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LAW ADVISORY

Arbitration Newsletter

April 2025

Disortho S.A.S. v. Meril Life Sciences (P) Ltd., 2025 SCC OnLine SC 570 – *Supreme Court Clarifies Law Governing Arbitration Agreements, holds that Indian Courts Retain Jurisdiction Despite Foreign Venue* – The Supreme Court of India examined the applicable law governing an arbitration agreement in the absence of an express choice. The Court reaffirmed that while party autonomy is paramount in arbitration, when the governing law of the arbitration agreement is not explicitly stated, the presumption favors the law governing the main contract (*lex contractus*).

The judgment applied the well-established three-step test from ***Sulamérica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A., [2012] EWCA Civ 638***, emphasizing that in the absence of an express choice, Courts should determine an implied choice based on contractual intent and, if necessary, apply the "closest and most real connection" test.

The dispute arose in an international commercial arbitration setting where the Petitioners, a foreign entity, sought the appointment of an arbitrator under Indian law, contending that Indian Courts had jurisdiction due to the contract being governed by Indian law. The Respondents opposed this, arguing that the arbitration should be conducted in Colombia under Colombian law, as the arbitration venue and procedural rules were stipulated to be those of the Arbitration and Conciliation Centre of the Chamber of Commerce of Bogotá. The Supreme Court analysed two key clauses in the agreement: Clause 16.5, which stipulated that the contract would be governed by Indian law and that Gujarat Courts would have jurisdiction over disputes, and Clause 18, which provided for arbitration in Bogotá, Colombia, under Colombian arbitration rules and stated that the award would be governed by Colombian law.

A primary issue before the Court was whether Clause 18, which referred to arbitration proceedings in Colombia, meant that Indian Courts lacked jurisdiction to appoint an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996. The Court noted the absence of an express provision stating which law would govern the arbitration agreement itself. Applying the three-step test from *Sulamérica*, it first found that there was no express choice of law governing the arbitration agreement. Moving to the second step, the Court determined that there was a strong presumption in favour of the law governing the main contract, which was Indian law. This was reinforced by Clause 16.5, which provided for Indian law to govern the agreement and disputes arising from it. At the third stage, applying the "closest and most real connection" test, the Court found that Indian law had the closest connection to the arbitration agreement

because the contract as a whole was governed by Indian law and Gujarat Courts had been given jurisdiction.

The Court rejected the argument that choosing Colombia as the arbitration venue implied that Colombian law governed the arbitration agreement. It emphasized that the *seat* of arbitration carries legal significance, but a mere designation of venue does not automatically displace the governing law of the contract. The Court also stressed the principle that conflicting contractual clauses should be harmonized wherever possible rather than interpreted in isolation. It ruled that Clause 16.5 and Clause 18 were not mutually exclusive—Indian law could govern the arbitration agreement while arbitration proceedings could take place in Colombia.

Ultimately, the Court held that Indian Courts retained jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996, and proceeded to appoint a sole arbitrator. It clarified that while arbitration would take place in Colombia, the arbitration agreement itself was subject to Indian law, and procedural rules of the Delhi International Arbitration Centre would apply. The ruling reinforces the importance of clarity in drafting arbitration clauses and provides significant guidance on resolving conflicts in contractual interpretation in international commercial arbitration.

Sulamérica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A. (2012) 107 ICLQ 91 *– Enforcement of Arbitral Award in Brazil*

In this case, the Brazilian Federal Supreme Court addressed the enforcement of an international arbitral award in Brazil. The dispute arose between Sulamérica Cia Nacional De Seguros (the Claimant), an insurance company, and Enesa Engenharia (the Respondent), a construction company, under an insurance policy that involved an arbitration clause. The Claimant sought the enforcement of an arbitral award rendered in favor of Enesa by an arbitral tribunal in London.

The Brazilian Court held that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which Brazil is a signatory, governed the enforcement of arbitral awards. However, it set limits on enforcement, particularly when an award conflicts with Brazilian public policy.

The Court ruled that foreign awards could be denied recognition or enforcement in Brazil if they violated Brazilian public policy. In this case, the Brazilian Court found that the arbitral award did not violate any public policy and, therefore, upheld its enforcement.

The ruling clarified the scope of judicial review over foreign arbitral awards in Brazil, balancing the country's commitment to international arbitration with the protection of its domestic public policy.

M/s Pramila Motors Pvt. Ltd. v. M/s Okinawa Autotech International Pvt. Ltd. REQ. CASE No.53 of 2024 – *Patna High Court on Venue vs. Seat in Arbitration – Exclusive Jurisdiction of Court at Venue* – The Patna High Court held that in the absence of an express clause specifying the *seat* of arbitration, the Court mentioned in the *venue* clause would have exclusive jurisdiction.

The Court clarified that where a contract only designates a venue without explicitly defining the seat, it must be presumed that the parties intended for the arbitration to be conducted at that location with the Courts of that place exercising jurisdiction. This decision aligns with the Supreme Court's precedent in *Brahmani River Pellets Ltd. v. Kamachi Industries Ltd., (2020) 5 SCC 462*, reinforcing the principle that where the contract specifies a particular location as the arbitration venue, jurisdiction is exclusive to that place.

The dispute arose out of a dealership agreement under which the Petitioner was to act as a dealer for electric vehicles manufactured by the Respondent. Due to delays in vehicle supply, the Petitioner terminated the agreement and invoked the arbitration clause, requesting the Respondent to either consent to its nominated arbitrator or propose an alternative. Since the parties failed to mutually agree on an arbitrator, the Petitioner approached the Patna High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking the appointment of an independent arbitrator.

The Respondent opposed the petition, contending that Clause 36.3 of the agreement explicitly designated New Delhi as the *venue* of arbitration and that, therefore, only the Delhi High Court had jurisdiction over the dispute. The Petitioner, however, relied on the Supreme Court's ruling in *Ravi Ranjan Developers (P) Ltd. v. Aditya Kumar Chatterjee, 2022 SCC OnLine SC 568*, which distinguished between *seat* and *venue* and held that the mere designation of a *venue* does not automatically confer jurisdiction.

The Patna High Court analysed these competing arguments and sided with the Respondent, emphasizing that *Brahmani River Pellets Limited* had already established the principle that if a contract specifies a Court at a particular location, only that Court would have jurisdiction, thereby excluding all other Courts. The Court found that the agreement in question did not contain any express clause specifying the *seat* of arbitration;

rather, it only provided for New Delhi as the *venue*. Consequently, the Court concluded that the designation of New Delhi as the arbitration *venue* must be interpreted as an intention to confer exclusive jurisdiction on the Delhi High Court.

Further, the Court rejected the Petitioner's reliance on *Ravi Ranjan Developers*, stating that the case did not apply in situations where the agreement contained no separate seat clause. Since the agreement only mentioned *venue*, and there was no conflicting provision specifying a different seat, the Court ruled that the venue must be treated as the seat by default. The Court further observed that absent any additional clause apart from Clause 36.3, which stipulated New Delhi as the arbitration venue, there was no basis to infer that the parties intended the *venue* and *seat* to be distinct.

On these grounds, the Patna High Court dismissed the petition, holding that only the Delhi High Court had jurisdiction to entertain arbitration-related proceedings. The ruling underscores the need for precision in drafting arbitration agreements and reinforces the principle that an expressly designated *venue* may be treated as the *seat* where no contrary intention is evident from the agreement.

In India, the seat of arbitration refers to the legal jurisdiction that governs the arbitration process, determining the applicable laws and which Courts have authority over the proceedings. It is the place that confers the legal framework, including procedural laws and the Courts that can intervene in case of challenges. The venue, on the other hand, is simply the physical location where hearings or proceedings take place. While the venue can be changed for convenience, the seat is essential as it dictates the legal and judicial oversight, ensuring that the arbitration follows the appropriate rules.

M/S Enmas GB Power Systems Projects Ltd and Micro v. Small Enterprises Facilitation Council & anr. Writ Petition no. 29610 of 2017 – *The Karnataka High Court holds that the MSME Council has the obligation to Refer Matters to Arbitration, and Cannot Pass Award on Account of Failure of Conciliation Proceedings* – Clarifying the role of the Micro and Small Enterprises Facilitation Council (MSME Council) under the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act), the Karnataka High Court held that the Council cannot pass an arbitral award merely because conciliation proceedings have failed. Instead, it must either conduct arbitration itself or refer the dispute to an arbitral institution.

The dispute arose when the Petitioner placed a purchase order with the Second Respondent, on 14.02.2013 for the supply of materials. Due to non-payment of the full amount, the Second Respondent initiated conciliation proceedings under Section 18 of the MSMED Act. Multiple meetings were conducted by the Karnataka MSME Council, which ultimately issued an award on 14.03.2017, directing the Petitioner to pay ₹11,88,756 as the principal outstanding amount, along with interest at three times the bank rate notified by the Reserve Bank of India.

The Petitioner challenged this award, arguing that since only conciliation proceedings had taken place, the Council lacked jurisdiction to pass an award. According to the Petitioner, once conciliation failed, the Council was required by law to either terminate conciliation and take up arbitration itself or refer the matter to institutional arbitration. The Respondent, however, contended that the only available recourse was under Section 19 of the MSMED Act, which requires a deposit before a challenge to an award can be entertained, and thus the writ petition was not maintainable.

The Karnataka High Court, after analysing Section 18 of the MSMED Act, ruled in favour of the Petitioner. The Court noted that under Section 18(2), the MSME Council can conduct conciliation on its own or refer it to an alternative dispute resolution (ADR) institution. However, under Section 18(3), if conciliation fails, the Council is legally obligated to either conduct arbitration itself or refer the matter to an arbitral institution, treating the dispute as if it were governed by an arbitration agreement under Section 7(1) of the Arbitration and Conciliation Act, 1996.

The Court found that the Council erred in passing an award despite conciliation failing, without following the arbitration process prescribed under the Act. It observed that the Council had reached a unilateral conclusion that the claim of the Respondent was credible without giving the Petitioner an opportunity to file objections, present evidence, or contest the claim in an arbitration proceeding. This was a fundamental violation of procedural fairness and a clear jurisdictional error.

The Court further held that since the award was issued without legal authority, it was *non est* in law, meaning it had no legal existence. The Court rejected the Respondent's contention that the only remedy available was under Section 19, clarifying that since the award itself was without jurisdiction, a writ petition challenging its validity was maintainable.

Accordingly, the Karnataka High Court allowed the petition, set aside the award, and remitted the matter back to the Karnataka MSME Council. It

directed the Council to formally terminate the conciliation proceedings and thereafter decide whether to conduct arbitration itself or refer the dispute to an arbitral institution. The ruling serves as a crucial precedent ensuring that MSME Councils adhere to statutory procedural requirements and do not exceed their jurisdiction in dispute resolution.

The **MSME Council** in India is a quasi-judicial body established to resolve disputes between Micro, Small, and Medium Enterprises (MSMEs) and buyers, particularly concerning delayed payments. It operates under the framework of the **Micro, Small, and Medium Enterprises Development (MSMED) Act, 2006**, which aims to protect the interests of MSMEs. The Council facilitates the speedy resolution of payment-related disputes, ensuring that MSMEs receive fair compensation for the delay in payments by buyers.

The MSME Council is empowered to adjudicate matters related to outstanding dues and can pass orders for payment within a stipulated timeframe. It offers an alternative to lengthy litigation, providing a more accessible and cost-effective forum for MSMEs to enforce their rights.

M/s Dewan Chand v. Chairman cum Managing Director and Another ARB.P. 1387/2022 – *The Delhi High Court holds that Unconditional Withdrawal of Prior Section 11 Petition Bars Subsequent Petition on Same Cause of Action* – The Delhi High Court held that an unconditional withdrawal of a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996, without explicit liberty to file a fresh petition, bars any subsequent petition on the same cause of action. The judgment applies the principles of Order 23 Rule 1(4) of the Code of Civil Procedure, 1908, which precludes a party from instituting fresh proceedings once a matter is withdrawn without liberty.

The dispute arose out of a contract between the Petitioner and Respondent No. 1, which pertained to the construction of a Staff Training Institute Building and other ancillary works, with a contract value of ₹13.57 Crores. Respondent No. 2 was engaged as the Project Management Consultant (PMC) for the project. The Petitioner claimed that it had completed the work as per the agreed schedule, a position disputed by the Respondents.

The Petitioner had previously filed two petitions under Section 11 for the appointment of an arbitrator. The first petition, Arb P. 24/2017, was filed after the Petitioner invoked arbitration on

28.09.2016. The Court had permitted the Petitioner to withdraw the petition with liberty to refile with better particulars on 16.01.2017. However, the Petitioner entered into a settlement agreement with the Respondents on 23.02.2017 instead of refiling. The second petition, Arb P. 277/2021, was filed on 18.02.2021, and was withdrawn unconditionally on 02.08.2022, without liberty to refile. The current petition was filed based on a fresh notice dated 08.08.2022, following the invocation of Bank Guarantees by Respondent No. 2 in connection with the contract.

The Court examined the implications of the unconditional withdrawal of the second petition, referring to Order 23 Rule 1(4) of the CPC, which prevents the institution of fresh proceedings on the same cause of action when a previous petition has been withdrawn without liberty. The Court noted that even though Order 23 Rule 1 refers to suits, its principles apply equally to petitions filed under the Arbitration and Conciliation Act, 1996. The Court relied on previous judgments such as ***HPCL Bio-Fuels Ltd. v. Shahaji Bhanudas Bhad, 2024 SCC OnLine SC 3190***, where the Supreme Court extended these principles to arbitration petitions, and ***BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738***, which addressed the issue of res judicata in arbitration proceedings.

The Court observed that the Petitioner had voluntarily chosen to withdraw the second petition without liberty, despite the invocation of the Bank Guarantees occurring during the pendency of that petition. The invocation of the Bank Guarantees on 12.04.2022 did not create a new cause of action, as it occurred while the second petition was still pending. The Petitioner consciously chose to withdraw the second petition unconditionally on 02.08.2022, thus the Court ruled that the Petitioner could not reinitiate the proceedings on the same cause of action. The Court further held that the unconditional withdrawal of the second petition barred the filing of a fresh petition under Section 11, and the invocation of the Bank Guarantees did not change the position, as it was related to the same cause of action.

In conclusion, the Delhi High Court dismissed the present petition, emphasizing that the Petitioner was precluded from filing a fresh petition due to the unconditional withdrawal of the second petition. The Court highlighted the significance of understanding the legal consequences of such withdrawals, reinforcing that without explicit liberty to refile, a subsequent petition on the same cause of action cannot be entertained. This decision underscores the importance of adhering to procedural rules and the implications of withdrawal in arbitration-related proceedings.

M/s Brij Lal & Sons v. Union of India FAO 351/2010 & CM APPL. 54765/2022 – *Delhi High Court rules that a Publication Does Not Invalidate Award Unless It Is Shown That The Award Has Materially Affected Rights Of Parties* – The Delhi High Court bench while dismissing an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 has observed that delay in publication of award does not invalidate the award unless it is shown that the award has materially affected the rights of the parties.

The case involved a contract for work between the Appellant and Respondent No. 1, valued at ₹1,53,054. The contract was to be completed by 31.10.1999; however, the work was finished only on 03.04.2000, following an extension of time. After completing the work, the Appellant raised claims that were disputed by Respondent No. 1.

The dispute was referred to arbitration, with the arbitrator entering the reference on 03.09.2002. The final hearing was conducted on 04.08.2004, but the award was rendered only on 11.05.2005, after an inordinate delay of nine months. Dissatisfied with the award, the Appellant filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996, challenging the award before the Additional District Judge (ADJ). However, the ADJ dismissed the objections in an order dated 03.02.2010. The Appellant then appealed the ADJ's order under Section 37 of the Act.

The Appellant argued that the ADJ's order was flawed, contending that the delay in the publication of the award—specifically the nine-month delay after the final hearing—rendered the award invalid. The Appellant further contended that the award was legally defective as it failed to address the disputes outlined in the arbitration agreement. The Appellant also raised concerns regarding the invalidity of the stamp paper, which expired six months after the final hearing.

In contrast, the Respondents argued that the delay was not attributable to them, asserting that the Appellant had failed to complete the work efficiently within the agreed time frame. The Respondents also claimed that the Appellant's challenges to the award were baseless and part of a strategy to prolong the litigation.

The Court, in its analysis, reiterated the limited scope of review under Section 34 of the Arbitration and Conciliation Act, noting that the Court does not act as an appellate body. The Court emphasized that an arbitral award cannot be challenged on merits except on specific grounds outlined in the Act. Relying on precedents such as ***MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163*** and ***Hindustan Construction Company Limited v. National Highways Authority of India (2023)***

SCC OnLine SC 1063, the Court stressed that judicial intervention under Section 34 should be limited to situations where there is illegality, perversity, or violation of public policy.

The Court further discussed the concept of "public policy of India" under Section 34(2)(b)(ii), referencing ***ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705***, which clarified that an award in violation of statutory provisions could be considered against public policy. However, in the present case, the Court found no such violation. The Court acknowledged the delay in the publication of the award but held that the delay did not invalidate the award unless it could be shown that the delay had materially affected the rights of the parties. The Appellant did not demonstrate that the delay had prejudiced their case in any significant manner.

The Court concluded that the arbitrator had properly considered all the issues raised and had rendered reasoned findings. Re-examining the evidence would amount to impermissible appellate review of the award. The Court found no evidence of illegality or violation of public policy in the award. Therefore, the ADJ's decision to dismiss the objections was upheld, and the appeal under Section 37 was dismissed.

In Indian law, the term **"material effect"** refers to a significant or substantial impact on a legal right, obligation, or outcome. It is used to assess whether a particular action, event, or condition has sufficiently altered the core substance of a contract, dispute, or legal situation to warrant a change in the legal standing or outcome. For instance, in the context of contract law, a "material effect" may occur if a breach of contract substantially alters the performance or results expected by the parties.

Similarly, in arbitration, the presence of a material effect may influence the scope of claims or defenses presented. Courts in India consider whether a change or breach has a material effect on the terms and execution of an agreement, guiding decisions related to claims, remedies, and enforceability.

Fab Tech Works & Constructions Pvt. Ltd. vs Savvology Games Pvt. Ltd. & Ors. (Commercial Arbitration Application No. 419 Of 2024 and Related Matters) – *Invocation of Section 9 & Section 11 Of Arbitration Act Does Not Constitute Parallel Proceedings* – The Bombay High Court clarified the distinction between Section 9 and Section 11 of the Arbitration and Conciliation Act, 1996, emphasizing that they serve different purposes and do not result in parallel proceedings.

The matter arose from an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act") for the appointment of an arbitrator. The dispute between the parties originated under an Investment Agreement, where the Applicant invoked the arbitration clause. The Respondent argued that arbitration could not proceed simultaneously under both Section 9 and Section 11, as it would result in parallel proceedings.

In the previous decision of the Single Bench of the Bombay HC, the Court granted interim reliefs under Section 9 of the Act in July 2024, which required the Respondent to disclose certain information. However, the Respondent's compliance with the disclosure order was called into question in this appeal, as the document provided (Exhibit 'F') contained minimal information. The Applicant claimed that the disclosure was insufficient and did not comply with the Court's order.

The Court distinguished between the two provisions. It noted that Section 9 is intended to provide temporary interim relief to preserve the subject matter of arbitration, while Section 11 concerns the appointment of an arbitrator when there is a dispute over the existence of an arbitration agreement. The Court emphasized that the invocation of these sections does not amount to parallel proceedings, as they serve different functions in the arbitration process.

The Bench also observed that the Respondent had not appealed the Section 9 order or sought intervention, which further supported the view that the invocation of Section 9 and Section 11 were not contradictory or parallel proceedings. It referred to Section 11(6A) of the Act, which limits the Court's jurisdiction to examining the existence of the arbitration agreement, while substantive questions regarding the scope and validity of disputes are to be dealt with by the arbitral tribunal under Section 16.

Ultimately, the Court referred the matter to arbitration, appointing a sole arbitrator to adjudicate the disputes arising from the Investment Agreement. This ruling reinforces the principle that Section 9 and Section 11 serve distinct and complementary roles within the arbitration process, and the invocation of both does not constitute parallel proceedings.

The Court reaffirmed that Section 9 provides interim relief in support of arbitration, while Section 11 pertains to the appointment of an arbitrator. It clarified that invoking both provisions is not a case of parallel proceedings, emphasizing the specialized roles these sections play in facilitating arbitration.