JULY

1. Participation in arbitral proceedings without expressing an objection to invocation is seen as a waiver of that right.

In *C. Mugilan v. IndusInd Bank Ltd. & Ors.*[1], the High Court of Madras dismissed a challenge to the award, which was based on the claim that the Petitioner (respondent before the arbitrator) had not been served with a notice of invocation of arbitration. The Court noted that Petitioner had participated in arbitral proceedings but had never raised the aforementioned objections under Sections 13[2] and 16[3] of the Arbitration and Conciliation Act, 1996 ["**the Act**"]. The court held that if any provision has been violated, and the party participated in the proceedings without raising any objection about such violation, the conduct shall be taken as a waiver of any such violation under Section 4[4] of the Act.

2. Non-filing of any reply/objection despite service of the Section 11 petition notice would be construed as an acknowledgment of the arbitration agreement's existence.

The High Court of Delhi in *Swastik Pipe Ltd. v. Shri Ram Autotech Pvt. Ltd.*[5] held that while the Respondent had not signed the invoice including the arbitration clause, the existence of the arbitration agreement could be inferred from the parties' stand in pleadings in Section 11[6] proceedings. Despite service of the notice, the court said, the Respondents have not filed a reply to reject the assertion of the arbitration agreement. The Court found that because of the non-appearance, the assertion of the arbitration agreement's existence is unrebutted. So, it can be inferred that the arbitration agreement exists between the parties.

3. If the arbitration agreement is just a "contract to contract", it is not an arbitration agreement.

The High Court of Delhi held in *Ashwani Kumar v. Scraft Products Pvt. Ltd.*[7] that if the arbitration clause only shows a vague possibility and not a conclusive decision of the parties to arbitrate in the

[1] *C. Mugilan v. IndusInd Bank Ltd. & Ors.* OP Nos. 871 to 875 of 2017.
[2] Arbitration and Conciliation Act 1996, s 13.
[3] Arbitration and Conciliation Act 1996, s 16.
[4] Arbitration and Conciliation Act 1996, s 4.
[5] *Swastik Pipe Ltd. v. Shri Ram Autotech Pvt. Ltd.* ARB P 241/2021.
[6] Arbitration and Conciliation Act 1996, s 11.
[7] *Ashwani Kumar v. Scraft Products Pvt. Ltd.* ARB P 488/2020.

future, i.e., if the arbitration agreement is only a "contract to contract" requiring unequivocal consent again to the dispute resolution mechanism of arbitration, it is not a valid agreement. Although the use of the word "may" not be always decisive (in some situations, courts have interpreted "may" to mean "must"), it was concluded that such an interpretation is permitted only if that is the true intention of the parties as deduced from other sources. It was held that the usage of the term "may" in the facts of the case demonstrates that the parties intended to make the arbitration voluntary. The Court rejected the Petitioner's argument that the issue should be left to the arbitrator to decide, holding that the Court can examine the existence (which includes the validity and lawfulness) of an arbitration agreement under Section 11 itself. It was also held that a clause that does not withstand the statutory requirements or essential elements under Section 2(b)[8] read along with Section 7[9] of the Act is not an arbitration clause.

4. Unless expressly excluded, all agreement clauses would be referenced in the Addendum, including arbitration.

Although Respondent No. 2 in *Blue Star Ltd. v. Bhasin Infotech & Infrastructure Pvt. Ltd. & Anr.*[10] was not a signatory to the original agreement containing the arbitration clause, he was a signatory to a letter that was expressly made an addendum to the original agreement. He stated that clauses of the original agreement are binding on the parties, and thus Respondent No. 2 was bound by the arbitration agreement. The Court concluded that it could not be inferred that the parties agreed to be bound by all of the service agreement's terms, as provided, but not the arbitration clause and that such a stipulation would have to be spelled out in the Addendum.

5. The Arbitration and Conciliation Act does not allow for adjudication in two stages, i.e., summary adjudication by the Court under Section 9 and final adjudication by the Arbitral Tribunal under Section 6.

In *Navayuga Bengalooru Tollway Pvt. Ltd. v. National Highways Authority of India*[11], the High Court of Delhi, in dealing with a Section 9[12] petition seeking deposit/release of debt due as contractual termination payment, held that it is evident that directing a party to pay up/deposit an amount, based on an interpretation of the Contract Clauses without a determination of the same by an

[8] Arbitration and Conciliation Act 1996, s 2 (b).
[9] Arbitration and Conciliation Act 1996, s 7.
[10] *Blue Star Ltd v. Bhasin Infotech & Infrastructure Pvt. Ltd. & Anr.* ARB P 444/2020.
[11] *Navayuga Bengalooru Tollway Pvt. Ltd. v. National Highways Authority Of India* OMP (I) (COMM) 152/2021.
[12] Arbitration and Conciliation Act 1996, s 9.

Arbitral Tribunal would be tantamount to usurping the latter's jurisdiction. The Court decided that the ability to grant interim measures of protection under Section 9 of the Act can only be utilized if it does not involve a final adjudication and, at best, is based on a prima facie analysis of the situation and does not require the interpretation and enforcement of conditions of a contract. Even if a party offered to safeguard mandatory deposits by providing a Bank Guarantee, the Court would still go beyond its jurisdiction if it decided substantive claims and directed payments while deciding a petition under Section 9 of the Act. The court determined that granting the relief sought in the current petition would entail mandating the required amount, contrary to the rules governing the award of temporary mandatory injunctions.

6. Accusations of misrepresentation or suppression of vital information are insufficient to justify a delay in the invocation of a bank guarantee.

The High Court of Delhi in *Atindra Construction Pvt. Ltd. v. GAIL India Ltd. & Ors.*[13] held that claims of misrepresentation or suppression of material facts are not on the same level as charges of egregious fraud, on which a bank guarantee could be interdicted. It dismissed the Section 9 petition, which sought to prevent the invocation of the bank guarantee because the agreement had been obtained by misrepresentation of the soil condition.

7. The arbitrator's fee-fixing order could not be appealed under Section 9(ii)(e).

The High Court of Delhi observed in *Cement Corporation of India v. Promac Engineering Industries Ltd.*[14] that sub-paragraph (e) of S. 9(1)(ii) of the Act[15] is, in essence, a residuary clause that empowers the court to issue other interim orders that are not covered by sub-clauses (a) to (d). However, it was concluded that such a residuary clause would not cover the impugned Tribunal orders concerning fee calculation, which are based on the interpretation of the provisions of the IV Schedule of the Act. Thus, the petitioner could not bring a Section 9 action against them.

8. Claims that are ex-facie time-barred do not merit the appointment of an arbitrator.

[13] *Atindra Construction Pvt. Ltd. v. GAIL India Ltd. & Ors.* OMP (I) (COMM.) 184/2021.
[14] *Cement Corporation of India v. Promac Engineering Industries Ltd.* FAO(OS) (COMM) 92/2021.
[15] Arbitration and Conciliation Act 1996, s 9(1)(ii)(e).

In *M/s Golden Chariot Recreations Pvt. Ltd v. Mukesh Panika & Anr.*[16], the High Court of Delhi was dealing with a case in which the Petitioner had filed a second petition under Section 11 after the earlier petition was dismissed on the grounds of limitation and had sought to submit that the cause of action for the two Section 11 petitions were different, as the earlier case involved an attempt to sell on the part of the Respondent and the second case involved an actual sale. The Court found that the distinction between the causes of action for the two petitions, namely the attempted and actual sale, is nothing more than a ruse to create the appearance of a new cause of action and that this ostensibly "new" cause of action would not extend the limitation period. The Court held that the cause of action for arbitration, which serves as the flashpoint for calculating the statute of limitations, has already accrued as a result of Respondent's denial of the arbitration agreement in response to the first invocation notice, and that the statute of limitations is to be calculated as three years from the date of service of the first invocation notice.

9. The clause stating that no one other than a nominee arbitrator may act as an arbitrator can be separated from the purpose to arbitrate.

The fundamental agreement between the parties to refer disputes to arbitration would not perish even if it were no longer permissible to follow the mechanism of appointment of an arbitrator provided in the agreement, as held by High Court of Delhi in *M/s Jyoti Sarup Mittal v. The Executive Engineer-XX-III, South Delhi Municipal Corporation.*[17] The clause stating that no individual other than a nominee arbitrator may act as an arbitrator might, at most, be described as ancillary to the agreement to send conflicts to arbitration and may be regarded severable, according to the court. The agreement between the parties to refer issues to arbitration would thus exist even if the method for appointing an arbitrator could no longer be followed.

10. When the parties cannot agree on a venue or a seat, the plea of forum conveniens must be considered.

The High Court of Madras in *Tata Capital Financial Services Ltd. v. Focus Imaging & Research Centre Pvt. Ltd. & Ors.*[18] was faced with an arbitration clause that provided, among other things, "that arbitration shall be held in Mumbai/Delhi/Kolkata/Chennai as may be decided by the Lender by the Arbitration and Conciliation Act, 1996." The Lender, the petitioner before the Court, had filed

[16] *M/s Golden Chariot Recreations Pvt. Ltd v. Mukesh Panika & Anr.* ARB P 593/2020.
[17] *M/s Jyoti Sarup Mittal v. The Executive Engineer-XX-III, South Delhi Municipal Corporation* ARB P 275/2021.
[18] *Tata Capital Financial Services Ltd. v. Focus Imaging & Research Centre Pvt. Ltd. & Ors.* OP Nos. 144 of 2021.

the petition for appointment of the arbitrator. When the parties cannot agree on a specific seat, the Court concluded that the seat of arbitration must be determined solely by the Act's provisions. It took note of Section 18[19] of the Act, which states that the parties shall be treated equally and that each party should be allowed to present their case. The Court held that where a specific seat is not provided, neutral convenience of the seat can be determined by the parties and that fixing the venue or seat at a location where no cause of action has arisen and forcing the parties to travel to an unfamiliar place to present their case will defeat the Act's very purpose. According to the circumstances, the entire cause of action occurred in Delhi, and the applicant maintains a branch office in Delhi. Thus, the parties can file a complaint in the Delhi High Court.

11. After filing an application under Sections 12 and 13 of the Act with the Arbitrator, a party cannot file a Section 14 application.

The High Court of Delhi held in *Delhi Tourism & Transportation Development Corporation (DTTDC) v. M/s Swadeshi Civil Infrastructure Pvt. Ltd.*[20] that, under the scheme of Section 12[21] and 13 of the Act, once a party has preferred an application under Sections 12 and 13 of the Act before the Arbitrator, it cannot maintain a Section 14[22] application on the same grounds, and that the only recourse available to a party who is unsuccessful in its challenge to the Arbitral Tribunal is to challenge the arbitral award made under Section 34 of the Act.[23] The Court ruled that a challenge under Section 14 would not be maintainable based on perceived doubts about an arbitrator's independence and impartiality, save in circumstances where an arbitrator is ineligible to act as such under Section 12(5) of the Act[24].

12. It is impossible to interfere with a finding of duress and coercion based on documentary evidence.

The High Court of Delhi stated in *Gail (India) Ltd. v. Bansal Infratech Synergies Ltd.*[25] that a bold declaration of coercion or pressure without any material substantiating the claim would be utterly insufficient to prove such a claim. On closer examination of the facts of the case, it was discovered

[19] Arbitration and Conciliation Act 1996, s 18.
[20] *Delhi Tourism & Transportation Development Corporation (DTTDC) v. M/s Swadeshi Civil Infrastructure Pvt. Ltd.* OMP(T) COMM 56/2021.
[21] Arbitration and Conciliation Act 1996, s 12.
[22] Arbitration and Conciliation Act 1996, s 14.
[23] Arbitration and Conciliation Act 1996, s 34.
[24] Arbitration and Conciliation Act 1996, s 12 (5).
[25] *Gail (India) Ltd. v. Bansal Infratech Synergies Ltd.* OMP (COMM) 177/2021.

that the Arbitrator had concluded that the Respondent was required to submit the said certificate to be paid the admitted amount due under the Final Bill and that the language of the NCC was dictated by the petitioner and was a one-sided letter, based on the documentary evidence. As a first appellate court, the Court decided that the arbitrator's position was not found on no evidence but was a plausible perspective based on the appreciation of evidence. The Court was not obliged to re-appreciate or re-evaluate the evidence to analyse the Arbitral Tribunal's decision on the merits.

13. Interest awarded in violation of contract terms is likely to be overturned.

The award was set aside in *Cosmopolis Properties Pvt. Ltd. v. Loyal Credit and Investments Ltd.*[26] by the High Court of Madras because there was no breakdown or computation of the granted amount, and interest was awarded in violation of the contract. The Court concluded that when the parties have entered into a contract, the learned Arbitrator cannot go beyond the terms of the agreement, particularly when it comes to the interest. The Court ruled that the award is perverse, particularly when a large sum is taken without explanation and interest is given in violation of the contract, resulting in unjust enrichment of the respondents.

14. Arbitrator could not award interest where the agreement prohibits it.

The High Court of Madras remarked in *Steel Authority of India Ltd. & Ors. v. K. Gauthaman & Ors.*[27] that a contract clause stated that no interest would be due if a delay in payment of the final bill or running bill occurred. Therefore, it was determined that awarding interest for late payment is against the contract and Section 31(7) of the Act[28] when the parties have agreed on that element. As a result, the award was set aside as an interest award.

15. A court's power to "put aside" an arbitrator's award under Section 34 of the Act does not include the power to modify it.

The Supreme Court of India held in *The Project Director, National Highways Nos. 45E and 220, National Highways Authority of India v. M Hakeem*[29] that Section 34 of the Act does not include a power to modify an award. It was held that the position under the Arbitration Act of 1940 was different.

[26] *Cosmopolis Properties Pvt. Ltd. v. Loyal Credit and Investments Ltd.* OP Nos. 183 of 2017.
[27] *Steel Authority of India Ltd. & Ors. v. K. Gauthaman & Ors.* OP Nos. 412 of 2018.
[28] Arbitration and Conciliation Act 1996, s 31 (7).
[29] *The Project Director, National Highways Nos. 45E and 220, National Highways Authority of India v. M Hakeem* 2021 (4) Arb LR 36 (SC).

Still, the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985. It makes it clear that, given the limited judicial interference on extremely limited grounds that do not deal with the merits of an award, the 'limited remedy' under Section 34 is co-terminus with the 'limited right'. While the Court overturned the High Court's decision on the law, it left the decision on the facts alone, finding that the case's justice did not need involvement under Article 136 of the Indian Constitution[30].

16. A reason for setting aside an award is when the same person acts as both a Conciliator and an Arbitrator.

In *Hatsun Agro Products Ltd. v. Three C Visuals & Ors.*[31], the High Court of Madras accepted the argument that a conciliator could not act as an arbitrator in arbitration under the MSME Act. The Court found that Section 18(2) of the MSME Act[32] clearly states that the Arbitration and Conciliation Act applies to conciliation proceedings, and that Section 80 of the Act[33] prohibits the Conciliator from acting as an Arbitrator in the same matter unless otherwise agreed, and that Section 81 of the Act[34] prohibits relying on any evidence or suggestions in conciliation proceedings.

The Court found that if conciliation proceedings were handled solely by the same person/Council and a final award was also issued, it would violate both the MSME and the Arbitration and Conciliation Act, as there would be a serious risk of using evidence discovered during conciliation processes in arbitration. The Court also found the award for being unjustified. It denied the Respondent's request that the matter is remitted to the same Arbitrator under Section 34(4) of the Act[35], stating that when the Council has already issued an order directing the petitioner to pay the amount plus interest if the matter is remitted under Section 34(4) of the Act, the Council will have no choice but to give some reasons to substantiate the final verdict, which will be the result of bias and partiality.

17. The order denying the application for amendment of the grounds of Section 34 is not appealable under Section 37 of the Act.

[30] Constitution of India, art. 136.
[31] *Hatsun Agro Products Ltd. v. Three C Visuals & Ors.* OP Nos. 321 of 2021.
[32] Micro, Small and Medium Enterprises Development Act, 2006, s 18(2).
[33] Arbitration and Conciliation Act 1996, s 80.
[34] Arbitration and Conciliation Act 1996, s 81.
[35] Arbitration and Conciliation Act 1996, s 34(4).

In *Oil & Natural Gas Corporation Ltd. v. A Consortium of Sime Darby Engineering and Ors.*[36], a Division Bench of the High Court of Bombay was considering the Appellant's submission that the appeal against the order refusing amendment of the Section 34 petition would be maintainable if the Supreme Court's 'Effect Test' was applied. It was argued that rejecting the modification, which included grounds for challenging the counterclaim's refusal, would amount to foreclosure of the challenge and, as a result, a refusal to set aside the judgment under Section 37(1)(c)[37]. The Court rejected the argument, holding that refusing to excuse a delay in filing a petition under Section 34 has the effect of refusing to set aside the award in its entirety. In contrast, the situation is entirely different in the case of amendment rejection, which is simply a refusal to take the ground of challenge and thus would not be covered under Section 37(1) (c).

18. When an arbitral award is confirmed in an application filed under Section 34 of the Act, the Appellate Court must exercise extreme caution in overturning concurrent fact and legal conclusions.

The Division Bench of the High Court of Delhi reiterated in *M/s Mangalwar Filling Station v. Indian Oil Corporation Ltd. & Ors.*[38] that while exercising appellate jurisdiction under Section 37 of the Act, the Court has similar restrictions as prescribed under Section 34 of the Act, namely, the Court can only determine whether the learned Judge's exercise of power under Section 34 of the Act was lawful or not. It was also decided that it is settled law that the Appellate Court should not intervene until it is clear that the arbitral award's perversity lies at the heart of the dispute, with no alternative interpretation that may justify the verdict.

19. The arbitral tribunal cannot construct a new contract for the parties by recognizing one party's unilateral purpose against the other party's intention in the award.

The Supreme Court of India upheld the setting aside of the award by the High Court under Section 37 in *PSA Sical Terminals Pvt. Ltd. v. The Board of Trustees of V.O. Chidambranar Port Trust, Tuticorin & Ors.*[39], finding that the Arbitral Tribunal's findings were either based on "no evidence" or without taking into account the relevant evidence, both of which would fall into the realm of perversity. The Court went on to say that the arbitral tribunal was not warranted in effectively substituting

[36] *Oil & Natural Gas Corporation Ltd. v. A Consortium of Sime Darby Engineering & Ors.* 2021 (5) ABR 56.
[37] Arbitration and Conciliation Act 1996, s 37(1)(c).
[38] *M/s Mangalwar Filling Station v. Indian Oil Corporation Ltd. & Ors.* FAO (COMM) 75/2021.
[39] *PSA Sical Terminals Pvt. Ltd. v. The Board of Trustees of V.O. Chidambranar Port Trust, Tuticorin & Ors.* 2021(4) Arb LR 1 (SC).

the royalty payment method under the parties' agreement. A contract that has been duly entered into between the parties cannot be unilaterally covered without the parties' approval. The Court decided that rewriting a contract for the parties would violate fundamental principles of justice, entitling a Court to intervene because such a case would shock the Court's conscience and fall into the extraordinary category.

AUGUST

1. **Emergency arbitral awards are orders under Section 17(1) of the Arbitration and Conciliation Act, 1996, and are enforceable under Section 17(2) of the Act.**

In *Amazon.com NV Investment Holding LLC v. Future Retail Ltd. & Ors.*,[40] Amazon had agreed to invest INR 14.31 billion in Future Retail Limited, owned by the Biyani Group. The basic understanding was that Amazon's stake in the Biyani Group's retail assets could not be transferred without Amazon's consent. Furthermore, the Biyani Group was forbidden from dealing with the Mukesh Dhirubhai Ambani Group (Reliance Group). Disputes arose amongst the parties as Biyani Group entered into a transaction with Reliance Group, which envisaged amalgamation and disposal of Future Retail Limited, where Amazon had invested INR 14.31 billion. Aggrieved by the transaction, Amazon initiated arbitration proceedings and filed an application for emergency interim relief under the Rules of Singapore International Arbitration Centre ["**SIAC Rules**"]. The seat of the arbitral proceedings was New Delhi. After hearing both the parties, the emergency arbitrator issued an award injuncting the Biyani Group and the Reliance Group from proceeding with the disputed transaction. Amazon filed an application under Section 17(2)[41] of the Act for enforcement of the emergency arbitral award before the Single Judge of the High Court. The learned Single Judge passed a detailed judgment holding that an emergency arbitrator's award is an order under Section 17(1)[42] of the Act.

After a series of decisions, the matter reached the apex Court. The Supreme Court referred to various judgments to highlight the importance of party autonomy as a pillar of arbitration. It was ruled that the definition of arbitration under the Act meant any arbitration, whether or not administered by a permanent arbitral institution. When read with Sections 2(6)[43] and 2(8)[44] of the Act, it was made clear that an emergency arbitrator would fall under the definition of an "arbitral tribunal" under Section 2(1)(d)[45] of the Act. Because an emergency arbitral order is identical to any other arbitral tribunal's ruling, the Supreme Court found that it would be covered by Section 17(1) and enforceable in India. Finally, the Supreme Court concluded that there lies no appeal against an order of enforcement made under Section 17(2) of the Act as the legal fiction created under Section 17(2) of the Act for enforcement of interim orders was created only for the limited purpose of enforcement as a decree of the court.

[40] *Amazon.com NV Investment Holding LLC v. Future Retail Ltd. & Ors.* 2021 SCC OnLine SC 145.
[41] Arbitration and Conciliation Act 1996, s 17(2).
[42] Arbitration and Conciliation Act 1996, s 17(1).
[43] Arbitration and Conciliation Act 1996, s 2(6).
[44] Arbitration and Conciliation Act 1996, s 2(8).
[45] Arbitration and Conciliation Act 1996, s 2(1)(d).

2. **Foreign arbitral awards can bind non-signatories to an arbitration agreement and can be enforced against them.**

In *Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd. & Anr.*,[46] Integrated Sales Services Ltd. ["**ISS**"], Hong Kong, signed a Representation Agreement with DMC Management Consultants Ltd. ["**DMC**"], Nagpur, India, under which ISS agreed to assist DMC in marketing its goods and services to potential customers in exchange for a commission. The Agreement was amended to be governed by the State of Delaware, U.S.A. ["**Delaware Laws**"]. In 2008, DMC terminated contracts with clients that were introduced and serviced by ISS. Disputes arose between ISS and DMC. ISS alleged that upon the termination of the contracts, DMC, through related parties, signed new contracts with these customers that ISS introduced, thereby depriving ISS of commissions. ISS commenced arbitration against DMC and the associated parties, which included Mr. Arun Dev Upadhyay (Chairman), DMC Global Inc., Gemini Bay Consulting Limited ["**GBCL**"], and Gemini Bay Transcription Pvt. Ltd. ["**GBT**"].

In March 2010, the arbitrator passed his final award wherein it was held that the timing and coordination of efforts between the DMC and GBC could not simply be a coincidence. Thus, the Arbitrator granted, amongst other things, an award of $ 6,948,100 to be jointly paid up by DMC, DMC Global, the Appellant, GBC, and GBT. The arbitrator had applied Delaware Laws. To enforce the arbitral award, ISS approached the High Court of Bombay. The matter went through a series of litigation and reached the Supreme Court. The Appellant before the Apex Court challenged the decision of the Division Bench of the High Court, which held that the enforcement of impugned award could not be resisted under Section 48[47] of the Arbitration Act.

According to the Supreme Court, a reading of Section 44[48] of the Arbitration Act shows that a foreign award consists of six elements. To begin with, it must be an arbitral award based on differences between individuals arising from legal relationships. Secondly, these discrepancies may arise in the context of a contract or outside of it, such as in tort. Thirdly, the legal relationship between the parties should be considered "commercial" under Indian law. Fourthly, the award must be given on or after October 11th, 1960. Fifthly, the award must be under the New York Convention. Finally, it must be made in one of the territories that the Central Government has declared by notification to be areas to which the New York Convention applies. The Supreme Court found that all requirements imposed under Section 44(1)[49] were procedural to ensure that a

[46] *Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd. & Anr.* 2021 SCC OnLine SC 572.
[47] Arbitration and Conciliation Act 1996, s 48.
[48] Arbitration and Conciliation Act 1996, s 44.
[49] Arbitration and Conciliation Act 1996, s 44(1).

foreign award was made. The Court also held that the proof required under Section 47[50] only demonstrates that the award is a foreign award. Section 47 does not require substantive evidence to "prove" that a foreign award can bind a non-signatory to an arbitration agreement.

The Supreme Court examined Section 46[51] and found that a foreign award is binding between persons and not parties, thereby indicating a broader intent than Section 35[52] (which deals with domestic awards and limits itself to be binding as against parties and persons claiming under them). Thus, the Court held that the foreign award is binding on non-signatories to the arbitration agreement and unless a party was able to show that its case comes clearly within Section 48(1) or 48(2), the foreign award must be enforced.

3. High Court of Bombay sets aside an INR 48 billion award against the BCCI on patent illegality.

The High Court of Bombay in *Board of Control for Cricket in India v. Deccan Chronicle Holdings Ltd.*[53] set aside an INR 48 billion award against the Board of Control for Cricket in India ["**BCCI**"] on the ground of patent illegality. The BCCI and Deccan Chronicle Holdings Limited ["**DCHL**"] had entered into a franchise agreement dated 10 April 2008 for the Indian Premier League franchise, Deccan Chargers. Disputes arose between the parties, which led to BCCI putting DCHL on notice of a 30-day curative period and, subsequently, terminating the Agreement for DCHL's material breaches. Upon DCHL's challenge, the sole arbitrator issued an award in favor of DCHL requiring BCCI to pay approximately INR 48 billion to DCHL for wrongful termination of the Agreement, which BCCI challenged before the Bombay High Court under Section 34[54] of the Act.

The High Court found numerous findings in the Award to be speculative for being unreasoned or based on improper, inadequate, and unintelligible reasons, including damages. Section 31(3)[55] of the Act requires an award to state the reasons it is based on unless parties have agreed otherwise. The Court also noted that while a Section 34 court cannot examine the sufficiency or reasonableness of reasons, it must determine whether reasons exist, and providing 'reasons' requires careful consideration of evidence and rival arguments. The Court reiterated the settled principles of patent illegality as set out in *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*[56]

[50] Arbitration and Conciliation Act 1996, s 47.
[51] Arbitration and Conciliation Act 1996, s 46.
[52] Arbitration and Conciliation Act 1996, s 35.
[53] *Board of Control for Cricket in India v. Deccan Chronicle Holdings Ltd.* 2021 SCC OnLine Bom 834.
[54] Arbitration and Conciliation Act 1996, s 34.
[55] Arbitration and Conciliation Act 1996, s 31(3).
[56] *Ssangyong Engineering & Construction Co. Ltd. v. NHAI* (2019) 15 SCC 131.

and restrained itself from re-appreciating evidence or undertaking a merits-based review while dealing with an application under Section 34 of the Act. Thus, whilst courts in India are adopting a pro-arbitration approach, patently illegal and perverse awards will not be upheld.

4. **Section 9 of the Arbitration Act will apply to foreign arbitration unless expressly excluded by parties in Arbitration agreements.**

In *Medima LLC v. Balasore Alloys Ltd.*,[57] the Calcutta High Court held that choosing foreign law to govern an arbitration would not in itself exclude the application of Section 9[58] of the Act unless parties expressly exclude its application in the arbitration agreement.

The Court was adjudicating upon a plea wherein the issue before the Court was whether the 'governing law' clause contained in the agreement for referring disputes between the petitioner and the respondent to arbitration before the International Chamber of Commerce ["**ICC**"] excludes the operation of Section 9 of the Act.

In this case, the Petitioner, Medima, was awarded USD 30,35,249.87 (about INR 22,08,75,133/-). The ICC passed the award in proceedings governed by British law with the seat of arbitration in London, United Kingdom. Accordingly, Medina had moved the instant application under Section 9 of the Act seeking protective orders to secure the dues payable by the Respondent, Balasore Alloys. However, the Respondent contested the maintainability of the plea on the ground that the applicability of Section 9 was excluded since the parties were governed by English law and since the arbitration took place before the ICC.

The Court noted that the proviso to Section 2(2)[59] of the Act stipulates *among other things* that Section 9 under Part I of the Act, which ordinarily applies if the place of arbitration is in India, would also apply to international commercial arbitration, even if the location of arbitration is outside India unless there is "an agreement to the contrary". The Court observed that an "agreement to the contrary" as mentioned under Section 2(2) of the Act must be expressed and not implied. Unless an arbitration agreement expressly excludes the application of Section 9 of the Act, the provision would apply to foreign seated arbitration as well.

5. **Only one party to a dispute cannot nominate an arbitrator even if the arbitration agreement allows it.**

[57] *Medima LLC v. Balasore Alloys Ltd.* (2021) AP/267/2021.
[58] Arbitration and Conciliation Act 1996, s 9.
[59] Arbitration and Conciliation Act 1996, s 2(2).

The Kerala High Court, in *Tulsi Developers India (P) Ltd. v. Appu Benny Thomas,*[60] held that neither a party to an arbitration agreement nor a person nominated by it could be appointed an arbitrator, even if the agreement expressly allows the same.

The parties had entered into a lease agreement that contained an arbitration clause that in case parties fail to appoint a sole arbitrator, the lessor would have the right to appoint an arbitrator. The Petitioner approached the court to appoint a sole arbitrator as per Section 11(6)[61] of the Act. The Respondents, however, challenged the petition contending that the said application is not maintainable, claiming that the petitioner has in actuality approached the court under Section 11(5),[62] style as if it was filed under Section 11(6).

The Court distinguished that Section 11(5) applies to cases where the parties have not agreed to a procedure for the appointment of a sole arbitrator. Whereas Section 11(6) applies to cases where the parties already have agreed to the appointment procedure but have failed to act accordingly. Applying this distinction to the present case, where the parties had already agreed to a procedure, the High Court held that the petitioner's application under Section 11 (6) could not be said to be non-maintainable.

Concerning the arbitration clause that provided that the lessor would appoint the arbitrator in case of failure on the part of parties to agree upon one, the court relied upon the case of *TRF Ltd. v. Engineering projects Ltd.*[63] to hold that neither a party to the disputes nor a person nominated by it can be appointed as an Arbitrator.

6. Counsel's failure to argue written submissions is not a ground for review.

The Bombay High Court, in the case of *Priyanka Communications (l) Pvt. Ltd. v. Tata Capital Financial Services Ltd.*[64], observed that written submissions in a dispute become immaterial if the litigant's counsel doesn't rely on them before the Court of the first instance. The Bench went on to add that those submissions cannot subsequently be used to challenge any order. Justice GS Patel remarked that allowing parties to take grounds in review pleas or in appeals that weren't argued initially injects an impermissible level of uncertainty into the whole decision-making process.

[60] *Tulsi Developers India (P) Ltd. v. Appu Benny Thomas* 2021 SCC OnLine Ker 3420.
[61] Arbitration and Conciliation Act 1996, s 11(6).
[62] Arbitration and Conciliation Act 1996, s 11(5).
[63] *TRF Ltd. v. Engineering projects Ltd.* (2017) 8 SCC 377.
[64] *Priyanka Communications (l) Pvt. Ltd. v. Tata Capital Financial Services Ltd.* 2021 SCC OnLine Bom 2193.

7. **An arbitrator has a limited role, and that is to arbitrate the matter within the realm of the contract and would have no power to grant terms beyond what is assigned under the contract.**

In *PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin*,[65] the Supreme Court ruled that an arbitration award cannot ignore important evidence that is critical to reaching a rational decision and that if such evidence is disregarded, the award would be set aside under Section 34 of the Arbitration Act on the ground of patent illegality. According to the Court, such an award would be perverse and a breach of the fundamental principles of justice. Furthermore, the Court found that the award rewrites a new contract based on the intention of one party against the other. It was ruled that such a decision amounts to interference shocked the Court's conscience as such a blatant breach falls under an exceptional category.

8. **High Court of Delhi clarifies the scope of Section 9 of the Act.**

In *Thar Camps Pvt. Ltd. v. Indus River Cruises Pvt. Ltd.*,[66] the Petitioner applied Section 9 of the Arbitration Act before the Delhi High Court to secure certain outstanding amounts payable to them by the first Respondent, i.e., Indus River Cruises. The specific claim was to restrain the first Respondent from removing three leased vessels from Indian waters. The Court was faced with the primary issue of whether the petitioner has the right to obtain an interim order.

The Court held that "the mere possibility of frustration of arbitral proceedings, or any award which may be passed therein, cannot justify the grant of interim protection under Section 9 of the 1996 Act". Further, the Court interpreted the scope of Section 9 to be limited. The Court relied on *Sunil B. Naik v. Geowave Commander* and *J.S. Ocean Liner LLC v. M.V. Golden Progress*[67] to observe that strangers, i.e., other third parties like the owners of the vessels who leased it to the Respondent, to the arbitration agreement may not be injuncted under Section 9. Therefore, the Court found no reason to take any coercive action against the fourth and the fifth Respondents, i.e., owners of the vessels.

[65] *PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin* 2021 SCC OnLine SC 508.
[66] *Thar Camps Pvt. Ltd. v. Indus River Cruises Pvt. Ltd.* 2021 SCC OnLine Del 3150.
[67] *J.S. Ocean Liner LLC v. M.V. Golden Progress* 2007 SCC OnLine Bom 69.

SEPTEMBER

1. SC states that applications for interim measures can be entertained even after the arbitral tribunal has been constituted.

Recently, in the case of *Arcelor Mittal Nippon Steel (India) Ltd. v. Essar Bulk Terminal Ltd.,*[68] the Supreme Court resolved the issues regarding the interplay of Section 9[69] and Section 17[70] of the Act and examined whether courts can entertain applications for interim measures once the arbitral tribunal has been constituted. The Supreme Court noted that Section 9(3)[71] of the Act has two limbs. The first limb prohibits an application under Section 9(1)[72] from being entertained once an Arbitral Tribunal has been constituted. The second limb carves out an exception to that prohibition if the court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious.

Considering the true meaning and purport of "entertain" in Section 9(3), the Court that it is now well settled that the expression "entertain" means to consider the issues raised by the application of mind. The court entertains a case when it takes up a matter for consideration. The process of consideration can continue till the pronouncement of judgment. The question is whether the process of consideration has commenced and whether the court has applied its mind to some extent before the constitution of the Arbitral Tribunal. If so, the application can be said to have been entertained before the constitution of the Arbitral Tribunal.[73]

The Supreme Court clarified that even if an application under Section 9 had been entertained before the constitution of the Arbitral Tribunal, the court always has the discretion to direct the parties to approach the Arbitral Tribunal, if necessary, by passing a limited order of interim protection. Therefore, it was settled by this case that mere delay in agreeing upon an arbitrator does not dis-entitle a party from relief under Section 9 of the Arbitration Act.

2. Supreme Court: courts acting under Section 34 are not empowered to reappreciate evidence to find faults in the arbitral award.

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[68] *Arcelor Mittal Nippon Steel (India) Ltd. v. Essar Bulk Terminal Ltd.* 2021 SCC OnLine SC 797.
[69] Arbitration and Conciliation Act, 1996, s 9.
[70] Arbitration and Conciliation Act, 1996, s 17.
[71] Arbitration and Conciliation Act, 1996, s 9(3).
[72] Arbitration and Conciliation Act, 1996, s 9(1).

In *Delhi Airport Metro Express Pvt Ltd v Delhi Metro Rail Corporation Ltd,*[74] the Apex Court observed that in respect of Part I of the Arbitration Act, Section 5[75] imposes a bar on intervention by a judicial authority except when provided for statutorily. An application for setting aside an arbitral award could only be made within the four walls of the grounds mentioned under Section 34 of the Arbitration Act. It was held that the courts under Section 34[76] of the Arbitration Act must refrain from appreciating or re-appreciating matters of fact and law.[8] The Apex Court also observed a disturbing tendency of courts setting aside arbitral awards after dissecting and reassessing factual aspects of the case to conclude that the award needs intervention. It was emphasized that such an approach would lead to corrosion of the object of the Arbitration Act.

Commenting upon patent illegality, the Hon'ble Supreme court held that not every error of law committed by the arbitral tribunal would fall within the expression 'patent illegality'. The Apex Court also observed that it was not open for courts to re-appreciate evidence to conclude that an award suffered from patent illegality as the courts did not sit in an appeal against an arbitral award.

3. SC resolves whether an officer of the department, appointed as sole arbitrator, can continue the arbitration proceedings after his retirement.

Recently, in the case of *Laxmi Continental Construction Co. v. State of UP & Anr.,*[77] it was observed that the mandate of a sole arbitrator who was appointed by designation could not be terminated solely on the ground of their retirement. It was held that once an officer of the department is appointed as an Arbitrator considering the arbitration clause, his mandate to continue the arbitration proceedings shall end on his retirement if the Arbitration clause doesn't specifically provide for the same. Consequently, it was settled that continuance of the arbitration proceedings by such an Arbitrator after his retirement cannot be said to be committing misconduct by such a sole arbitrator. Once the sole arbitrator continued with the arbitration proceedings and passed the award within the extended period, it cannot be said that he has misconducted himself as he continued with the arbitration proceedings.

4. SC expands the scope of judicial inquiry under Section 11 of the Arbitration and Conciliation Act, 1996.

The Supreme Court has finally clarified through the case of *DLF Homes Developers Ltd. v. Rajapura Homes Pvt Ltd. & Anr.*[78] that the Courts are not expected to act mechanically merely to deliver a

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[74] *Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.* 2021 SCC OnLine SC 695.
[75] Arbitration and Conciliation Act, 1996, s 5.
[76] Arbitration and Conciliation Act, 1996, s 34.
[77] *Laxmi Continental Construction Co. v. State of UP & Anr.* 2021 SCC OnLine SC 750.
[78] *DLF Homes Developers Ltd. v. Rajapura Homes Pvt. Ltd. & Anr.* 2021 SCC OnLine SC 781.

purported dispute raised by an applicant at the doors of the chosen Arbitrator. The Courts are obliged to apply their minds to the core preliminary issues, albeit within Section 11(6)(A) of the Act.[79] The Supreme Court held that while such a review is not intended to usurp the jurisdiction of the Arbitral Tribunal, it is aimed at streamlining the process of arbitration. As such, even when an arbitration agreement exists, it would not prevent the Court to decline a prayer for reference if the dispute in question does not correlate to the said agreement.

The Supreme Court has now categorically held that the Courts are required to apply their minds and see whether the dispute in question correlates to the arbitration agreement between the parties. Where there is no correlation, the reference to arbitration can be rejected, despite an agreement between the parties. Hence, courts can decline reference under Section 11[80] of the Act if disputes do not fall within the ambit of the arbitration agreement.

5. The choice of a venue is the choice of an arbitral seat in the absence of any indication to the contrary: Delhi High Court.

In its recent decision in *SP Singla Constructions Pvt. Ltd. v. Construction and Design Services, Uttar Pradesh Jal Nigam*,[81] the High Court of Delhi, reiterated that choosing a venue in an arbitration agreement is also a choice of the arbitral seat in the absence of a contrary indication. In this article, we navigate through the facts and findings of the High Court in the judgment above.

The instant decision followed the law laid in *BGS SGS SOMA JV v. NHPC Ltd.*,[82] wherein it was held that the designation of the "venue" is the designation of the "seat" of arbitration in the absence of any indication to the contrary. The venue selection must not be viewed as an empty formality, for the law generally presumes that the venue shall be the seat of arbitration. Thus, the parties must structure their arbitration agreement properly if they intend to convey that a venue is merely a place of convenience as under Section 20(3) of the Act.[83] A properly worded arbitration agreement would aid in preventing any disputes that may crop up about the seat of arbitration.

6. Arbitrator cannot grant pendente-lite interest when barred contractually by parties: Supreme Court

[79] Arbitration and Conciliation Act, 1996, s 11(6)(A).
[80] Arbitration and Conciliation Act, 1996, s 11.
[81] *SP Singla Constructions Pvt. Ltd. v. Construction and Design Services, Uttar Pradesh Jal Nigam* 2021 SCC OnLine Del 4454.
[82] *BGS SGS SOMA JV v. NHPC Ltd.* (2020) 4 SCC 234.
[83] Arbitration and Conciliation Act, 1996, s 20(3).

In the recent case of *Garg Builders v. Bharat Heavy Electricals Ltd.*,[84] a two-judge bench of the Supreme Court held that an arbitrator cannot grant pendente lite interest when the contracting parties have freely and expressly opted out of receiving interest under the contract.

The Supreme Court's verdict holds special significance since:

(i) it analyzed the scope of the interest-barring clause under the contract between the parties vis-à-vis Section 28 of the Indian Contract Act, 1872;[85] and

(ii) it reinforced the well-founded principle that an arbitrator is a creature of contract, and its powers cannot traverse beyond the purview of the contract.

This judgment supports the settled legal position of the contractual right of the parties to a waiver of claims towards interest, and the arbitrator is bound by such contractual conclusion. The Court has favored party autonomy which is the very essence of the arbitration laws as applicable in India, thereby lending precision and certainty to contractual stipulations and encouraging arbitration as a mode of dispute.

7. SC settles whether a pre-deposit of 75% of arbitration award amount under Section 19 of the MSME Act, 2006 is mandatory or discretionary.

In the recent judgment of *Gujarat State Disaster Management Authority v. M/s Aska Equipments Ltd.*,[86] it was held that in an appeal/application filed under Section 34[87] of the Arbitration Act read with Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006 ["**MSME Act**"],[88] the appellate court would not have any discretion to deviate from the deposit of 75% of the awarded amount as a pre-deposit. The Court held that as per Section 19 of the MSME Act at the time/before entertaining the application for setting aside the award made under Section 34 of the Act, the applicant/appellant has to deposit 75% of the amount in terms of the award as a pre-deposit. However, at the same time, considering the hardship which may be projected before the appellate court and if the appellate court is satisfied that there shall be undue hardship caused to the appellant/applicants, the court may allow the pre-deposit to be made in instalments.

The Apex Court reiterated the settled position in law and answered the question of pre-deposit being mandatory in terms of Section 34 of the Act read with Section 19 of the MSME Act, while

[84] *Garg Builders v. Bharat Heavy Electricals Ltd.* 2021 SCC OnLine SC 855.
[85] Indian Contract Act, 1872, s 28.
[86] *Gujarat State Disaster Management Authority v M/s Aska Equipments Ltd* 2021 SCC OnLine SC 917.
[87] Arbitration and Conciliation Act, 1996, s 34.
[88] Micro, Small and Medium Enterprises Development Act, 2006, s 19.

at the same time reiterating the discretion of the Court to command such pre-deposit in instalments on facts of the case.

OCTOBER

1. Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd.[89]

In this matter, Arcelor Mittal Nippon Steel India Ltd. ("AMNS") and Essar Bulk Terminal Ltd. ("Essar") disagreed and, as a result of various disagreements, both sought interim remedy from the Commercial Courts in Surat under the Arbitration Act. The Commercial Court heard the applications, and orders were deferred for a later date. While the rulings were still pending before the Commercial Courts, the Gujarat High Court established an arbitral panel to address the main dispute after receiving an application from AMNS. AMNS filed an interim application with the Commercial Court, requesting that the parties' interim relief motions be sent to the newly formed arbitral panel as well.

The Commercial Courts, on the other hand, dismissed the case. AMNS appealed the Commercial Court's decision to the Gujarat High Court. However, they dismissed the case, ruling that the Commercial Court should be allowed to rule on both interim relief applications, prompting AMNS to file a petition with the Supreme Court, appealing the Gujarat High Court's decision. The question before the Apex Court was whether the Commercial Court has the authority to hear an application under the Arbitration Act after the arbitral tribunal has been formed. Even after establishing an arbitral tribunal, the Commercial Court retains the ability to give interim relief under the Arbitration Act, according to the Supreme Court. According to SC, the term "entertain" refers to thinking about the challenges of using one's thoughts. When an issue is brought before the Commercial Court for consideration, it is called a case. The deliberation process could go on until the final decision is made.

Once a tribunal has been established, the Commercial Court cannot entertain an application for interim reliefs unless demonstrated that the arbitral tribunal's remedy for interim reliefs is ineffective. However, after an application has been heard, taken up for discussion by the Commercial Court, and the Commercial Court has applied its mind, the application can be adjudicated. According to the Supreme Court, the Gujarat High Court correctly directed the Commercial Court to finish the adjudication on the interim relief cases.

2. Garg Builders v. Bharat Heavy Electricals Ltd.[90]

[89] *Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd.* 2021 SCC OnLine SC 797.
[90] *Garg Builders v. Bharat Heavy Electricals Ltd.* 2021 SCC OnLine SC 855

The laws about an arbitrator's award of pendente lite interest under the Arbitration and Conciliation Act of 1996 are no longer res Integra. As held by the Apex Court through Justice S. Abdul Nazeer in the case of Garg Builders v. Bharat Heavy Electricals Ltd., the Act gives paramount importance to the contract entered into between both the parties and categorically limits an arbitrator's power to award pre-reference and pendente.

According to the case's facts, the respondent issued a tender for the construction of a boundary wall at its Combined Cycle Power Project in Bawana, Delhi. The respondent accepted the appellant's project bid. Following that, on October 24, 2008, the parties signed a contract that included the interest blocking clause, among other things. The parties had disagreements over the aforementioned contract. Thus, the appellant filed a case with the Delhi High Court under Section 11 of the Act[91]. The Court assigned Hon'ble Mr. Justice M.A. Khan (Retd.) as the sole Arbitrator to resolve the issues.

After hearing both sides' arguments, the learned Arbitrator awarded the appellant pendente lite and future interest at a rate of 10% p.a. on the award amount from the date of filing the claim petition, i.e., 02.12.2011, until the day of realization of the award amount. The respondent challenged the decision in the Delhi High Court under Section 34 of the Act[92], claiming that the learned Arbitrator, as a product of the arbitration agreement, went beyond the scope of the contract. The assailed order was set aside by the learned Single Judge in his final judgment and order of 10.03.2017, which was upheld by the Division Bench of the High Court.

Mr. Sanjay Bansal, learned counsel for the appellant, argued before the Hon'ble Supreme Court that the learned Arbitrator had taken a plausible view of Clause 17 of the Contract and ruled that the said clause did not prevent the payment of interest during the pendency lite period. Ambica Construction v. Union of India[93] and Raveechee and Company v. Union of India[94] were used to support this viewpoint. On the other hand, Mr. Pallav Kumar, learned counsel for the respondent, argued that Section 31(7)(a) of the Act[95] places a high priority on the parties' contract and expressly limits an arbitrator's ability to award pre-reference and pendente lite interest when the parties have agreed to the contrary.

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[91] Arbitration and Conciliation Act 1996, s 11.
[92] Arbitration and Conciliation Act 1996, s 34.
[93] *Ambica Construction v. Union of India* CA No. 5093 of 2006.
[94] *Raveechee and Company v. Union of India* CA No. 5964-5965 of 2018.
[95] Arbitration and Conciliation Act 1996, s 31(7)(a).

After hearing both parties, the Hon'ble Court stated that "If the contract prohibits pre-reference and pendente lite interest, the arbitrator cannot award interest for the said period," citing the cases of Sayeed Ahmed and Company v. State of Uttar Pradesh & Ors, Bharat Heavy Electricals Limited v. Globe Hi-Fabs Limited, and Sri Chittaranjan Maity v. Union of India. The interest-barring clause, in this case, is very plain and unambiguous. It uses the employer's phrase "any amounts of money owing to the contractor", which includes the arbitrator's award.

3. DLF Home Developers Ltd v Rajapura Homes Pvt Ltd 2021 SCC OnLine SC 781

In DLF Home Developers Ltd. v. Rajapura Homes Pvt. Ltd. & Anr.[96] and DLF Home Developers Ltd. v. Begur OMR Homes Private Limited & Anr.[97], a two-judge bench of the Apex Court recently issued a landmark decision, expanding the scope of judicial inquiry under Section 11 of the Arbitration and Conciliation Act, 1996. [98]

The Supreme Court has now emphasized that courts are "not expected to act mechanically just to deliver a supposed disagreement raised by an applicant to the designated Arbitrator's door." According to the law, courts are "obliged to apply their minds to the basic preliminary questions, albeit within the framework of Section 11(6-A) of the Act," according to the law. While such a review does not seek to usurp the Arbitral Tribunal's jurisdiction, it does seek to streamline the arbitration process, according to the Supreme Court. As a result, "even if an arbitration agreement exists, the Court may refuse a prayer for reference if the dispute in question does not correspond to the aforementioned agreement."

4. Whether in an appeal/application filed under Section 34 of the Arbitration & Conciliation Act, 1996 read with Section 19 of the MSME Act 2006, the Appellate Court would have any discretion to deviate from the deposit of 75% of the awarded amount as a pre-deposit.

A disagreement emerged between the parties over the payment of goods that the Appellant had seized. Section 18 of the MSME Act[99] was invoked. The Facilitation Council issued an award in favor of the Respondent on November 10, 2017 (Award) and ordered the Appellant to pay INR 105,053,387. The Appellant filed an application with the learned Additional District Judge

[96] *DLF Home Developers Ltd. v. Rajapura Homes Private Ltd. & Anr.* ARB/P 17/2020.
[97] *DLF Home Developers Ltd. v. Begur OMR Homes Private Ltd. & Anr.* ARB/P 16/2020.
[98] Arbitration and Conciliation Act 1996, s 11.
[99] Micro, Small and Medium Enterprises Development Act, 2006, s 18.

(Commercial), Dehradun, under Section 34 of the Act[100] read with Section 19 of the MSME Act, feeling aggrieved by the Award. The Appellant was compelled to deposit 75 percent of the money granted by the arbitrator under Section 19 of the MSME Act. An application for a waiver of the pre-deposit was favored, but it was denied. Following that, by order dated August 22, 2019, the Additional District Judge (Commercial), Dehradun, granted the Appellant one month as the last chance to deposit the aforementioned amount. The Appellant filed a writ case in the High Court, feeling aggrieved by the stated ruling (HC). The HC dismissed the writ petition in the assailed judgment and decree. Despite dismissing the writ petition, the HC gave the Appellant an additional eight weeks to deposit 75% of the allocated money. The Appellant herein sought this appeal because he was aggrieved and unsatisfied with the impugned decision and order of the HC.

The Applicant/Appellant must deposit 75 percent of the amount in terms of the award as a pre-deposit, according to a plain/fair reading of Section 19 of the MSME Act and Section 34 of the Arbitration Act. The award stipulates that a pre-deposit of 75% of the total sum is required. However, if the Appellate Court is convinced that depositing 75 percent of the awarded money as a pre-deposit in one go would create an undue hardship to the Appellant/Applicant, the Court may allow the pre-deposit to be deposited in installments.

The Court cited the case of Goodyear India Ltd v. Norton Intech Rubbers Pvt Ltd. It concluded that while the provision requires a pre-deposit before an application under Section 34 of the Arbitration Act can be filed, they were not inclined to read that provision into the provision at hand. The phrase "in the manner directed by such court" indicates that the court has the authority to enable the pre-deposit to be paid in installments if necessary. Given the language used in Section 19 of the MSME Act, as well as the object and purpose of requiring a pre-deposit of 75% of the awarded amount while preferring the application/appeal for setting aside the award, it must be held that the requirement of a pre-deposit of 75% of the awarded amount is mandatory. As a result, both the High Court and the Additional District Judge (Commercial), Dehradun, were right in ordering the Appellant to deposit a pre-deposit of 75 percent of the awarded amount. As a result, the appeal was dismissed.

[100] Arbitration and Conciliation Act 1996, s 34.

NOVEMBER 2021

1. **A party is not barred from raising new grounds to set aside an award in an appeal under section 37 of the Arbitration & Conciliation Act, 1996 ["Arbitration Act"]**

On 8th November 2021, the Supreme Court in *State of Chhattisgarh v. Sal Udyog Private Ltd.*[101] observed that a party is not prevented from presenting an additional ground for setting aside an arbitration judgment in an arbitration appeal under Section 37[102] of the Act just because the said ground was not submitted in the petition under Section 34 to set aside the arbitration award. In this case, an arbitration award was contested before the District Judge (by filing Section 34 petition) who declined to interfere with the Award, save for altering it to reflect the interest awarded to the Company. The State presented a new basis in the appeal to the High Court filed under Section 37 regarding the repayment of 'supervision expenses.' The question before the Supreme Court essentially was whether the High Court was proper in refusing to use its authority to set aside the judgment based solely on the fact that the said ground of supervision expenses was not introduced before the District Judge. While emphasizing the phrase "the Courts find that" as used in Section 34(2)(b) of the Act[103], the Court ruled that the clause permits the Court to give leave to modify the Section 34 [104]application if the facts of the case support it and it is necessary for the interest of justice

2. **The 2015 amendment to the arbitration act doesn't apply to section 34 applications that were filed before the amendment.**

An important judgment delivered by the Supreme Court in *Ratnam Sudesh Iyer v. Jackie Kakubhai Shroff*[105] on November 10, 2021, reiterated that the 2015 amendment to Section 34 of the Act would apply exclusively to Section 34 applications filed after the date on which the amendment was made effective. This is irrespective of the fact that arbitration proceedings commenced before the amendment. In this case, the issue to be determined by the Court was the applicability of Section 34 of the said Act to international commercial disputes. The Court noted that because the appellant was a Singapore-based party, the arbitration would be international commercial

[101] *State of Chhattisgarh v. Sal Udyog Private Ltd.*, 2021 SCC OnLine SC 1027.
[102] Arbitration and Conciliation Act 1996, s 37.
[103] Arbitration and Conciliation Act 1996, s 34(2)(b).
[104] Arbitration and Conciliation Act 1996, s 34.
[105] *Ratnam Sudesh Iyer v. Jackie Kakubhai Shroff* CA No. 6112 of 2021.

arbitration. The award would be a domestic award arising out of an international commercial agreement under Section 2 (f) of the Act.[106]

Further, the Court noted that the 2015 Amendment seeks to distinguish between a domestic award resulting from international commercial arbitration and a purely domestic award. The 2015 amendment attempted to make the criteria for interference stricter in the case of a domestic award coming from international commercial arbitration. The Court placed reliance on the *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. & Ors.*[107] and *Ssangyong Engineering and Construction Company Ltd. v National Highways Authority of India*[108], to hold that the 2015 Amendment is prospective.

3. Draft of the mediation bill, 2021, was released for public comments and consultation.

The Ministry of Law and Justice released a draft of the Mediation Bill, 2021, for stakeholder consultation and public suggestions on November 5, 2021. This bill comes after India signed the United Nations Convention on International Settlement Agreements Resulting from Mediation, 2020 (Singapore Convention). This bill will encourage mediation as the preferred mode for alternative dispute resolution in India. Its various goals include the promotion, support, and facilitation of mediation, particularly institutional mediation, the enforcement of domestic and international mediation settlement agreements, and, most importantly, the acceptance and cost-effectiveness of online mediation.

One of the key provisions of this bill is that it requires parties to settle disputes through pre-litigation mediation before bringing a suit or proceeding in courts or tribunals, with the exception of circumstances requiring an urgent temporary relief. Further, this applies regardless of any pre-existing mediation agreement. Additionally, the bill provides for the establishment of the Mediation Council in India. Moreover, it provides a time limit of 90 days for the completion of the mediation proceedings. Another significant provision of this bill is that these settlements shall be final and binding on the parties and others claiming under them and shall be enforceable like judgments or decrees of Courts. One important loophole in this draft bill is that it doesn't provide for confidentiality of the mediation proceeding. Nevertheless, this bill will propose umbrella legislation to establish the current legislative framework. Furthermore, it gives a much-needed

[106] Arbitration and Conciliation Act 1996, s 2(f).
[107] *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. & Ors.* (2018) 6 SCC 287.
[108] *Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India* (2019) 15 SCC 131.

momentum to mediation the Indian legal framework. The adoption of online mediation is beneficial to parties in the post-pandemic society.

4. The 2015 amendment to Section 34 of the Arbitration & Conciliation Act, 1996 won't apply to Section 34 applications filed prior to it.

The Supreme Court in *Ratnam Sudesh Iyer v. Jackie Kakubhai Shroff*[109] examined whether an arbitral award could be challenged under Section 34 of the Act on the grounds of 'patent illegality' the arbitration proceedings had commenced before the 2015 amendment had come to force. Ruling on the nature of the award, the Apex Court held that for an award to be vitiated by patent illegality, the same has to be purely domestic in nature. The 2015 amendment won't be applicable on awards arising out of international relations.

The two-judge bench of Justices Sanjay Kishan Kaul and M.M.Sundaresh relied on *BCCI v. Kochi Cricket (P) Ltd.*[110] and *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*[111] cases and held that Section 34 Court proceedings already commenced before the 2015 Amendment Act came into effect will be subjected to the pre-2015 legal position as the 2015 Amendment Act is prospective.

5. Jurisdiction of High Court hearing an arbitration appeal is distinct from that of First Appellate Court in a civil suit.

The Supreme Court in *Punjab State Civil Supplies Corporation Ltd. v. Ramesh Kumar & Co.*[112] observed that the jurisdiction in a first appeal arising out of a decree in a civil suit is distinct from the jurisdiction of the High Court under Section 37[113] of the Arbitration Act arising from the disposal of a petition challenging an arbitral award. The court observed that under Section 37, the High Court was only required to determine whether the District Judge had acted contrary to the provisions of Section 34 of the Act in rejecting the challenge to the arbitral award. The Court observed that while considering a petition under Section 34 of the Act, it is well-settled that the Court does not act as an appellate forum. The High Court must not proceed as if it was exercising jurisdiction in a regular first appeal from a decree in a civil suit.

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[109] *Ratnam Sudesh Iyer v. Jackie Kakubhai Shroff* 2021 SCC OnLine SC 1032.
[110] *BCCI v. Kochi Cricket (P) Ltd.* (2018) 6 SCC 287.
[111] *Ssangyong Engg. & Construction Co. Ltd. v. NHAI* (2019) 15 SCC 131.
[112] *Punjab State Civil Supplies Corporation Ltd. v. Ramesh Kumar & Co.* 2021 SCC OnLine SC 1056.
[113] Arbitration and Conciliation Act 1996, s 37.

6. **Mere existence of an explicit clause isn't sufficient to make time the essence of a contract.**

The Supreme Court in *Welspun Specialty Solutions Ltd. v. ONGC*[114] observed that merely having an explicit clause may not be sufficient to make time the essence of the contract. The Court observed that whether the time is of the essence in a contract, has to be culled out from the reading of the entire contract as well as the surrounding circumstances.

In this case, the Arbitral Tribunal ruled that simply having a contractual clause that makes the time the essence of it would not be determinative; instead, an overall assessment of the contract's terms should be factored in. The District Court upheld the Tribunal's decision in a petition brought under Section 34 of the Arbitration Act, ruling that time was not the essence of the contract and that only actual losses suffered could be granted. The Uttarakhand High Court, while allowing the Arbitration Appeal, disagreed with this view and ordered the award to be set aside.

The Supreme Court observed that the Arbitral Tribunal's reliance on the contractual conditions and conduct of parties to conclude that the existence of an extension clause dilutes time, being the essence of the contract was by rules of contractual interpretation. And the same was done by Section 55[115] of the Indian Contract Act.

7. **Arbitrator cannot modify award on an application under Section 33 of the Arbitration Act.**

In *Gyan Prakash Arya v. Titan Industries Ltd.*,[116] the Supreme Court observed that except in arithmetical and/or clerical error cases, an arbitrator could not modify an arbitration award on an application filed under Section 33[117] of the Arbitration Act.

One of the parties attempted to have the amended Arbitration award set aside, but it was denied. In addition, the appeal against this ruling was denied. It was argued before the Supreme Court that the arbitrator's original award had neither arithmetical nor typographical errors. It was argued that the City Civil Court and the High Court made substantial errors in maintaining the arbitrator's ruling accepting the application filed under Section 33 of the Act and altering the award in the alleged exercise of Section 33 powers. The court agreed with this assertion, noting that the

[114] *Welspun Specialty Solutions Ltd. v. ONGC* 2021 SCC OnLine SC 1053.
[115] Indian Contract Act 1872, s 55.
[116] *Gyan Prakash Arya v. Titan Industries Ltd.* 2021 SCC OnLine SC 1100.
[117] Arbitration and Conciliation Act 1996, s 33.

arbitrator's ruling in the application under Section 33 of the 1996 Act is outside the scope and ambit of Section 33 of the 1996 Act.[118]

[118] Arbitration and Conciliation Act 1996, s 33.