



September 2022

## Delhi High Court sets aside arbitral award for patent illegalities and fraud

In its recent decision in *Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.*<sup>1</sup>, the High Court of Delhi (“**Court**”) has set aside the arbitral award dated September 14, 2015 (“**Award**”) passed against Antrix Corporation Ltd. (“**Antrix**”), directing it to pay USD 562,200,000 (US Dollars five hundred sixty two million two hundred thousand) to Devas Multimedia Pvt. Ltd. (“**Devas**”) for wrongful termination of the contract between them. The Court held that the Award suffers from patent illegalities and fraud and was against the public policy of India.

### Brief Facts

On January 28, 2005, Antrix (the commercial arm of Indian Space and Research Organization (“**ISRO**”)) and Devas entered into a contract for “Lease of Space Segment Capacity on ISRO/Antrix S-band Spacecraft” (“**Contract**”).

As per the Contract, Antrix was tasked to build, launch and operate 2 (two) satellites. The spectrum capacity on these satellites was leased to Devas for a certain period. Devas planned to use the capacity to provide digital multimedia broadcasting services across India.

In February 2011, the Cabinet Committee on Security (“**CCS**”) took the decision to deny Antrix the right to use any spectrum capacity for commercial activities and to annul the Contract. In view of this development, Antrix terminated the Contract with Devas on February 25, 2011, citing force majeure.

Devas refused to accept the termination and sought specific performance of the Contract or, in the alternative, damages to the tune of USD 1,600,000,000 billion (US Dollars one billion six hundred million). Devas initiated arbitration proceedings against Antrix. The arbitration was seated in Delhi, and subject to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitral tribunal passed the Award in favour of Devas, directing Antrix to pay an amount of USD 562,200,000 (US Dollars five hundred sixty two million two hundred thousand) to Devas.

The arbitral tribunal held that Antrix was not entitled to terminate the Contract under the force majeure clause of the Contract. Consequently, the arbitral tribunal held that the letter of termination issued by Antrix amounted to wrongful repudiation of the Contract. In reaching its conclusions, the arbitral tribunal disregarded some evidence on pre-contractual negotiations sought to be presented by Antrix for interpreting the Contract.

During the pendency of the arbitral proceedings, Antrix sought winding up of Devas under Section 271(c) read with Section 272(1)(e) of the Companies Act, 2013 before the National Company Law Tribunal (“**NCLT**”) alleging that Devas was formed for a fraudulent and unlawful purpose and its affairs had been conducted in a fraudulent manner. The

<sup>1</sup> Judgment dated August 29, 2022 in OMP (Comm.) 11 of 2021

NCLT allowed winding up of Devas. Devas challenged the order of winding up all the way to the Supreme Court, which dismissed its appeals, and upheld the order of winding up.

### Findings of the Delhi High Court:

1. The Court set aside the Award, holding that it was vitiated by patent illegality and fraud.
2. The Court held that arbitral tribunal's reliance on the International Bar Association Rules of Taking of Evidence in International Arbitration ("**IBA Rules**") to exclude evidence as to pre-contractual negotiations while interpreting the Contract was patently illegal. The arbitral tribunal did not appreciate that the IBA Rules are applicable only in case of international arbitrations, that too with party consent. Since the arbitration between Antrix and Devas was a domestic arbitration, the IBA Rules are not applicable, and the evidence could not have been excluded.
3. Similarly, the Court held that the Award was patently illegal since the arbitral tribunal's findings while deciding one of the issues were contradictory to its findings on another issue. The Court also found that the arbitral tribunal's reasoning also was self-contradictory. The Court found many instances of such contradictions and highlighted them. This rendered such findings perverse.
4. The Court also held that the arbitral tribunal had overlooked provisions of the Contract, amounting again to patent illegality.
5. The Court, while stating that courts do not sit in appeal against arbitral awards, held that if an arbitrator takes a view which is not even a possible one or arrives at a conclusion without basing it on any evidence or by ignoring vital evidence, such findings would be perverse, and the award can be set aside on the ground of patent illegality.
6. Further, the Court took notice of the findings in the judgments of the NCLT, the National Company Law Appellate Tribunal and the Supreme Court with respect to the winding up of Devas, wherein they held that Devas had been incorporated for the commission of fraudulent activities. The Court relied on the findings of fraud by the Supreme Court to hold that the Award contravenes the fundamental policy of Indian law, since it was in conflict with the most basic notions of justice and was contrary to the national economic interest due to the violations of the Foreign Investment Promotion Board policies, provisions of Foreign Exchange Management Act, 1999 and Prevention of Money Laundering Act, 2002.
7. The Court relied on the Supreme Court's finding that "*the seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetrated by Devas*". Therefore, "*every subsequent plant growing out of the seeds such as the [Contract], the disputes, arbitral awards etc., are all infected with the poison of fraud.*" A product of fraud would contravene the public policy of India, since it contravened basic notions of morality and justice.

### Conclusion

This judgment is significant since the Court has elaborated and explained the scope of the grounds of "patent illegality" and "fundamental policy of Indian law" which forms the basis of a challenge to an award in a domestic arbitration under Section 34 of the Arbitration and Conciliation Act, 1996.

It is now clear that contradictory findings and reasoning by the arbitral tribunal or the exclusion of evidence by the arbitral tribunal on the basis of IBA Rules, or for that matter even reliance on the IBA Rules in a domestic arbitration could render an award liable to being set aside on the ground of "patent illegality".

Similarly, "fundamental policy of Indian law" would include conflict with basic notions of justice, or conflict with national economic interest.

Further, fraud is in conflict with the public policy of India since it conflicts with basic notions of morality and justice. This interpretation has brought forth an important explanation to what constitutes conflict with the public policy of India.

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