



Legal Updates on Arbitration

MRP Advisory

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By way of this article, the author intends to capture the arbitration judgments issued by the Supreme Court in the last quarter (i.e., from July- September 2024)

1. SC rules on power of Court under Section 37 of Arbitration and Conciliation Act, 1996 to remand the matter to Court under Section 34.

Bombay Slum Redevelopment Corporation Private limited v Samir Narain Bhojwani Civil Appeal No. 7247 of 2024

Date of Judgment: 08 July 2024

The Supreme Court examined the scope of remand by a Division Bench under Section 37 of the Arbitration and Conciliation Act, 1996, to the Single Bench under Section 34 of the same Act. In its ruling, the Supreme Court affirmed that the Division Bench holds the authority to remand matters to the Court under Section 34. However, the Court clarified that the exercise of such remand power is confined to exceptional circumstances. The Court provided three specific illustrations for such scenarios: (1) when summary disposal of a petition under Section 34 occurs without due consideration of merits; (2) when interference with an arbitral award takes place without serving notice to the respondent; and (3) when a decision is rendered in proceedings under Section 34 while one or more contesting parties are deceased and their legal representatives have not been brought on record. The Supreme Court clarified that CPC is not applicable to arbitral proceedings. Accordingly, the power to remand is not sourced from the CPC. This judgment reinforces the principles governing remand orders in arbitration-related matters.

2. Supreme Court strictly interprets Section 4 and 12 of Limitation Act while rejecting a petition under Section 34 of Arbitration and Conciliation Act, to include vacation period while computing limitation.

State of West Bengal and Ors v Rajpath Contractors and Engineers Ltd. Civil Appeal No. 7246 of 2023

Date of Judgment: 08 July 2024

The Supreme Court dealt with an arbitral award issued by the Tribunal on 30 June 2022. From 1 October to 30 October 2022, the High Court—where a challenge to the award under Section 34 of the Arbitration and Conciliation Act, 1996 was filed—was closed for pooja vacation. As per Section 34(3) of the A&C Act, the limitation period for challenging an arbitral award is three months, with the Court having the discretion to extend this period by an additional 30 days.

The Supreme Court noted that under Section 12(1) of the Limitation Act, the limitation period for filing the challenge began on 1 July 2022. Accordingly, the three-month period expired on 30 September 2022. As mentioned earlier, the High Court was closed from 1 October until 30 October 2022 due to vacation.

The Court further observed that the exclusion under Section 4(1) of the Limitation Act did not apply in this case, as the three-month limitation period had already ended on 30 September 2022, a day before the vacation began. Since the three-month period had expired on 30 September 2022, the Court held that the vacation period would be counted within the additional 30-day extension permitted under Section 34(3).

As a result, although the petition was filed on 31 October 2022, the day after the vacation ended, it was deemed time-barred under Section 34 and was dismissed.

3. The Supreme Court clarified relying on the principle of separability that an arbitration clause will survive even if there is a full and final settlement by accord and satisfaction under Section 63 of Indian Contract Act, 1872.

SBI General Insurance Co Ltd v Krish Spinning Civil Appeal No. 7821 of 2024

Date of Judgment: 18 July 2024

Ratio: The Supreme Court considered the effect of executing a discharge voucher, purportedly in full and final settlement between parties, on the enforceability of an arbitration clause.

In addressing this issue, the Court reviewed two key documents: a consent letter and an advance discharge voucher. It noted that in the insurance sector, it is a common practice for insurers to secure undated discharge vouchers from the insured in advance, often requiring signatures on dotted lines before processing claims payments.

The concept of discharge vouchers is rooted in Section 63 of the Indian Contract Act, 1872, which allows a promisee to waive or remit the performance of a promise. The Court invoked the doctrine of separability under Section 16 of the Arbitration and Conciliation Act, 1996. It clarified that an arbitration clause, even if embedded in a contract, should be treated as a distinct and independent agreement. Moreover, a ruling by an arbitral tribunal declaring the main contract void does not affect the validity of the arbitration clause.

On the principle of separability, the Supreme Court held that even if the parties agree to discharge their obligations under the substantive contract, this cannot be taken to mean that they also intend to waive their obligation to resolve disputes arising from that contract through arbitration. In support of this reasoning, the Court cited *National Insurance Co. Ltd. v. Boghara Polyfab* [(2009) 1 SCC 267], concluding that when the alleged full and final settlement itself becomes a point of contention, it constitutes a dispute "in relation to" or "in connection with" the original contract.

The Court also referred to its rulings in *M/s Arif Azim Co. Ltd. v. M/s Aptech Ltd.* [2024 INSC 155] and *In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899*. It emphasized that when deciding an application for the appointment of an arbitrator, referral courts should avoid conducting intricate evidentiary inquiries, such as determining whether the claims are time-barred, as these matters should be left to the arbitrator's discretion.

4. Supreme Court clarified that initiating of proceedings under Section 138 of Negotiable Instruments Act 1881 does not imply continuing cause of action to initiate arbitration.

Elfit Arabia and Anr v Concept Hotel BARONS Limited and Ors Arbitration Petition (Civil) No. 15 of 2023

Date of Judgment: 09 July 2024

In this case, the Supreme Court considered a petition under Section 11 of the Arbitration and Conciliation Act, 1996, where the proceedings were initiated based on a cause of action that arose in 2011. The Court reaffirmed that under Section 11, it holds the authority to dismiss claims that are ex-facie barred by limitation. Given that

the notice invoking arbitration was issued 11 years after the cause of action had arisen, the Court found this delay sufficient to dismiss the petition as time-barred under the Act. One of the parties sought to argue that the existence of a pending complaint under Section 138 of the Negotiable Instruments Act, 1881, should be treated as a “continuing cause of action,” thereby extending the limitation period for initiating arbitration. However, the Court clarified that arbitration proceedings and criminal proceedings under Section 138 of the Negotiable Instruments Act arise from distinct and separate causes of action. The initiation of a Section 138 complaint does not create a continuing cause of action that would delay or suspend the limitation period for invoking arbitration.

The Court’s decision underscores the clear separation between arbitration under the Arbitration and Conciliation Act and criminal liability under the Negotiable Instruments Act. It rejected the argument that criminal proceedings could serve as a basis to extend the time for initiating arbitration, emphasizing that arbitration must be invoked within the prescribed limitation period, failing which it is liable to be dismissed.

5. SC clarifies the scope of awarding compound interest by interpreting the term ‘awarded amount’ to include only principal awarded amount and not interest that accrued upto issuance of award.

M/D Khosla and Company v Union of India Special Leave Petition (Civil) No. 812 of 2014

Date of Judgment: 07 August 2024

This case involved an arbitral award and a court decree that stipulated interest at 12% per annum on the awarded amount up to the date of the award and 15% per annum from the date of the award until the realization of the awarded or decretal amount. The Respondent had paid the principal amount of compensation, along with 12% interest for the pre-award period and 15% for the post-award period on the principal amount. However, the Petitioner was dissatisfied and sought execution to recover an alleged shortfall in interest. The Petitioner argued that the 15% post-award interest should apply not only to the principal compensation amount but also to the 12% simple interest accrued during the pre-award period.

The Court examined the provisions of Sections 17 and 34 of the CPC, along with Section 3 of the Interest Act, 1978. It referred to Sub-section (3) of Section 3, which generally prohibits courts from awarding interest on interest unless explicitly stated by statute or contract terms. Since the 12% and 15% interest rates were specified only on the ‘awarded amount’ and there was no clear indication that the 15% interest was to be applied on the 12% interest, the Court upheld the consistent rulings of both the High Court and District Court. As a result, the Special Leave Petition (SLP) was dismissed.

6. SC clarified the correct and appropriate date to determine foreign exchange rate for converting award amount expressed in foreign currency to Indian Rupees. Further, it also ruled on how interim measures concerning deposit could be issued for awards in foreign currency.

DLF Limited and Anr v Koncar Generators and Motors Limited Civil Appeal No. 7702 of 2019

Date of Judgment: 08 August 2024

The Supreme Court in this judgment was identifying the relevant date for determining the foreign exchange rate used to convert an award amount expressed in foreign currency to Indian Rupees (INR). This case involved two deposits. The first deposit of awarded amount permitted the award holder to withdraw deposited amount subject to issuance of an appropriate security after applying to Court. However, the second deposit did not permit such withdrawal. It was contended that in relation to both deposits, since exchange rate was determined while depositing the amount in INR, the same must serve as date for determining the foreign exchange rate used to

convert an award amount expressed in foreign currency to Indian Rupees (INR). The Court noted that Order 21 Rule 1 embodies a rule of prudence that once amount is tendered by JD, whether in form of a court deposit or other forms of payment such as DD or cheque, the JD cannot be made liable to pay interest.

However, the Court did not agree with this rationale and identified two circumstances regarding the determination of the appropriate date for the exchange rate:

7. Once a deposit is made by the award debtor and the award holder is allowed to withdraw the amount—even if such withdrawal is conditional—the Court must consider that the award holder can access and benefit from the deposit.
8. If the Respondent is not permitted to benefit from the deposited amount, then the foreign exchange rate will be the date on which objections against the award under Section 48 are finally decided and disposed of. The Court noted that enforceability is automatic and deemed under Section 49 after objections against such an award under Section 48 are finally decided and disposed of.
9. The Court also noted that after the conversion of the deposited amount, the same must be adjusted against the remaining amount of principal and interest pending under the arbitral award. This remaining amount must be converted on the date when the arbitral award becomes enforceable, i.e., when the objections against it are finally decided

7. SC exercises its authority under Article 142 of the Constitution of India to apply waiver of right to object in arbitral proceedings involving Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983

Modern Builders v State of MP and Anr Civil Appeal Nos .8528-8529 of 2024

Date of Judgment: 30 August 2024

This case involves a reference to the Madhya Pradesh Arbitration Tribunal, Bhopal (hereinafter referred to as "the Arbitration Tribunal"), in accordance with Section 7 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 ("1983 Act"). The dispute arose concerning the construction of a minor bridge. The Petitioner initially approached the Arbitration Tribunal, which rejected the application and directed the Petitioner to seek recourse under the Arbitration and Conciliation Act, 1996. Consequently, the Petitioner filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996. Notably, the State Government, as the Respondent, did not challenge the applicability of the 1983 Act and contested the petition only on merits. The petition was allowed, an arbitrator was appointed, and an award was issued.

Further, during the arbitral proceedings, Respondent did not invoke Section 16(1) of the Arbitration Act to raise any jurisdictional objection concerning the applicability of the 1983 Act. The award was later challenged under Section 34 of the Arbitration and Conciliation Act, 1996, on the grounds that the 1983 Act was applicable, citing the Supreme Court's decision in *Madhya Pradesh Rural Road Development Authority & Anr. v. L. G. Chaudhary Engineers and Contractors* (2018) 10 SCC 826. However, this challenge was dismissed.

Subsequently, the Respondent appealed before the High Court, and under Section 37 of the Arbitration Act, the High Court set aside the award, holding that the 1983 Act was applicable. The Supreme Court, on appeal, set aside the High Court's decision and remanded the case back to the High Court under Section 37 of the Arbitration and Conciliation Act, 1996, for reconsideration on the merits.

The Supreme Court reasoned that the Respondent had failed to object under Section 11 of the Arbitration and Conciliation Act, 1996, and similarly failed to raise any jurisdictional challenge before the Arbitral Tribunal under Section 16(1) of the Act during the arbitral proceedings. Exercising its powers under Article 142 of the Constitution of India, the Supreme Court set aside the High Court's order and directed it to reconsider the matter on its merits.

8. SC clarifies that an award ignoring contractual provisions is liable to be set aside. Further, while detailing the scope of Section 37 of Arbitration and Conciliation Act, 1996, it upheld and highlighted the difference between pre-reference interest, pendente lite and post award interest.

Pam Developments Private Limited v State of West Bengal and Anr Civil Appeal No. 9781-9782 of 2024

Date of Judgment: 23 August 2024

The Supreme Court (SC) considered three claims in an arbitral award, which had been previously challenged in the District Court under Section 34 and in the High Court under Section 37 of the Arbitration and Conciliation Act, 1996. While hearing a Special Leave Petition (SLP) against the High Court's decision, the SC addressed each claim as follows:

- 1. Claim for losses due to idle labor, machinery, etc.:** The arbitrator accepted this claim, applying the Hudson's formula to permit 3% of the contract amount for expenses related to on-site establishment, including engineers and supervisors. The respondent's challenge to this award was dismissed by the District Court under Section 34, which held that the arbitrator's findings were not irrational, insensible, or unrealistic, nor did they violate public policy. However, the High Court, exercising its jurisdiction under Section 37, scrutinized the relevant contractual clauses and found the claim impermissible under the contract. The Supreme Court ultimately set aside the award, explaining that the arbitrator failed to account for a specific contractual provision, which explicitly stated: "No claim for idle labor, enhanced labor rates, additional establishment costs, or related expenses would be entertained under any circumstances." The SC clarified that disregarding contractual provisions constitutes valid grounds for setting aside an arbitral award.
- 2. Claim for interest on delayed payment of running account (RA) bills:** The arbitrator awarded interest for delayed payments, reasoning that the claimant was entitled to compensation for any loss or damage to capital arising naturally from the breach, as stipulated in the contract, and since there was no prohibition against interest on "blocked capital." The District Court upheld this decision under Section 34. However, the High Court set aside the award under Section 37, ruling that there was no factual delay in the payments. The Supreme Court overturned the High Court's decision, stating that its conclusion—that payments were made soon after the bills were prepared—was not a valid ground for interference under Section 37. The SC also noted that the High Court's criticism that the arbitrator neither established nor discussed specific issues was not sufficient grounds to annul the award.
- 3. Claim for interest on the awarded sum:** The arbitrator granted pre-award interest at 12% per annum and post-award interest at 9.5% per annum. The District Court upheld this award. However, the High Court held that since the contract prohibited the granting of pre-reference interest, it could not be awarded for that period and accordingly modified the award to allow pendente lite and post-award interest only. The Supreme Court addressed this by distinguishing the differences between the Arbitration and Conciliation Act of 1940 and that of 1996. It observed that the latter does not explicitly distinguish between pre-reference and pendente lite interest, treating both under the same provision. Furthermore, the SC emphasized that the 1996 Act upholds party autonomy and limits the arbitrator's power to award pre-

reference and pendente lite interest if the contract bars such payments. Since the contract in this case did not expressly forbid pre-reference interest, the SC ruled that the High Court should not have set it aside.

9. The Supreme Court held that an application for extension of time under Section 29A(4) of the Arbitration and Conciliation Act is maintainable even after the expiry of the original or extended period for passing an arbitral award, provided there is sufficient cause.

Rohan Builders (India) Private Limited v Berger Paints India Limited SLP (Civil) No. 24489 of 2023

Date of Judgment: 12 September 2024

The SC was addressing the issue of whether an application for extension of time under Section 29 A of Arbitration and Conciliation Act, 1996 can be filed after expiry of the period for making an arbitral award. The Division Bench of Patan HC¹ and Calcutta HC² were of the view that the once the mandate of the arbitral tribunal is terminated by afflux of time of twelve months, or when so consented to by the parties after a further six-month extension, the power of the court to extend time under Section 29A(4) cannot be invoked. However, a catena of judgments from other High Courts have taken an opposite view., i.e., High Court of Delhi³, High Court of Bombay⁴, High Court of Kerala⁵, High Court of Madras⁶ and High Court of Jammu and Kashmir and Ladakh⁷. Further, the Calcutta High Court concurred with this opposite view.⁸ The Supreme Court went on to accept the opposite view.

The Supreme Court observed that the key issue revolved around interpreting Section 29A(4). It emphasized that legal provisions must be interpreted not only based on the text but also in context, akin to the approach under the Arbitration and Conciliation Act, 1940. The Court underscored that words can carry various meanings, and a strictly literal interpretation could sometimes result in manifest absurdity or unjust outcomes. In this case, the term "terminate" within Section 29A(4) was not to be interpreted strictly but rather in light of the context provided by the provision.

The Court reasoned that the mandate of the arbitral tribunal does not "strictly" end when the time period lapses, as long as an application for an extension is filed in a timely manner. Furthermore, under Section 29A(5), the power to extend time is contingent upon the presence of sufficient cause. Extensions are not granted automatically upon the mere filing of an application, as courts must exercise judicial discretion to prevent abuse of the legal process through frivolous or vexatious applications.

Additionally, the Supreme Court noted the following when considering an extension application:

- a. Section 29A(4) allows the court to substitute one or all arbitrators if necessary.
- b. Under Section 29A(7), if new arbitrators are appointed, the reconstituted tribunal is considered a continuation of the original tribunal. Moreover, according to the second proviso of Section 29A(4), the mandate of the arbitral tribunal continues if an application under Section 29A(5) is pending. However, any extension of time must be granted by the court in accordance with sub-sections (5), (6), and (8).
- c. The power to extend the time for making an award rests solely with the court, not the arbitral tribunal. Therefore, the arbitral tribunal is prohibited from pronouncing the award while an application under Section 29A(5) remains pending before the court.

Consequently, the Court concluded that an application to extend the time period for passing an arbitral award under Section 29A(4), in conjunction with Section 29A(5), is valid even after the expiry of the initial twelve-month period or any extended six-month period.

10. SC refers non signatory to arbitration because of complex factual questions relating to its involvement in the contract.

Ajay Madhusudan Patel and Ors v Jyotindra S Patel and Ors Arbitration Petition No. 19 of 2024

Date of Judgment: 20 September 2024

The SC was considering the issue of whether one of parties being a non signatory to agreement can be referred to arbitration and whether they are “veritable” parties to arbitration. The Court noted that an important factor to be considered by the Courts and Tribunals is the participation of the non-signatory in the performance of the underlying contract. The Court made a list of factual issues to determine whether the non signatory was involved in performance of contract. The existence of factual issues was found as the basis to refer the matter to Arbitration Tribunal for resolution.

11. Supreme Court Upholds Tribunal's Interpretation of Implied Contract Terms and Limits Interference Under Section 34 of Arbitration Act

OPG Power Generation Private Limited v Enexio Power Cooling Solutions India Private Limited and Anr Civil Appeal No. 3981-3982 of 2024

Date: 20 September 2024

The Court considered the power to set aside an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996, addressing the following key issues:

a. **Implied Terms in Contracts:** The Court examined whether an unexpressed term can be implied as a condition in a contract. It held that such a term can only be implied if the parties must have intended it to form part of their agreement. It is insufficient for the Court to conclude that the parties would have reasonably adopted the term if it had been suggested. Instead, it must be a term that “went without saying,” essential to giving business efficacy to the contract. Before reading an implied condition into the contract, the business efficacy doctrine must be carefully invoked.

b. **Upholding a Plausible Tribunal View:** The Tribunal found that an arbitral tribunal has the jurisdiction to interpret a contract, considering its terms, the parties' conduct, and the correspondences exchanged, in line with Section 34(2-A) of the Arbitration Act, which limits the scope of interference with arbitral findings. The Court upheld the Tribunal's plausible view, noting the following:

- Gita Power was a holding company of OPG, which was a signatory to the arbitration agreement.
- Gita Power issued the Purchase Order and actively participated in forming the contract.
- Gita Power provided the initial 10% of the purchase price.
- Subsequent Purchase Orders issued by OPG mirrored Gita Power’s terms, issued to resolve technical issues.

Finally, the Supreme Court affirmed the Tribunal’s view on the limitation issue, as it was considered a plausible interpretation.

MRP Advisory - Anuraag Iyer

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