

## Lack of evidence of loss of profit in an arbitral award renders the award as contrary to public policy

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In [\*Unibros v. All India Radio\*](#), India's Supreme Court (the "SC") set aside an arbitral award that allowed a claim for damages without any proof of the claimant having suffered injury, thereby rendering the award as being in conflict with India's public policy. Section 34(2)(b)(ii) of India's Arbitration and Conciliation Act, 1996 (the "**Arbitration Act**") stipulates that an arbitral award may be set aside by a court if "the arbitral award is in conflict with the public policy of India." The ambit of "public policy" has constantly been broadened through a plethora of judgments.

### Facts

All India Radio ("**AIR**") engaged M/s. Unibros (the "**Contractor**") in the construction of the Delhi Doordarshan Bhawan in New Delhi. The project encountered a substantial delay of over forty-two (42) months leading to disputes between the parties, which were referred to an arbitrator. The Contractor claimed loss of profits for having to render services and blocking its resources longer than the period stipulated in the contract, which would, otherwise, have enabled the Contractor to take up other projects and earned profits elsewhere. The Arbitrator awarded compensation to the Contractor for loss of profits by using Hudson's formula, a formula generally used by courts in determining loss of profits (the "**First Award**").

In the application challenging the First Award filed by AIR under Section 34 of the Arbitration Act, the single bench of the Delhi High Court (the "**DHC**") noted that the Contractor's claim had been allowed by the arbitrator without considering credible evidence. Accordingly, the single bench of DHC remitted the matter back to the arbitrator for re-consideration and to pass a fresh award in relation to the claim for damages, based solely on evidence available on record and not being influenced by other factors weighing on his mind.

The arbitrator passed a fresh award (the "**Second Award**") maintaining the award for loss of profit and interest to the Contractor under the First Award.

The Second Award was set aside by the single bench of the DHC, who also ruled that the Second Award conflicted with India's public policy. In an appeal to the division bench of the DHC, it was held that no evidence was produced by the Contractor to support the plea of loss of profit, and therefore, the findings of the arbitrator were contrary to law, more particularly the Indian Contract Act, 1872, that applies to matters related to loss of profits. In addition, the Second Award conflicted with India's public policy.

### The SC's observations

#### ***The Second Award was against India's public policy***

In its previous judgments, the SC has interpreted "public policy of India" to include, among others, compliance with the fundamental policy of Indian law, statutes and judicial

precedents, need for judicial approach, compliance with natural justice, Wednesbury unreasonableness, and patent illegality. The SC noted that despite the DHC's directions to the arbitrator to not be influenced by factors weighing on his mind while making the First Award, the Second Award was different only in form but not in substance from the First Award. Any award that is an overreach on a binding judicial decision will conflict with fundamental public policy and, therefore, cannot sustain.

### ***Loss of profits should be substantiated with credible evidence***

The SC emphasized that for claims on loss of profit or missed opportunities, a claimant needs to prove the following:

- (i) there is a delay in finishing the contract;
- (ii) this delay is not due to the fault of the claimant;
- (iii) the claimant is an established contractor handling big projects; and
- (iv) there is credible evidence supporting the claim of loss of profitability.

In the *Unibros* case, the SC observed that condition (iv) was not fulfilled. The SC also commented that Hudson's formula, as well as other methods used to calculate claims for loss of off-site overheads and profits, only provide an estimate of losses that a contractor may have suffered but do not directly measure a contractor's exact costs. These formulae are useful in assessing losses, but only if the Contractor has evidence to prove the loss of profits and opportunities it suffered owing to the delayed completion. The SC held that the claims of loss of profits cannot, as a matter of course, result in loss of profits being granted without proof of the claimant having suffered injury. Such an arbitral award would be patently illegal, outrightly perverse and in conflict with the "public policy of India" as contemplated by section 34(2)(b) of the Arbitration Act.

### **Our comments**

Violation of the "public policy of India" gives a losing party the right to challenge an arbitral award and seek an order rendering the arbitration as infructuous. This ruling provides that, although an arbitrator is the sole judge of the quality and quantity of evidence, if a perverse award is passed, a court may, under section 34 of the Arbitration Act, interfere and set aside the award.

Often, loss of profits is a commonly claimed in arbitration matters involving construction contracts, and ascertaining such loss and the quantum of damages must be regarded as a technical undertaking for which adequate evidence should be led. This decision reiterates that claims for loss of profits must be adequately substantiated by documents denoting such loss and technical experts confirming the feasibility of such loss.