

## This Fortnight in Arbitration

Volume 1 | Issue 1

01 March 2021 to 15 March 2021

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(1)

**Moratorium under IBC extends to set-aside petitions (Supreme Court of India)**

01 March 2021 | P Mohanraj & others v. M/s Shah Brothers ISPAT Pvt Limited | RF Nariman, Navin Sinha & KM Joseph JJ | 2021 SCC OnLine SC 152

When insolvency commences, a moratorium is declared under [Section 14 IBC](#) prohibiting "suits or continuation of pending suits or proceedings against the corporate debtor." But, in *Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd.*, 2017 SCC OnLine Del 12189, a single judge of the Delhi High Court had ruled that the moratorium does not hit a proceeding to set aside an award obtained by the corporate debtor because Section 14 IBC is intended to prohibit 'debt recovery action' against the corporate debtor. A challenge to an award in favour of the corporate debtor, it said, is not such an action.

The main question in *Mohanraj* was something else (whether the moratorium hit the institution of criminal proceedings for the dishonour of cheque). But *Power Grid* was cited in arguments.

Overruling *Power Grid*, the Supreme Court has ruled that "proceeding against the corporate debtor" covers a challenge to an award (just like an appeal filed against a suit-decree). Also, there may be a situation where an arbitral award against the corporate debtor is upheld and, as a result, monies would be payable by the corporate debtor.

Access the court's decision [here](#) and *see* para 74 (para 97 SCC OnLine).

**Categories:** [Section 34 | Application for Setting Aside Arbitral Awards](#) | [Insolvency | Moratorium](#) | [Section 14 IBC](#)

(2)

**Under Section 34 ACA, receiving an award means receiving a copy signed under Section 31 ACA (Supreme Court of India)**

02 March 2021 | Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies Pvt. Ltd.

| Indu Malhotra & Ajay Rastogi JJ | 2021 SCC OnLine SC 15

The date on which the parties receive a copy of the award signed under [Section 31 ACA](#) is the date on which the award comes into legal effect. It is from this date that:

- (a) The period of 30 days under [Section 33 ACA](#) for applying to correct or interpret the award or make an additional award begins.
- (b) The arbitral proceedings terminate as provided by [Section 32 ACA](#) (subject to Section 33 ACA).
- (c) The time limit specified under [Section 34 \(3\) ACA](#) to apply for setting aside an award starts to run.

Thus, held that even though the majority award was pronounced on 27 April 2018, the time limit started to run only on 19 May 2018 when the arbitrators delivered the signed copy of the award with the dissenting opinion.

Access the judgment [here](#).

**Categories:** [Section 34 | Application for Setting Aside Arbitral Awards](#) | [Section 31 ACA | Form and Contents of Arbitral Award](#) | [Section 32 ACA | Termination of Proceedings](#) | [Section 33 ACA | Correction and Interpretation of Award](#) | [Additional Award](#) | [Limitation](#) | [Receipt of Award](#) | [Making of Award](#)

(3)

**Meaning of international commercial arbitration ("ICA") (Supreme Court of India)**

04 March 2021 | Amway India Enterprises Pvt. Ltd. v. Ravindranath Rao Sindhia & another | BR Gavai JJ | 2021 SCC OnLine SC 171

Mr Sindhia, a US resident, applied to become Amway's distributor in India as a sole proprietorship. Mrs Sindhia, also a U.S. resident, was the co-applicant. The distributorship was granted in the name of Sindhia Enterprises (sole-proprietorship). Would an arbitration between the couple, on the one hand, and Amway on the other be an ICA?

The Delhi High Court said no and appointed an arbitrator. It reasoned that the central management of the distributorship was in India.

Reversing and distinguishing *Larsen & Toubro Ltd.—Scomi Engineering Bhd. v. MMRDA* (2019) 2 SCC 271, the Supreme Court said whatever be the transaction between the parties if at least one foreign national was involved (or a habitual foreign resident, foreign body corporate, or foreign government), the matter was an ICA notwithstanding that the business was carried on in India through an office [See [Section 2\(1\) \(f\) ACA](#)].

Access the decision [here](#).

**Categories:** [Section 2 ACA](#) | [Definitions](#) | [Section 2 \(1\) \(f\) ACA](#) | [International Commercial Arbitration](#)

(4)

#### **Scope of appellate court's power under Section 37 ACA (Delhi High Court)**

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04 March 2021| Prudent Broking Service Private Ltd. v. Poonam Maheshwari | FAO (Comm) 48/2021| Manmohan & Asha Menon JJ

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The court's jurisdiction under [Section 37 ACA](#) is limited. More so, when the award and the set-aside court have given concurrent findings of facts and interpreted the contract identically.

However, "upon insistence of learned counsel for appellant", facts perused and finding examined but no ground to interfere with the unanimous findings on interpretation of contract and conduct of parties, held, was made out.

Access the judgment [here](#).

**Categories:** [Section 37 ACA](#) | [Appealable Orders](#) | [Jurisdiction of Appellate Court](#)

(5)

**The set-aside court would not lift the corporate veil just because a different view on the evidence is plausible (Delhi High Court)**

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4 March 2021| Ahlcon Parenterals Ltd. v. Scan Biotech Ltd. | OMP (Comm) 91/2021 & I.A. No. 3301/2021 & I.A. No. 3302/2021 | Vibhu Bakhru J

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The arbitrator allowed some claim made against two sister companies located abroad but disallowed some. It acknowledged that it had the power to pierce the corporate veil but refused to do so on facts, saying mainly that the foreign companies were non-signatories and non-parties.

Affirming the award, the High Court ruled that though the material linking all companies was not insubstantial, the set-aside court was not an appellate court that could reappraise evidence and supplant its opinion. Thus, even if a different conclusion than the tribunal was plausible, it was not a ground to interfere. Further, there was no patent illegality on the face of the award, nor was it against the fundamental policy of Indian law.

Access the judgment [here](#).

**Categories:** [Appealable Orders](#) | [Jurisdiction of Appellate Court](#) | [Non Signatory to Arbitration](#) | [Section 37 ACA](#)

(6)

#### **Pandemic related suspension of limitation lifted (Supreme Court of India)**

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08 March 2021 | In Re: Cognizance for extension of limitation Suo Motu | SA Bobde CJ, L Nageswara Rao & S Ravindra Bhat JJ | 2021 SCC OnLine SC 193

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The suspension of limitation periods under general and special laws including Arbitration and Conciliation Act, 1996 ("ACA") that had been in force since 15 March 2020 by the court's order of 27 March 2020 was lifted.

Read the order [here](#).

**Category:** [Limitation](#)

(7)

#### **Existence of arbitration agreement left for the arbitrator to decide as a preliminary matter (Supreme Court of India)**

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08 March 2021 | Pravin Electricals Pvt. Ltd. v Galaxy Infra and Engineering Pvt. Ltd. | RF

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Nariman, BR Gavai & Hrishikesh Roy JJ | 2021  
SCC OnLine SC 190

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The High Court had allowed an application for the appointment of an arbitrator, rejecting the argument that the arbitration agreement was a forged document. Affirming the appointment, the Supreme Court, however, in light of the tests set out in *Vidya Drolia v. Durga Trading Corporation* (2021) 2 SCC 1, said that the arbitrator must decide the existence of the arbitration agreement as a preliminary issue. Noting that the facts were “curiouser and curiouser”, the court also found that “this is a case which eminently cries for the truth to out between the parties through documentary evidence and cross examination.”

Also, the court said that *Vidya Drolia* had read the *prima facie* test of [Section 8 ACA](#) into [Section 11\(6A\) ACA](#), but the former was appealable, and the latter was not. Hence, the Parliament was exhorted to make orders made under [Section 11 \(6\)](#) read with [Section 11 \(6A\)](#) appealable at par with [Section 8 ACA](#).

Read the judgment [here](#).

**Categories:** [Section 11 ACA | Appointment of Arbitrators | Section 8 ACA | Power to Refer Parties to Arbitration | Section 37 ACA | Appealable Orders | Existence of Arbitration Agreement | Prima Facie No Valid Arbitration Agreement Exists | Vidya Drolia](#)

(8)

### **Application of the set-aside grounds (Bombay High Court)**

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08 March 2021 | State of Goa v. Reliance Infrastructure Limited | MS Sonak & Bharati H Dangre JJ | SCC OnLine Bom 306

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Applying the grounds under Section 34 ACA, an appellate court partially set aside the award and overturned the decision of the single judge affirming the award. The dispute arose out of a power purchase agreement. Reliance had been awarded INR 278.89 crores with interest for its several claims. The appellate court found that the set-aside court did not satisfactorily deal with the case. It just adopted some paragraphs from the award without considering the rival

contentions. This is how the set-aside grounds were applied:

- (a) The court found that an award of INR 24.66 crores was made on a claim of “variable charges” but without advertent to, much less considering or evaluating the issue and evidence concerning applicability and non-compliance of the contractual provisions. Thus, the award was vitiated by patent illegality for ignoring evidence. It was also an unreasoned award. Also, the counsel’s suggestion that even if the clauses were considered, the result would be no different was rejected. Held, it is not for the party to supplant reasons into the award or for the appellate court to consider the impact of the contract for the first time.
- (b) An award of INR 18.63 crores was made, rejecting the State’s defence on downrating (i.e., by not applying downrating, the respondent’s invoices were inflated). The arbitrator ignored the contract and assumed it had been amended or deleted. This, held, was *ex facie* perverse finding and patently illegal on its face.
- (c) To the extent of INR 3.94 crores, the award unjustly enriched the respondent and was perverse, patently illegal and conflicts with the most basic notions of morality and justice.
- (d) An award of INR 2.36 crores was made again, ignoring the contract and finding that the parties had agreed to do away with specific provisions. This was not even a plausible finding, and hence the award was vitiated by perversity and patent illegality.
- (e) An award of 15% interest from the date of the award till payment, following *MMTC Ltd. v. Vedanta Limited*, (2019) 4 SCC 163 warranted a reduction and was reduced to 9% per annum.

Read the judgment [here](#).

**Categories:** Section 34 ACA | Section 34 (2A) | Section 34 (2) (b) (ii) | Application for Setting Aside Arbitral Award | Standard for Setting Aside | Patent Illegality | Perversity | Public Policy of India | Most Basic Notions of Morality or Justice | Unreasoned Award

(9)

**Assigning work under a sub-contract is not an assignment of contract (Delhi High Court)**

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08 March 2021 | Laxmi Civil Engineering Services Ltd. and others v. Gail (India) Limited | Vibhu Bakhru J | 2021 SCC OnLine Del 2867

The first petitioner was the Contractor, and this term was defined by the contract to include the Contractor's "permitted assigns." The other petitioners were the sub-contractors appointed by the Contractor with GAIL's approval. The work order the Contractor had placed with the sub-contractors read, "the Company hereby assigns work of civil work ...".

Arguing that the sub-contractors fell within the definition of "Contractor" and became parties to the contract, the Contractor and the sub-contractors requested the Delhi High Court to appoint an arbitrator to arbitrate their dispute with GAIL.

Rejecting the argument, held, the work order assigned some work and not the contract, both materially different. An assignment entails assigning all rights and obligations and the assignee steps into the assignor's shoes.

Also, it held that a clause in the contract requiring that the Contractor obtains from the sub-contractors an undertaking did not constitute a contract between GAIL and the sub-contractor. Lastly, payments made by the sub-contractors to GAIL did not constitute a contract either; it was made at the instance and on behalf of the Contractor.

An appointment was made to arbitrate the dispute leaving out the sub-contractors.

See the judgment [here](#).

**Categories:** Section 11 | Appointment of Arbitrators | Non-signatory | Binding Non-signatory to arbitration | Claiming Through or Under Him | Assignment | Chloro Controls |

(10)

**Appointing authority's legal disability does not frustrate the arbitration clause (Delhi High Court)**

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08 March 2021 | TK Engineering Consortium Pvt. Ltd. v. Director (Projects) Rites Ltd. and another | Vibhu Bakhru J | 2021 SCC OnLine Del 1188

The arbitration clause stipulated that only a person appointed by the appointing authority (an Executive Director of RITES) would act as an arbitrator. If for any reason, this was not possible, there would be no arbitration at all.

It was common ground that the appointing authority lost the ability to appoint an arbitrator because of the change in the law. Was the arbitration clause frustrated? No, said the court because:

- (a) The loss of ability was not absolute. It could still be waived by TK Engineering if it agreed in writing after the dispute arose that the authority could make an appointment. But in the absence of TKE's consent, the clause was inoperative. It could be severed and did not invalidate the entire arbitration agreement.
- (b) The no-arbitration part was not a standalone term but linked to the appointment clause, and it should also be considered inoperative rather than invalidating the agreement. The clause should be considered as only an adjunct clause. Once RITES agreed to arbitration, it could not say that the arbitration should be conducted by an impartial process or not at all,
- (c) Also, RITES had in another round of litigation resisted TKE's writ petition arguing that TKE should enforce contractual remedies.



Read the judgment [here](#).

**Categories:** [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Section 12 ACA](#) | [Grounds for Challenge](#) | [Section 12 \(5\) ACA](#) | [Independence and Impartiality of Arbitrators](#) | [TRF](#) | [Perkins](#) | [Invalidity of Arbitration Agreement](#) | [Severability](#) | [Inoperative](#)

(11)

### **Interpretation of arbitration agreement (Delhi High Court)**

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08 March 2021 | Hoya Medical India Pvt. Ltd. v. Everest Vision | Sanjeev Narula J | 2021 SCC OnLine Del 1188

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A clause that said “either party may ... propose to the other in writing that such a dispute or difference shall be referred to and finally resolved by arbitration ...” constitutes an arbitration agreement.

The expression “shall be referred to” and “finally resolved” indicates an intent to arbitrate. [relying on principles set out in *Jagdish Chander v. Ramesh Chander*, (2007) 5 SCC 719]

See the judgment [here](#).

**Categories:** [Section 7 ACA](#) | [Arbitration Agreement](#) | [Interpretation of Arbitration Agreement](#) | [May versus Shall](#) | [Delivery of Possession](#) | [Mandatory Interim Injunction](#)

(12)

### **Arbitration maintainable against a member under an agreement the cooperative society signed (Bombay High Court)**

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08 March 2021 | Chirag Infra Projects Pvt. Ltd. v. Vijay Jwala Coop. Hsg. Soc. Ltd. and another | GS Patel J | 2021 SCC OnLine Bom 364

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The dispute arose from a redevelopment agreement (containing an arbitration clause) between the developer and the cooperative society. The respondent was the only member who objected to the redevelopment project and

refused to vacate his flat. The developer invoked arbitration and applied under Section 9 ACA for a mandatory interim injunction for delivery of possession.

Following precedent, the Bombay High Court ruled that the petition was maintainable even though the member did not sign the agreement. His identity was subsumed with the identity of the society. Also, interim orders can be passed even against non-signatories.

The court also found that the member never challenged either the resolution of the society or the agreement. His defence to the petition was vague and “the most complete and the purest moonshine”. Thus, held there was an exceptionally strong prima facie case that warranted the grant of a mandatory order.

Read the judgment [here](#).

**Categories:** [Section 9](#) | [Interim Measures by Court](#) | [Mandatory Injunction](#) | [Mandatory Order](#) | [Prima Facie Case](#) | [Nonsignatory](#) | [Interim Relief Against Non-signatory](#)

(13)

### **The objection that the set-aside application was not filed in the seat-court can be waived (Bombay High Court)**

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09 March 2021 | Naresh Kanyalal Rajwani and others v. Kotak Mahindra Bank Ltd. and another | BP Colabawalla J | 2021 SCC OnLine Bom 367 |

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The Bombay High Court has ruled that, in domestic arbitration, an objection that the court does not have jurisdiction because the seat was located somewhere else is a matter of the court’s territorial jurisdiction that could be waived.

An award had been challenged in the Bombay High Court and set aside. No objection as to the court’s jurisdiction was raised. The respondent invoked another arbitration and got another award, which was again challenged. Objecting this time to the court’s jurisdiction, the respondent asserted that only the courts at the indisputable seat of the arbitration (New Delhi) had jurisdiction. Also, under the laws declared in *BGS SGS Soma JV v. NHPC Ltd.* (2020) 4

SCC 234, Section 42 ACA applied only when the seat was not designated.

Rejecting the objection, held that (i) an objection to territorial jurisdiction, if not taken at the earliest opportunity, cannot be raised in subsequent proceedings; (ii) the court had jurisdiction under Section 42 ACA, and (iii) the Supreme Court's decision in BGS Soma was distinguishable because it was not a case where the objection on jurisdiction was not raised in the first instance but raised in a subsequent application.

See the judgment [here](#).

**Categories:** [Section 42](#) | [Jurisdiction](#) | [Territorial Jurisdiction](#) | [BGS SGS Soma](#) | [Seat of Arbitration](#) | [Waiver of Territorial Jurisdiction](#)

(14)

#### **The limitation period for bringing an application to appoint an arbitrator (Supreme Court of India)**

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10 March 2021 | Bharat Sanchar Nigam Ltd. & another v. M/s Nortel Networks India Pvt. Ltd. Indu Malhotra & Ajay Rastogi JJ | 2021 SCC OnLine 207

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The Supreme Court has ruled that the limitation period for filing an application for appointment of arbitrator under Section 11 ACA is governed by Article 137 of the Limitation Act, 1963 ("LA"). So, it is three years and will be counted from the date of refusal to appoint the arbitrator or expiry of 30 days from the issuance of the notice invoking arbitration, whichever earlier.

The court also noted that the courts had taken recourse to Article 137 LA, given the vacuum in the law to specify a limitation. But a three year limitation period runs contrary to the scheme of expeditious disposal of matters under the ACA. It is necessary for Parliament to bring an amendment.

In rare and exceptional cases, where the claims are *ex facie* time-barred, and it is manifest that there is no subsisting dispute, the court may refuse to make the reference under Section 11 ACA.

Read the judgment [here](#).

**Categories:** [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Limitation](#) | [Limitation Under Section 11 ACA](#) | [Article 137 Limitation Act](#)

(15)

#### **The Arbitration and Conciliation (Amendment) Act, 2021 receives the President's assent**

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11 March 2021 | Act No. 3 of 2021

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The Arbitration and Conciliation (Amendment) Act, 2021, received the President's assent. It shall be deemed to have come into force on 04 November 2020.

To address the issue of corrupt practices in securing contracts or arbitral award:

- (a) A proviso has been added to Section 36 (3) ACA. The proviso says that the court shall stay an award unconditionally until the disposal of the set-aside application if it satisfied a *prima facie* case has been made out that: (i) the arbitration agreement or contract which is the basis of the award, or (ii) the making of the award, was induced or effected by fraud or corruption.
- (b) An explanation clarifies that the proviso will apply irrespective of whether the arbitral or court proceedings were commenced before the Arbitration and Conciliation (Amendment) Act, 2015.

To promote India as a hub of international commercial arbitration by attracting eminent arbitrators to the country:

- (a) Section 43J of the ACA has been substituted to now say that the qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations.
- (b) The Eighth Schedule of the ACA (Qualifications and Experience of Arbitrator) has been omitted.

Access the document [here](#).

**Categories:** Arbitration and Conciliation (Amendment) Act, 2021

(16)

**Rejecting the notice of arbitration does start the limitation afresh (Supreme Court of India)**

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15 March 2021 | Secunderabad Cantonment Board v. M/s B Ramachandraiah & sons | Civil Appeal No. 900-902 of 2021 | RF Nariman & BR Gavai JJ | 2021 SCC OnLine SC 219

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A demand for arbitration was made to the appellant by letter of 07 November 2006. The demand was reiterated and a request to appoint an arbitrator made on 13 January 2007. Therefore, held on facts, at the very latest, time began to run on and from 12 February 2007 (expiry of 30 days). The time ended three years after it started to run [under Article 137, Limitation Act, 1963].

The rejection of the demand of arbitration on 10 November 2010 would not give fresh start to limitation. So, the High Court clearly fell in error in appointing an arbitrator after counting the limitation period from November when the demand was rejected.

**Categories:** Section 11 ACA | Appointment of Arbitrators | Limitation | Limitation for Appointing Arbitrators

(17)

**Opportunity to eliminate grounds for setting aside does not empower the tribunal to hear the matter again (Calcutta High Court)**

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15 March 2021 | Coal India Ltd. v. Hyderabad Industries Ltd. | AP No. 99 of 2009 | Moushumi Bhattacharya | 2021 SCC OnLine Mad 1126

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The court has ruled that under Section 34 (4) ACA, the court can adjourn the set-aside proceedings to enable the arbitral tribunal only to eliminate the grounds for setting aside and not reconsider the matter.

In this case, one of the grounds of challenge was that the award did not contain any reasons. However, the award-holder had made the application eleven years after the set-aside petition was filed, and thirteen years had passed

overall. Therefore, it was relevant to consider if the arbitrator could furnish reasons and make the award withstand the challenge without hearing the parties again. The court answered no.

Also, held, though Section 34 (4) does not state a time limit, the overall objective of Section 34 (4) had to be kept in mind.

**Category:** Section 34 (4) ACA | Remission of Award | Remand of Award



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