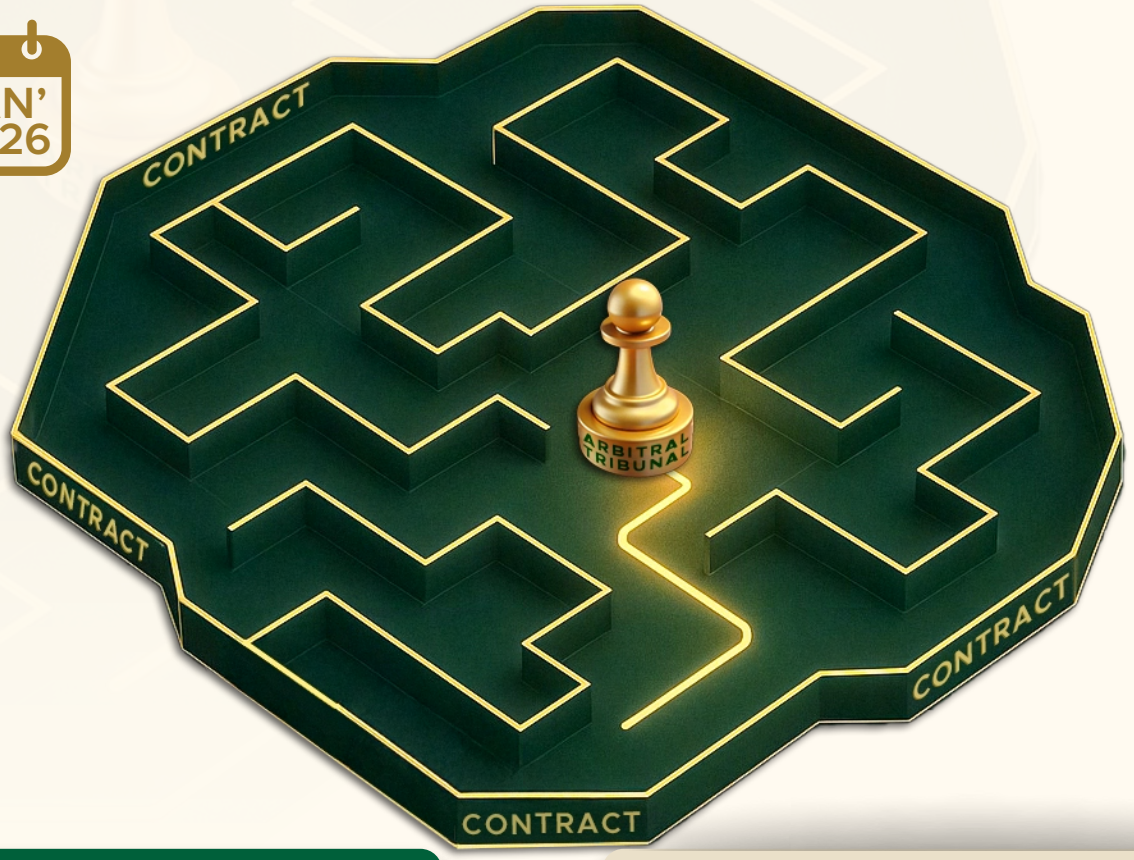
ARBITRA

Your Monthly Guide to Navigate the Evolving Landscape of Arbitration

JAN' 2026



COVER STORY

PIVOTAL ISSUES

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Editor's Note

Reinforcing the Four Corners of the Contract, our cover story this month explores the Supreme Court landmark reference in **State of Jharkhand v. The Indian Builders,** which seeks to restore contractual sanctity by challenging the long-standing Bharat Drilling precedent.

In our Pivotal Issues segment, we examine a series of high-stakes rulings that redefine procedural and substantive norms. We analyze the Supreme Court's robust defense of **party autonomy in upholding a 36% default interest rate,** drawing a clear line against **using "public policy" as a back-door to escape commercial bargains.** We further delve into the **"procedural guillotine" of Section 38(2),** where the Court clarifies the **consequences of failing to pay arbitral fees,** and the **"consent trap"** in international disputes, where even mutual agreement cannot grant a High Court the jurisdiction reserved for the Apex Court. Moving from jurisdiction to standing, we explore the limits of the **"non-signatory" doctrine,** reaffirming that a stranger to a contract cannot simply walk into an arbitration without clear legal privity.

This edition also brings in a comprehensive suite of **Regulatory Updates and summaries of Significant Case Laws, ranging from the necessity of valid Section 21 notices to the exclusive powers of High Courts in extending mandates.** Finally, we highlight essential **Upcoming Events and training sessions** designed to keep practitioners at the forefront of these evolving legal standards.

Let's Dive in

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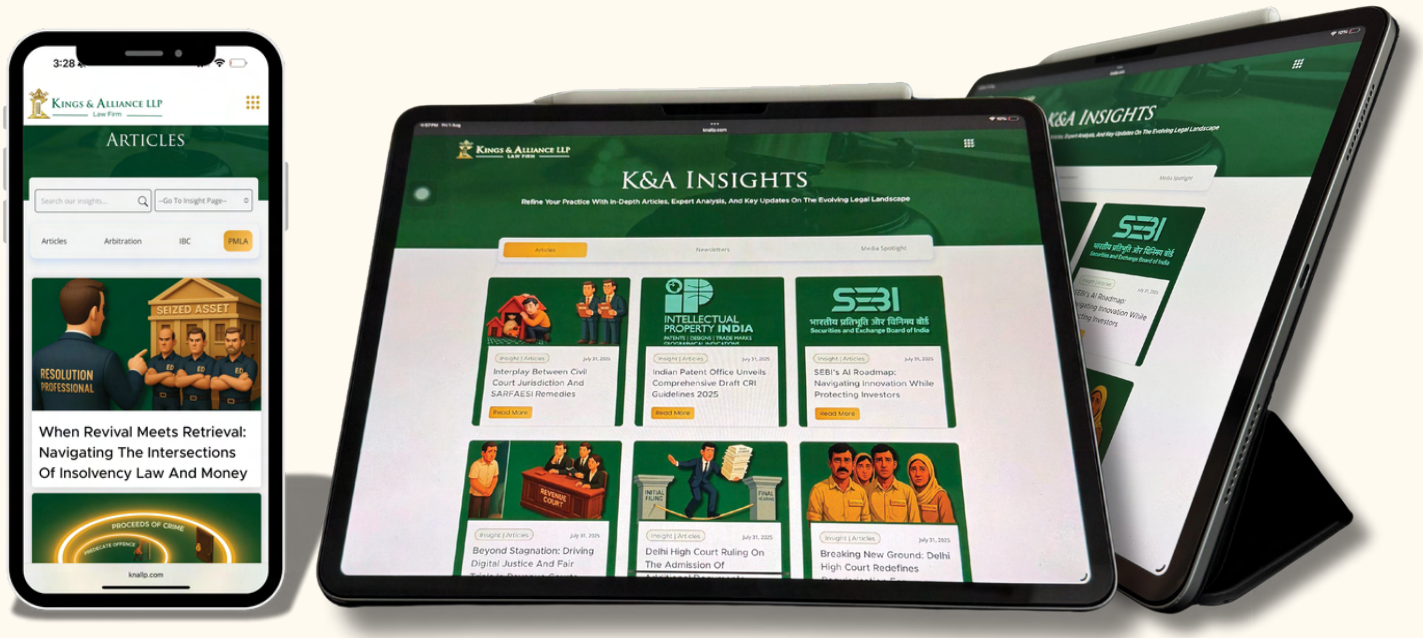

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COVER STORY

The Unravelling of Bharat Drilling: A Supreme Court Reckoning for Contractual Sanctity in Arbitration

> *Excepted or prohibited claim clauses bind only the employer and do not restrict the arbitral tribunal.*

The foundation of any contract, particularly those involving public resources, rests on the mutually agreed-upon allocation of risk. A fundamental scenario arises when government contracts contain prohibitory clauses, which explicitly bar claims for specific liabilities like idle labour/machinery or business loss. These clauses are not merely boilerplate; they represent a deliberate, negotiated boundary defining the parties' financial exposure. Yet, for over a decade, a line of judicial precedent threatened to systematically erode this foundational principle, allowing arbitral tribunals to disregard these clear contractual limits.

In a significant and necessary intervention, the Supreme Court of India in State of Jharkhand v The Indian Builders Jamshedpur has referred its 2009 judgment in Bharat Drilling and Foundation Treatment Private Limited versus State of Jharkhand to a larger bench. The bench of Justice P. S. Narasimha and Justice A. S. Chandurkar critically observed that the Bharat Drilling ruling has been repeatedly and incorrectly relied upon to dilute prohibitory clauses in government contracts. They explicitly rejected the notion that "excepted or prohibited claim clauses bind only the employer and and do not restrict the arbitral tribunal." This judicial re-assessment was triggered by the State of Jharkhand's challenge to a High Court order that had restored arbitral awards on claims expressly barred by the contract. Notably, the High Court relied solely on the Bharat Drilling precedent, failing to scrutinize the actual contractual prohibitions. The necessity for this referral stems directly from the principle of party autonomy, the very bedrock of arbitration. The Court pinpointed the error...

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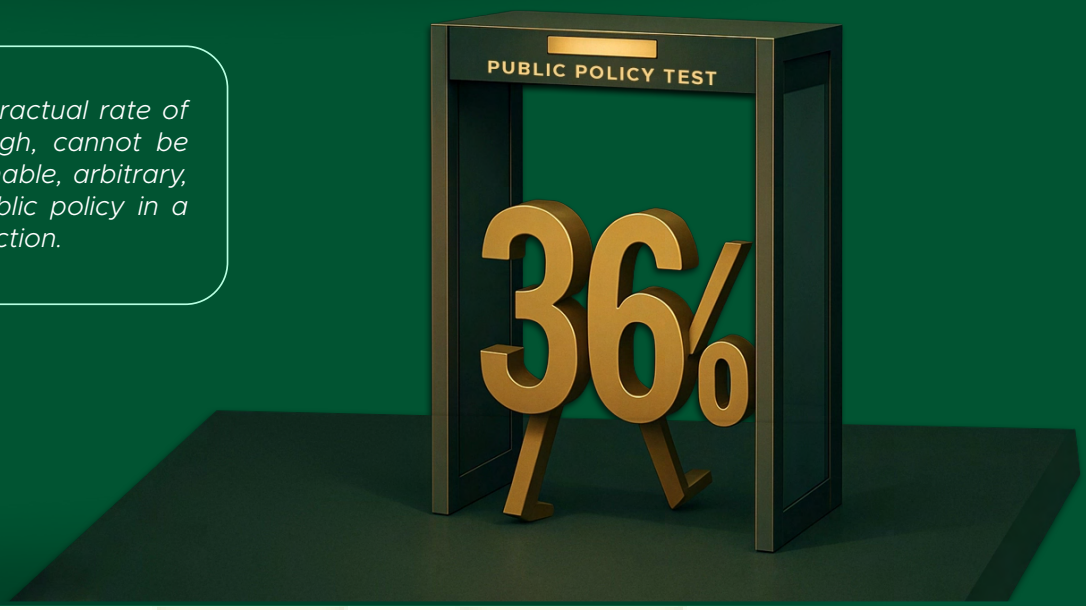
PIVOTAL ISSUES

36% Default Interest Upheld: SC Draws the Line on 'Public Policy' Challenges to Commercial Arbitration

> *A pre-agreed contractual rate of interest, even if high, cannot be termed unconscionable, arbitrary, or opposed to public policy in a commercial transaction.*



The stability of the Indian arbitration landscape hinged on whether a court could invalidate a contractually agreed-upon interest rate simply because it appeared excessively high. The question of whether an arbitral award is liable to be set aside for granting a high rate of interest in a purely commercial contract specifically, whether such a stipulation amounts to patent illegality or is opposed to the public policy of India is a central focus in modern Arbitration Law.

The Supreme Court of India addressed this critical issue in the landmark case of BPL Limited v. Morgan Securities and Credits Private Limited, pronounced by a Bench comprising Justice J. B. Pardiwala. The Court primarily held that a pre-agreed contractual rate of interest, even if high, cannot be termed unconscionable, arbitrary, or opposed to public policy in a commercial transaction between two business entities, provided the parties entered into the contract with informed consent and without duress.

The dispute arose from a Bill Discounting facility extended by the Respondent to a third party for which the Appellant, was the drawee and jointly and severally liable for repayment under the sanction letters dated on two dates. The facility offered a concessional interest rate of 22.5% per annum but stipulated a normal rate of 36% per annum in case of default. When the Appellant defaulted on payments amounting to over Rs. 25 crores in 2004, the Respondent invoked arbitration to recover the dues along with interest at the default rate...

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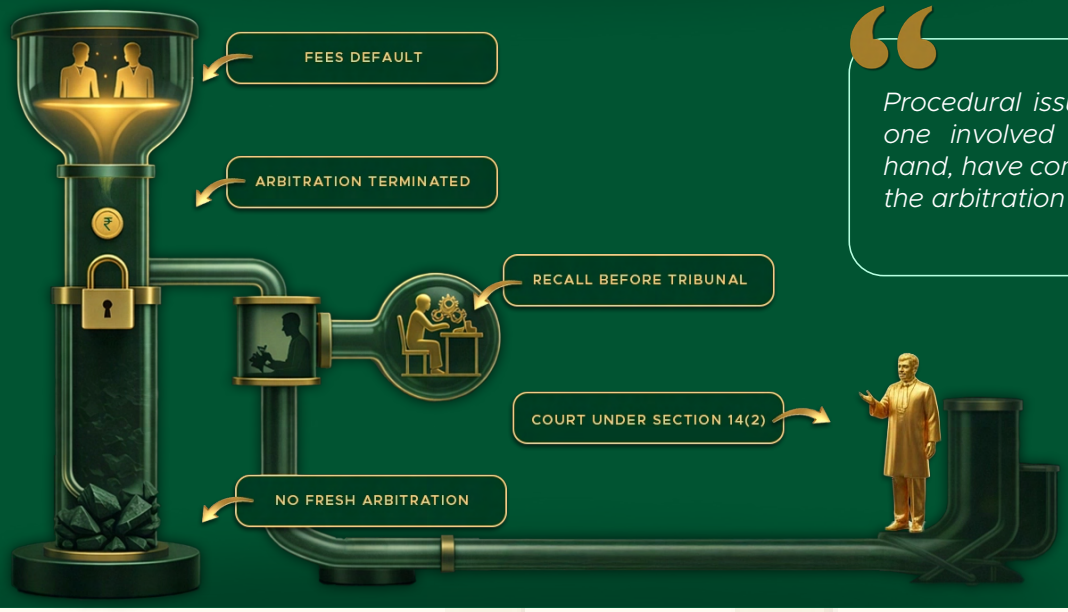
Section 38(2) and the Mandate's End: The Supreme Court Unifies Termination Law and Calls for Legislative Urgency



> *Procedural issues, such as the one involved in the case at hand, have continued to plague the arbitration regime of India*

Imagine an arbitration, which is a faster, less formal alternative to court—grinding to a halt, not over the merits of the dispute, but because a party failed to pay the arbitrator's fees. Does this technical termination seal the door forever, or can the aggrieved party simply open a new one? This procedural dilemma, one of many that continue to "plague the arbitration regime of India," recently took center stage before the Supreme Court.

In a significant ruling in Harshbir Singh Pannu and Anr. v. Jaswinder Singh, the Supreme Court unequivocally held that an Arbitral Tribunal is legally empowered to terminate proceedings under Section 38(2) of the Arbitration and Conciliation Act, 1996, when a party defaults on paying its share of the fee. Crucially, the Court clarified that the remedy for this specific termination is not to seek the appointment of a new arbitrator under Section 11, but rather to first seek a recall of the order before the tribunal itself. If that fails, the party must then approach the court under Section 14(2) for the termination of the arbitrator's mandate. The fundamental issue before the bench of Justices JB Pardiwala and R Mahadevan revolved around the distinct legal effect of a proceeding's termination under Section 38 (for non-payment) versus a termination of the arbitrator's mandate under Sections 14 or 15 and the appropriate recourse available to the frustrated litigant. The Court strongly criticized the current legislative framework, including the proposed Arbitration and Conciliation Bill, 2024, for failing to adequately address this ambiguity, stressing that a proper remedy against such a termination is "the need of the hour." Moreover, the bench expressed a firm disinclination...

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PIVOTAL ISSUES

Navigating the Non-Signatory Conundrum: When Can a Stranger Enforce an Arbitration Clause?

> *What exactly is the jurisdictional limit of the referral court when confronted with an alleged "stranger" to the contract?*

In the complex tapestry of commercial transactions, a fundamental question often arises: Can a party who never signed the main agreement and is a complete stranger to the initial contract later step into the shoes of a signatory and compel another party into arbitration? This delicate dance between contractual autonomy and commercial necessity forms the backdrop of many legal battles.

The Supreme Court, in its recent definitive ruling, Hindustan Petroleum Corporation Ltd. v. Black Cat Logistics, has clarified this highly debated area, holding that a non-signatory cannot invoke an arbitration clause against a party with whom it shares no direct legal relationship, especially where there is no clear intention to bind the non-signatory to the main contract.

This pivotal judgment stemmed from a dispute between Hindustan Petroleum Corporation Ltd. (HPCL) and Black Cat Logistics (BCL). BCL, a non-signatory, sought to enforce the arbitration clause in HPCL's primary contract with AGC Networks Ltd. (which had assigned its work to BCL without HPCL's consent, contrary to the contract's explicit non-assignment clause). The core issue before the Apex Court was whether BCL, lacking privity of contract with HPCL, could legally compel HPCL into arbitration under these circumstances. This article delves into the meticulous reasoning and underlying legal principles that guided the Supreme Court's pronouncement, shedding light on the crucial doctrine of privity of contract...

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The Consent Trap: How a High Court Appointment Rendered an International Arbitral Award Null

> *the appointment of an arbitrator by a High Court in a case of international commercial arbitration is a jurisdictional overreach that results in the award being a nullity*

When commercial giants lock horns over international contracts, the swift and binding resolution offered by arbitration is often the chosen panacea. But what happens when the very mechanism intended to deliver justice is founded on a jurisdictional flaw so fundamental it renders the final decision null and void? Such was the pivotal question that recently came before the Madras High Court in China Datang Technologies vs. NLC India Limited, forcing a critical examination of the non-derogable provisions of the Arbitration and Conciliation Act (ACA).

In a concise yet powerful observation, the bench of Justice N. Anand Venkatesh held that "the appointment of an arbitrator by a High Court in a case of international commercial arbitration is a jurisdictional overreach that results in the award being a nullity." The issue arose from a dispute between a Chinese foreign entity, China Datang Technologies and Engineering Company Ltd. (Datang), and a public sector undertaking, NLC India Ltd. (NLC), concerning a power project contract which NLC had terminated. Both parties approached the Madras High Court under Section 34 of the ACA to set aside or modify parts of the resulting award, which was delivered by an arbitrator whom the High Court had appointed by consent of the parties. Before delving into the merits of the cross-petitions, the Court, on its own motion, raised a fundamental legal quandary: Could the High Court, and not the Supreme Court, validly appoint a Sole Arbitrator in this international commercial arbitration? This article will explore the deep-seated legal principles specifically...

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SIGNIFICANT CASE LAWS

Bombay High Court Upholds Arbitral Award Directing Specific Performance of Development Agreement Between BTRA and Nilkanth Enterprise

In the case of Bombay Textile Research Association v. Nilkanth Enterprise, the Bombay High Court dismissed a petition under Section 34 of the Arbitration and Conciliation Act, 1996, thereby upholding a 2017 arbitral award that directed specific performance of a development agreement relating to 57,000 sq. m. of land in Ghatkopar (West), Mumbai.

Justice Somasekhar Sundaresan held that there was no evidence showing that Nilkanth Enterprise was unwilling or incapable of performing its obligations. The Court observed that it was BTRA that had failed to perform, having not even called upon Nilkanth to do so. Rejecting BTRA's argument that the arbitral tribunal had exceeded its jurisdiction, the Court found that the letters exchanged between 2003 and 2005, the draft Development Agreement, and the Minutes of Meeting formed a continuous chain of negotiations culminating in a concluded contract.

The Court further ruled that the alleged reliance on privileged legal opinions and internal documents did not render the award perverse or illegal, since the opinion was obtained when both parties were aligned in their objectives. It also dismissed BTRA's reliance on Mademsetty Satyanarayana and K.S. Vidyanadam, holding that those cases were inapplicable as Nilkanth had acted promptly and within limitation. Finding no perversity, illegality, or excess of jurisdiction, the Bombay High Court upheld the arbitral tribunal's award and dismissed BTRA's petition, affirming that arbitral findings on contractual interpretation warrant judicial deference.

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SIGNIFICANT CASE LAWS

Email Suggesting Arbitrator Appointment Insufficient Without Valid Section 21 Notice: Kerala High Court

In the case of Sajid Pasha & Ors. v. S. Abdunnasir P. & Ors., the Kerala High Court dismissed an application under Section 11(6) of the Arbitration and Conciliation Act, 1996, holding that the petitioners had failed to issue a valid notice under Section 21, which is a mandatory precondition for invoking the court's jurisdiction to appoint an arbitrator.

Justice S. Manu observed that the email relied upon by the applicants, merely suggesting the name of an engineer as arbitrator, did not refer to any specific dispute, arbitration clause, or partnership deed, and hence could not be treated as a valid Section 21 notice. The Court ruled that such a vague communication cannot mark the commencement of arbitration proceedings as required under the Act.

Relying on the Supreme Court's ruling in BSNL v. Nortel (2021), the Court clarified that while no formal format for a Section 21 notice is prescribed, it must clearly indicate the dispute sought to be referred to arbitration and the arbitration clause invoked. Since the applicants' email contained no such particulars, the Court held that the mandatory precondition for invoking Section 11 jurisdiction was not satisfied, rendering the application premature.

Accordingly, the Kerala High Court dismissed the petition, reiterating that a Section 11 arbitration plea cannot be maintained without a proper and specific Section 21 notice and that a mere suggestion for appointing an arbitrator by email is legally insufficient.

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SIGNIFICANT CASE LAWS

Power To Extend Mandate Of Arbitrator Appointed By High Court Rests Exclusively With High Court: Calcutta High Court

In the case of Cosmic MAPL JV v. Al-Amin Garments Haat Pvt. Ltd., the Calcutta High Court held that when an arbitrator is appointed by the High Court under Section 11 of the Arbitration and Conciliation Act, 1996, the power to extend or substitute the arbitrator's mandate under Section 29A lies exclusively with the High Court.

Justice Shampa Sarkar dismissed a revisional application challenging the Commercial Court's refusal to extend the arbitrator's mandate, affirming that the lower court lacked jurisdiction. The Court reiterated that the authority to extend an arbitrator's mandate under Section 29A(4) and (5) is intrinsically linked to the power of appointment under Section 11 and hence cannot be exercised by a subordinate court. Referring to its earlier ruling in Best Eastern Business House Pvt. Ltd., the Court observed that allowing a Commercial Court to extend or replace an arbitrator appointed by the High Court would conflict with the statutory scheme. The Court clarified that "the appointing court retains residual supervisory jurisdiction for extending the mandate," and the term "court" under Section 29A must be interpreted in this context, not as defined in Section 2(1)(e).

Distinguishing the Supreme Court's decision in Chief Engineer (NH) PWD (Roads), the Court noted that the ruling was based on the Meghalaya High Court's lack of original civil jurisdiction and therefore did not override the Best Eastern principle. Accordingly, the Calcutta High Court dismissed the petition, holding that only the High Court that appointed the arbitrator has the authority to extend or renew their mandate.

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SIGNIFICANT CASE LAWS

Question On Existence Of Arbitration Clause Cannot Be Re-agitated Under Section 11 After Being Settled Under Section 8: Delhi High Court

In the case of JSW MG Motor India Pvt. Ltd. v. M/s Tristar Auto Agencies (Vizag) Pvt. Ltd. (ARB.P. 682/2025), the Delhi High Court held that once the existence of an arbitration clause has been adjudicated under Section 8 of the Arbitration and Conciliation Act, 1996, the same issue cannot be re-agitated under Section 11 for the appointment of an arbitrator.

Justice Purushaindra Kumar Kaurav dismissed the Section 11 petition filed by JSW MG Motor India Pvt. Ltd., observing that since the Principal District Judge, Visakhapatnam, had already rejected JSW's Section 8 application by holding that Clause 63 of the dealership agreement did not constitute a valid arbitration clause, the question could not be reopened in a subsequent Section 11 proceeding. The court held that the matter was barred by res judicata and issue estoppel.

The Court relied on Anil v. Rajendra (2015) 2 SCC 583, Antique Art Export Pvt. Ltd. v. United India Insurance Co. Ltd. (2023 SCC OnLine Del 1091), and Surender Bajaj v. Dinesh Chand Gupta (2025 DHC 7387), reiterating that a party cannot seek appointment of an arbitrator under Section 11 after a competent court has already refused reference under Section 8 on the same issue. Since the earlier order had attained finality and had not been set aside, JSW was bound by that finding.

The Court emphasized that permitting a party to seek a fresh adjudication after an adverse judicial determination would undermine judicial discipline and allow forum shopping. Accordingly, it dismissed the petition, holding that JSW was precluded from invoking Section 11 due to the binding effect of the earlier Section 8 order.

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SIGNIFICANT CASE LAWS

Arbitration Is Only Between Parties to Agreement; Non-Parties Can Be Added Only in Exceptional Circumstances: Karnataka High Court

In the case of Lubna Shah v. B.M. Jayeshankar & Ors., the Karnataka High Court held that arbitration can take place only between parties to an arbitration agreement, and non-parties cannot be included in arbitral proceedings except in exceptional circumstances.

Justice Suraj Govindaraj, while allowing a petition filed by Lubna Shah, observed that even if a director of a company is a signatory to the agreement, the company and its directors are distinct legal entities, and directors cannot be made parties to arbitration proceedings merely because the company may be unable to satisfy an award. The court relied on the principle laid down in Salomon v. Salomon & Co. Ltd. [1897] AC 22, reiterating the doctrine of corporate separateness.

The dispute arose from a Joint Development Agreement dated 27 June 2016 between Lubna Shah and Varun Infra Projects, which contained an arbitration clause. After the failure of an amicable settlement, Shah invoked the arbitration clause and nominated an arbitrator. The company's directors contended that they were not parties to the agreement and therefore could not be subjected to arbitration.

The Court rejected Shah's argument that the directors should be joined as parties because Varun Infra was a special purpose vehicle with no independent assets, holding that financial incapacity is not a valid ground to pierce the corporate veil in arbitration. It also clarified that while Section 21 of the Arbitration and Conciliation Act, 1996 requires 30 days for a response to a notice, technical lapses in timing should not defeat initiation of arbitration where substantive grounds exist.

Accordingly, the Court referred the parties to mediation before the Karnataka Mediation Centre and directed that, if mediation fails, an arbitrator be appointed thereafter.

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SIGNIFICANT CASE LAWS

Supreme Court Questions Change Of Venue From Delhi To London In PSU's International Arbitration

In the case of NMDC Steel Ltd. v. Danieli & C. Officine, the Supreme Court questioned the decision of an arbitral tribunal to shift the venue of an international arbitration hearing from Delhi to London, observing that such a change cannot be made merely for the convenience of lawyers or arbitrators.

The bench comprises Chief Justice of India Surya Kant and Justices Ujjal Bhuyan and N.K. Singh was hearing a petition filed by NMDC Steel Ltd, a public sector undertaking, challenging the Telangana High Court's refusal to interfere with the tribunal's procedural order. Under the contract, Hyderabad was designated as the seat of arbitration, while the closing hearing was initially scheduled in Delhi. The tribunal had justified the change on the ground that holding hearings at the IDRC in London would be more cost-effective than using hotels in Delhi. Solicitor General Tushar Mehta, appearing for NMDC, argued that moving the hearing abroad would cause serious prejudice to the PSU, as it undermines the understanding that the arbitration would be conducted in India. On the other hand, Senior Advocate Shyam Divan, for the Italian company Danieli & C. Officine, contended that the seat of arbitration remained in Hyderabad and only the venue of hearing had been shifted for logistical reasons, which is permissible under international arbitration practice.

The Chief Justice observed that this situation revealed a "grey area in arbitration law," questioning whether the venue of arbitration can be altered merely for convenience. He cautioned that such practices might discourage Indian PSUs and corporations from opting for international arbitration if Indian-seated proceedings can be relocated abroad at will. At the same time, he noted that striking down such orders without justification might make Indian courts appear overly conservative to the global arbitration community.

Expressing an inclination to interfere with the High Court's order, the Supreme Court granted the respondent an opportunity to reach an amicable solution before the matter proceeds further. The bench observed that while cost considerations may be relevant, fairness and accessibility for both parties must remain the cornerstone of arbitral proceedings.

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REGULATORY UPDATE:

The KCAB 2026 Rules: A New Era for International Dispute Resolution

KCAB INTERNATIONAL
KOREAN COMMERCIAL ARBITRATION BOARD

The landscape of international dispute resolution in East Asia is set for a transformative shift. On January 1, 2026, the Korean Commercial Arbitration Board (KCAB) will officially implement its revised **International Arbitration Rules.** This update, the most comprehensive in a decade, moves beyond mere administrative tweaks to introduce structural reforms that align Korea with global best practices seen in the ICC and SIAC. By prioritizing procedural agility, transparency, and technological integration, the 2026 Rules aim to resolve the "procedural lag" that often plagues complex cross-border commercial disputes.

The Birth of the KCAB International Arbitration Court: The most significant institutional change is the creation of the KCAB International Arbitration Court. Moving away from a purely Secretariat-led model, this new independent body will oversee critical procedural decisions, including the appointment, challenge, and replacement of arbitrators. This "Court" structure ensures that high-stakes decisions are made by a panel of independent experts, significantly enhancing the institution's Multi-Tiered "High-Speed" Tracks: The 2026 Rules introduce a unique three-track procedural system designed to scale according to the value and urgency of the dispute: Fast-Track Procedure: For disputes under KRW 500 million, the tribunal must render a final award within three months of constitution. This track limits evidence to written submissions only, eliminating hearings and document production to ensure...

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Organised By: Young ITA (Institute for Transnational Arbitration) and SIAC

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Organised By: International Chamber of Commerce (ICC)

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