemicals Proprietors Saraswathi Leather Chemicals (P) Ltd.*, 2017 SCC OnLine Del 7519 (holding that a court can lift the corporate veil while enforcing an arbitral award in exceptional circumstances including for attempt to frustrate the enforcement of the decree or/and fraud).

[24] *See Bhatia Industries v. Asian Natural Resources & Anr.*, 2016 SCC OnLine Bom 10695 (holding that the doctrine of piercing of corporate veil is applicable in the case of holding or subsidiary companies, in the case of tax evasion and for execution proceedings where the record proves a judgement debtor attempting

The corporate veil should not come in the way of execution of a binding and a well settled legal obligation. It certainly should not come to promote disregard of trade and investments that will inure to the benefit of the country, which is what has happened in this instance. In any event, the Court noted that corporate veils can be pierced where equity, justice, and public policy or public interest is implicated, such as in this instance. The court concluded that DMRC was a mere alter ego of its two principal shareholders, who exercised control over it by virtue of the composition of its Board and thus, held that the circumstances of the present case and public policy warranted that the corporate veil of DMRC be lifted and that its shareholders be directed to take appropriate steps to enable DMRC to meet the obligations flowing from the award.

DMRC, meanwhile, requested in the Delhi High Court that the matter be deferred until its curative petition was heard. The fact is that such tactics *alone* should be an extraordinary circumstance warranting the lifting of corporate veils. Instead, the Delhi High Court, by its order dated 6 September 2022, deemed it appropriate to defer the proceedings.

vi. Curative Petition before the Supreme Court:[25]

A curative jurisdiction is a remedy created by judicial precedent.[26] Curative petition is the last opportunity available to a party involved in a legal dispute. The option to seek a curative petition becomes available on the dismissal of a review petition. Thus, the curative petition is the last possible opportunity after a review petition for the Supreme Court of India to hear a question and is generally done with a view to prevent or cure gross miscarriage of justice. A curative petitioner should establish either a violation of

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to defeat the execution of the award which is passed against him); *See also Cheran Properties Ltd. v. Kasturi & Sons Ltd*., (2018) 16 SCC 413 (noting that a non-signatory party could be subjected to arbitration provided the transactions showed a clear intention to bind the signatory as well as the non-signatory parties).

[25] *See Delhi Metro Rail Corporation v Delhi Airport Metro Express Pvt. Ltd.,* Curative Petition (Civil) No. 108-109 of 2022 (Sup. Ct. 2022) ['*DMRC Curative Petition'*].

[26] *Rupa Ashok Hurra v Ashok Hurra,* AIR 2002 SC 1771 (This judgement was rendered by a Constitutional Bench of the Supreme Court, which is one of the types of benches of the Supreme Court of India consisting of at least five judges to hear and decide cases "involving a substantial question of law as to the interpretation" of the Constitution of India or "for the purpose of hearing any reference" made by the President of India under Article 143 of the India Constitution). *See also* Rule 3 of Order XLVIII of the Supreme Court Rules, 2013, under which a curative petition should be filed within a reasonable time from the date of review judgement. Supreme Court of India Rules, NO.D.L.-33004/99 *available at https://main.sci.gov.in/supreme-court-rules-2013.*

principles of natural justice or an apprehension of bias from a conflict of interest adversely affecting the petitioner. In abject disregard of tax-payers' money, DMRC continued to delay execution of the arbitral award and this time, by filing a curative petition on 1 August 2022, which is yet to be heard by the Supreme Court although a notice for hearing was issued on 27 March 2023.

vii. Government Action targeted to disincentivize investment:

Meanwhile, the Ministry of Housing has proposed to amend § 89 of the Metro Railways (Operation and Maintenance) Act, 2002 ('*Metro Act*') to provide an absolute bar on attachment of all assets of metro railway administration, including its "earnings or any parcel of land," in execution of any decree or court order.[27] The proposed amendment would have two major consequences, if passed. *First*, it imposes an absolute bar on attachment of assets of metro rail administration under § 89(1) of the Metro Act, including from previously issued orders of the government; *second*, the proposed deletion of § 89(2) of the Metro Act will result in preventing courts from attaching earnings of metro rail administration, which were originally available for attachment by courts without previous permission of GOI.[28]

The proposed amendment comes in the wake of the Delhi High Court order that directed the GOI to consider sanction for the attachment of DMRC's properties to discharge its debt owed to DAMEPL under the arbitral award.[29]

Notably, the move of the government to amend the Metro Rail statute should be appreciated in view of the figures in Appendix A, which represent the long road that DAMEPL has faced and the cost of delays in the dispute.

III. NEED FOR ENUNCIATING AN ABUSE/MISUSE DOCTRINE AS A SOLUTION

The DMRC case represents a ripe case for enunciating a substantive misuse doctrine, whether statutorily or as a judicial precedent. It is abject injustice when delays leave one party at the mercy of lending institutions, banks, and the rest of the business community.

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[27] *See* Metro Act (n 7) § 89; *See generally* 'Centre Proposes to Tweak 2002 Act to make Metro Property, Bank Accounts Unattachable' (*THE HINDU*, 29 March 2023) <https://tinyurl.com/2p8xnr95>.

[28] *See* Metro Act (n 7) § 89(2) (providing for exception from application of bar on attachment of property of metro rail administration in an execution proceeding with respect to "earnings" of metro rail).

[29] *See* DMRC 2023 Execution Order (n 21).

It is worse when the party so left out is an Indian investor. When India cannot take care of its private investors, then how do we expect foreign investors to step-up to the country's calls for investments in other sectors. And, infrastructure has been repeatedly cited as the reason for India lagging behind other developing countries, including China.

Misuse doctrines have prevailed in other areas of law such as in intellectual property rights. For example, if a copyright holder engages in "abusive or improper conduct in order to exploit or enforce the copyright" against an infringer, the misuse doctrine will preclude/prevent/prohibit the copyright holder from enforcing the rights and exploiting the monopoly. The doctrine is based on equity, "equitable defence" to copyright infringement. There is a rich jurisprudence in intellectual property law for arbitration to borrow from. Similarly, government abuse or abuse of process doctrines found in other areas of law should be borrowed to set bargaining parity – otherwise, the existing state of law overly empowers government parties to the detriment of private parties in a public-private partnership model. As authors, we prefer the term misuse because it helps to borrow from abuse doctrines as well as from the broader misuse doctrine in copyright law.

As such, clear criteria can be used to enunciate such misuse in the context of execution of an arbitral award. For instance, a party alleging misuse should demonstrate and establish one or more of the criteria such as: (1) [the other party] extended execution of the arbitral award beyond a reasonable time without providing a remedy for accumulating interest, wherein the party should be deemed to know or ought to know that the benefit of an appeal results in execution delays over 12 months would inure to the delay of the appealing party; (2) the delay resulted in undue hardship to one party and/or undue benefit to the other; (3) does not comport with standards of business practice in that area; and (4) doing so has extended or enlarged the rights of one party to the direct detriment of the other or to the benefit of a third party. For instance, if an egregious delay resulted in a direct benefit to a third party, say, a member of the public, a government employee etc., that alone should trigger the misuse doctrine.

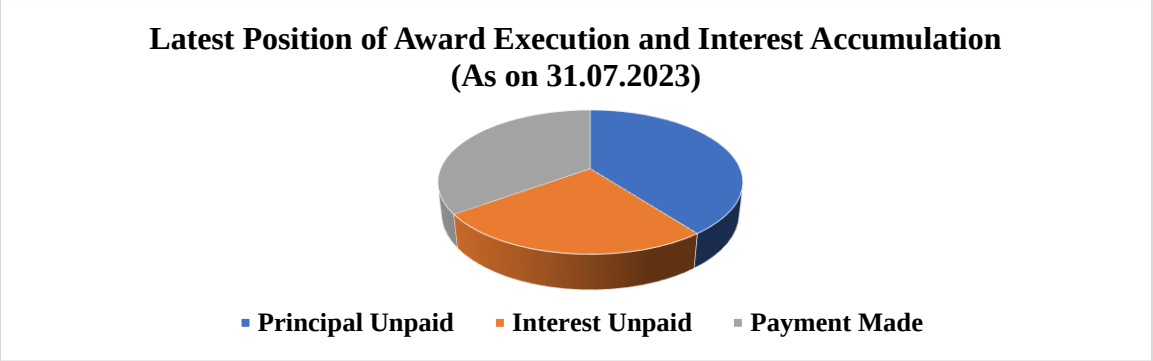
A *reasonableness* standard should be used to determine each criterion for determining misuse. Reasonableness should be outlined using guidelines based on value involved, time taken, type of parties, reasons for each level of appeal, and the consequential hardship involved for each of the parties. Courts should be cognisant of the fact that, what

may be reasonable in one industry need not be so in another industry, weighing in the public-interest component in the balance. In the context of arbitration, misuse can also be an affirmative defence for non-performance that can be asserted against a party perpetrating delays in executing an arbitral award.

Similarly, a party *unduly* delaying execution should bear the risk of their actions. Currently, it is the party that wins the award/appeal which carries the risk of delays perpetrated by using appeals as a viable tool to perpetrate delay. Thus, a party choosing to appeal beyond one stage should be affirmatively required to deposit the full value of the award in an escrow account and suffer costs if the appeal is lost, before they can assert the next level of appeal. This would comport with legal principles regarding allocation of risks and will deter misuse.

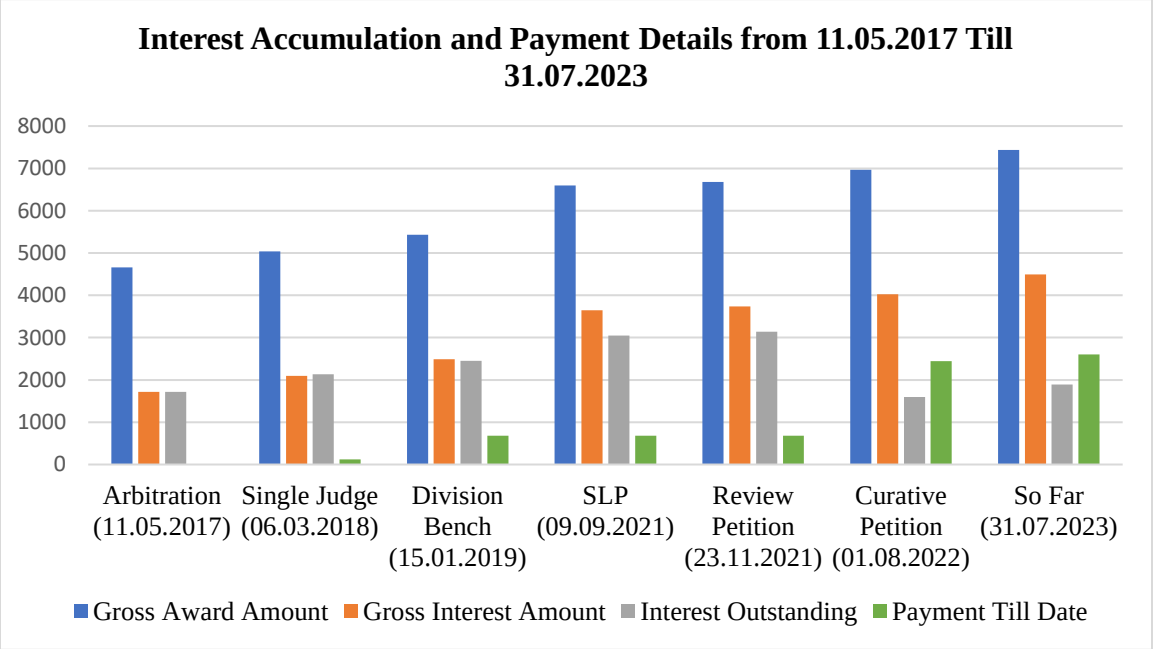
The appellant should also have a much higher burden on appeal to seek modification or set-aside. That will limit appeals *only* to parties who truly believe that there was an issue in the arbitral award.

The diagram and the table below show the egregiousness of the delay and its effect on the interest accumulated.



Source: DMRC decisions

Source: DMRC Decisions



Note 1: The interest amount outstanding by the date of curative petition is lower on account of partial interest being discharged although no principal component has been paid by DMRC yet.[30]

Note 2: The orange bar represents the gross interest component out of the gross award amount shown in blue and showcases how interest has piled up with every appeal)

[30] *See Gurpreet Singh v Union of India*, (2006) 8 SCC 457 (holding that the payments made by the judgement debtor to decree holder has to be appropriated first towards the interest and costs and then towards the principal amount); *See also Bharat Heavy Electricals Ltd. v R.S. Avtar Singh*, (2013) 1 SCC 243 (holding that if the payment made by the judgement debtor falls short of the decretal amount, then the general rule of appropriation shall apply, by appropriating the amount deposited towards interest, then towards costs and finally towards the principal amount due under the decree).

IV. How a Bad Arbitration System Messed-up What Could Have Been a Perfectly Fine Metro Railway Project

i) The latest on DMRC Dispute:

For readers wondering about the outcome of the DMRC dispute, following the arbitral award in 2017, DAMEPL filed a petition under §9 of the ACA before the Delhi High Court, seeking a direction to DMRC to deposit 75% of the amount awarded and a direction that the said amount be released to the lenders of DAMEPL.[31] The petition seeking 75% deposit was based on a GOI memorandum circulated by the NITI Aayog.[32] The notification provides that in case of claims where PSU/Department has challenged the arbitral award, 75% of the award amount may be paid by the said PSU/Department to the contractor/ concessionaire against Bank Guarantee without prejudice to the final order of the Court.[33] Under the arbitration award dated 11 May 2017, the judgement debtor -DMRC- was required to pay a sum of INR 4662.59 crores as on 11 May 2017 to DAMEPL, along with further interest at the rate of SBI PLR plus 2% on Termination Payment (which was 94% of the principal sum awarded) and at 11% on the remaining sums awarded. The Single-Judge Bench had directed DMRC to deposit 75% of the awarded amount within a period of four weeks from 6 March 2018 i.e., by 3 April 2018. After the Supreme Court of India dismissed the review petition of DMRC against the judgement of the court in favour of DAMEPL, the decree holder (DAMEPL) filed an execution petition under § 36 of the ACA for the execution of the arbitration award. The gross decretal sum along with interest stood at INR 7438.69 crores as on 31 July 2023. Out of the said amount, the DMRC had paid only a sum of INR 2599.18 crores so far, while INR 4839.51 crores remains outstanding and payable. Out of this sum, the interest component *alone* stands at approximately INR 1893.96 crores.

During the execution proceedings, DMRC has maintained before the Delhi High Court that it lacks sufficient resources to satisfy the amount due under the Award. It has argued that funds available under the head "project funds" pertain to the equity and debt funds earmarked towards construction of Mass Rapid Transport System in Delhi, and do not

[31] *See DMRC Single Judge Bench* (n 1).
[32] *See* NITI Aayog (n 6).
[33] ibid.

qualify as "earnings," which alone are susceptible to be attached for payment to creditors under §60 of the Code of Civil Procedure, 1908.

Given DMRC's clear knowledge of equity capital versus earnings, it is unclear why they allowed for interest accrual by delaying at every stage of the proceedings. Can the citizens now sue DMRC for squandering their money in undue delay tactics? Any Right to Information petition filed will show the amount squandered in using these delaying tactics, such as and including lawyers' fees. Will the tortious doctrine of negligence cover such actions by government parties, taken in callous disregard of tax-payers' money accruing as interest in such cases? Along with amending the ACA, India perhaps needs a Government Ethics doctrine or Code, even if it is only recommendatory in nature, such as the Restatements in the United States.

ii) Foreign Investors' Reaction to the delay:

The disincentive to foreign investment is evident from the fact that frustrated with the delays, foreign vendors successfully sued DAMEPL regarding the delays in payment. For instance, Construcciones Y Auxiliar De Ferrocarriles, S.A. of Spain (hereinafter *CAF*), a supplier of rolling stock to DAMEPL, and Siemens Aktiengesellschaft of Germany (hereinafter *Siemens*), power supply and signalling and train control systems vendor, both sued DAMEPL to recover amounts due to them under the respective sub-contracts and were awarded sums totalling INR 62 crores and INR 44 crores, respectively.[34] Both vendors petitioned the Delhi High Court for interim relief pending execution. In both cases, the High Court has directed DAMEPL to discharge the award amount due to its foreign vendors out of the termination payment receivable from DMRC following the SLP judgement.[35] Lamentably, in both cases, DAMEPL's inability to discharge their obligation is owed to DMRC's delay tactics using questionable and successive petitions despite repeated directions from Delhi High Court.[36]

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[34] *See Construcciones Y Auxiliar De Ferrocarriles v Delhi Airport Metro Express Private Limited (India),* OMP(I)(COMM) 375/2020 (Del. 2021); *See also Delhi Airport Metro Express Private Limited v M/S Siemens Aktiengesellschaft*, OMP(COMM)569/2020 (Del. 2022).

[35] *See* ibid; *See also Delhi Airport Metro Express (P) Ltd. v Delhi Metro Rail Corporation Ltd*., SLP (C) No. 4115 of 2019 (Sup. Ct. 2021).

[36] *See Delhi Airport Metro Express (P) Ltd. v Delhi Metro Rail Corporation Ltd*., SLP (C) No. 4115 of 2019 (Sup. Ct. 2021) [*'DAMEPL SLP'*]; *See also Siemens Aktiengesellschaft v Delhi Airport Metro Express*

The conduct of DMRC, a government entity, has caused consequential financial and reputational damage to DAMEPL. It is imperative to appreciate that when working with governments, the nature of such partnerships skews the balance of parities against the party with lesser bargaining parity, which is the private investor. Hence, from the vantage of a foreign investor, this reflects poorly on India's ability to establish an effective system of arbitration. It is time to treat all litigants in a level-playing field, including for all classes of investors, private or government, domestic or foreign.[37]

iii) Supreme Court Winces:

Meanwhile, the Supreme Court in the recently decided *Larsen Airconditioning and Refrigerator Company* (*'Larsen'*) v *Union of India* ('*UOI*'), gives credence to the argument that DMRC case is not an exception and that inefficiencies and delays characterize India's arbitration system.[38] This dispute pertains to an arbitral award passed on 21 January 1999 in favour of Larsen, directing UOI to pay 18% pendente lite and future compound interest on the award sums owed.

UOI, then, unsuccessfully challenged the award before the Kanpur District Court under § 34 of the ACA.[39] And, surprisingly, UOI was successful in challenging parts of the award before the Allahabad High Court on appeal under § 37 of the ACA.[40] The Allahabad High Court, on 17 July 2019, which is more than ***20 years*** after the original arbitral award was passed, partly allowed the appeal, reducing the rate of interest from 18% compound

Private Limited, OMP(I)(COMM) 265/2020 (Del. 2022); *See also Delhi Airport Metro Express Private Limited v Delhi Metro Rail Corporation Ltd*., OMP (ENF.)(COMM.) 145/2021 (Del. 2023) (nauseating attempts by DMRC to delay the payment of termination payment and those by Axis Bank, the leading banker in the consortium and the escrow agent, to intervene and block the payment from the escrow account citing higher rank of lender's dues in escrow waterfall, jeopardized any prospect of reaching settlement with CAF, and nullified the settlement reached with Siemens).

[37] *See Pam Development Pvt Ltd. v State of West Bengal & Ors*,, (2019) 8 SCC 112 (holding that § 18 of ACA mandates equal treatment of parties and no special treatment can be given to the Government as a party while considering an application for grant of stay of a money decree in proceedings under § 34 of ACA).

[38] *See M/S Larsen Air Conditioning and Refrigerator Company v. Union of India*, CA No. 3798 of 2023 (Sup. Ct. 2023); *See also* Ashok KM, 'Court Has No Power to Modify Award U/Sec 34 Arbitration & Conciliation Act: Supreme Court' (*LIVELAW*, 12 August 2023) <https://tinyurl.com/2s3ejaws>.

[39] *See generally* ibid; *See also* ACA (n 2)§ 34 (providing an aggrieved party with a recourse to get the award set aside by a court on limited and specified grounds).

[40] *See* ACA (n 2)§ 37 (providing an additional layer of appeal to an aggrieved party against the decision of the court under § 34 setting aside or refusing to set aside an award).

interest to 9% simple interest per annum.[41] Aggrieved, Larsen appealed to the Supreme Court with a simple question of law, as to whether the High Court erred in modifying the award.[42] The Supreme Court reinstated the award and observed that the jurisdiction of appellate courts under § 34 of the ACA is limited, such that courts are powerless to modify an award and can only set it aside, partially or wholly, on specific grounds. Further, the Court added that an appellate courts' powers and scope of review over an award under § 37 of the ACA, which is the appellate jurisdiction, is even narrower, especially if it is already upheld under a §34 application.

The fact that the dispute lingered unresolved until August 2023, more than 25 years after the invocation of arbitration in 1997, speaks volumes about India's arbitration system that prevents arbitral awards from being executed within a reasonable time-frame, not to mention the apathy of policymakers towards private investors or even the ease of doing business in the country, which is ***the*** point of this paper. The inefficiencies, including cost in terms of time and money spent, in resolving disputes goes against any wisdom of investing in India, a sense that this paper hopes to capture using the DMRC dispute as an example.

CONCLUSION

Getting back to the DMRC case, over 6 years after passing of the award by the Tribunal, and after attaining finality following the Supreme Court's judgement, DAMEPL still faces a curative petition filed by DMRC post the dismissal of its review petition!! The unfairness of DMRC's actions to DAMEPL, which has been continuously suffering interest burdens, not to mention the losses and the resulting frustration to the vendors, lenders and other sub-contractors who might be implicated into the project, is condemnable. The worst sufferer of all is, of course, the taxpayers, whom DMRC claims to service! Amidst this, the GOI's move to amend the Metro Act is astounding for a democracy like India. In any event, for the leaders of G-20 group of nations, the dispute resolution system alone provides a perverse incentive to think twice before investing in India.

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[41] *See* ibid*; See also Union of India v M/S Larsen Air Conditioning and Refrigerator Company*, Order No. 1227/2003 (All. 2019).

[42] *See M/S Larsen Air Conditioning and Refrigerator Company v. Union of India* (n 37).

To investors, India projects its rank in the Ease-of-Doing-Business ranking of the World Bank, where it stands 63rd in the overall ranking. [43] Nevertheless, on the question of contract enforceability, which is an important factor, India has an abysmal rank of 163rd out of 190 economies. Indeed, contract enforceability ranking, which is one of the 10 parameters of the annual ranking, is important to entice foreign investors into the country.[44] The DMRC dispute is just one of the testimonies to the fact that enforcing a contract, especially against a government party in India, is a costly, uncertain, and time-consuming affair. Unfortunately, India's arbitration system, in its present form and structure, does not help the affected investors either.

Incredible India, indeed!

[43] See 'Doing Business 2020' (*THE WORLD BANK*) <https://archive.doingbusiness.org/en/rankings> (last visited Aug. 17, 2023) (ranking economies on their ease of doing business from rank 1-190, where a high ranking means the regulatory environment is more conducive to the starting and operating of a local firm)
[44] *See* ibid. (ranking is based on 10 factors with equal weights, out of which contract enforceability is one of the factors).

APPENDIX A

DATA FLOW OF THE COST OF DELAYS IN THE DISPUTE

Events	Date	Days	Principal (crores)	Pre-Award Interest (crores)	Incremental Post-Award Interest (crores)	Total Post-award Interest (crores)	Gross Sum payable by DMRC (crores)	Payment made by DMRC (crores)	Balance payable by DMRC (crores)	Interest Outstanding (crores)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)=(4)+(5)+(7)	(9)	(10)=(8)-(9)	(11)=(10)-(4)
Arbitral Award	11.05.2017	-	2945.55	1717.04	0.00	--	4662.59	0.00	4662.59	1717.04
Delhi HC Single Bench	06.03.2018	299	2945.55	1717.04	376.21	376.21	5038.80	120.00	4918.80	1973.25
Delhi HC Division Bench	15.01.2019	315	2945.55	1717.04	395.18	771.39	5433.98	678.43	4755.55	1810.00
SLP	09.09.2021	968	2945.55	1717.04	1158.74	1930.13	6592.72	678.43	5914.29	2968.74
Review Petition	23.11.2021	75	2945.55	1717.04	85.95	2016.08	6678.67	678.43	6000.24	3054.69
Curative Petition	01.08.2022	251	2945.55	1717.04	290.99	2307.07	6969.66	2444.87	4524.79	1579.24
So far	31.07.2023	364	2945.55	1717.04	469.03	2776.10	7438.69	2599.18	4839.51	1893.96

Source: DMRC Cases.

Note: The principal and the pre-award interest (column 4 & 5 respectively) have remained the same. The interest component outstanding has increased over time (as reflected in Column 11).