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Interplay between MSMED and Arbitration Act

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Arbitration has become the most prevalent Alternate Dispute Resolution (ADR) mechanism over the years. This can be attributed to the binding nature of an arbitral Award and its enforceability by the local judicial system. However, it is not all roses in the world of arbitration. Bigger and more influential parties tend to dominate such arbitration proceedings by various means dealt with in detail in this paper. The smaller enterprises find it extremely difficult to sustain themselves during such arbitration proceedings, and quite a few of these firms end up filing for bankruptcy. To minimize the occurrence of sickness in MSMEs and to enhance their competitiveness, the Government of India introduced the MSMED Act,[1] in 2006.

The MSMED provides special provisions under which disputes related to non-payment or delayed payments by buyers are fast-tracked. However, the dispute redressal method to accomplish this is Conciliation and Arbitration. The stringent provisions and the Act usually favouring Sellers along with the presence of Arbitration Agreement in most Contracts and Purchase Orders have led to buyers trying to avoid submitting jurisdiction under MSMED Act.[2] Inevitably, this has led to an ongoing battle between MSME and non-MSME enterprises based on the issue of whether the matter would be resolved under the MSMED or the Arbitration Act. This paper attempts to deal with this issue by looking at several judgments of the Supreme Court and various High Courts.

Keywords: *arbitration, MSME, dispute redressal.*

[1] Micro, Small and Medium Enterprises Development Act 2006
[2] *Ibid*

INTRODUCTION

Arbitration gained traction as an Alternate Dispute Redressal (ADR) over the years for being a faster and effective means of dispute resolution between parties. The preference of arbitration over its other ADR counterparts can be attributed to the binding nature of an arbitral Award and its enforceability by the local judicial system. Arbitration's success can be largely attributed to its relatively quicker pace, procedural flexibility, and technical expertise of the arbitrator in the subject matter of dispute. The development and expansion of arbitration can be credited to the rising globalization, i.e. global trade and foreign investments into a country as a means to circumvent the intricacies of the local laws and opt for a quicker means of dispute resolution.

The rapid setting up of businesses throughout India further aided in establishing Arbitration as the preferred mode of dispute resolution for all commercial disputes. The binding nature of the award, along with quicker redressals, were the key contributors for solidifying the position of arbitration as the most prominent mode of dispute resolution in commercial disputes, so much so that, these days, every contract signed between two parties contains an arbitration for dispute resolution. Today, arbitration is synonymous with commercial contracts and dispute resolution and has even successfully dethroned litigation in this regard. However, it is not all roses in the world of arbitration. Bigger and more influential parties tend to dominate such arbitration proceedings by various means.

Firstly, the cost of arbitration and expenses of the arbitral tribunal needs to be borne by the parties. Therefore, in high stake matters where a large group of arbitrators needs to be appointed, the comparatively smaller party may find it burdensome to pay the expenses. This is even more so when the economic gap between the parties is much broader. In matters related to the payment to such firms, the dominant party may delay the matter, causing the financially smaller company to not being able to sustain itself. The dominant party might continue to do so till the smaller company is no longer able to sustain itself and having to

eventually file for bankruptcy, thereby completely frustrating the case and closing the issue itself since the other party is no longer available to fight the case.

Secondly, even after the final award is passed, the dominant party or the party against whom the award is passed may not implement the award. Rather, they might file an appeal in the appropriate local judicial court to further delay the matter. Also, for the implementation of arbitral awards, the party must approach the appropriate local judicial court, which can be a hugely time-consuming process. This delay may, in some cases, be so severe that the company to receive payment might even end up becoming bankrupt.

To prevent this from happening, the Indian Government in 2006 notified the Micro, Small And Medium Enterprises Development Act 2006,[3] which is a special act that aimed "to provide for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto" thereby making provisions by way of which Micro, Small and Medium Enterprises (MSME hereinafter) can sustain themselves in cases where the buyer doesn't pay the supplier in the prescribed time period in addition to other provisions for the promotion, advancement, expansion, and development of MSMEs. To ensure the subsistence of the MSMEs several measures were taken. The MSMED Act has provisions that benefit the MSME supplier for its subsistence in circumstances of non-payment of dues by the buyers. The Delhi High Court[4] noted the following about the object, reason, and scheme of this Act:

"If one examines the scheme of the provision of Section 15 to 23 of the Act,[5] It is apparent that the scheme is to provide a statutory framework for Micro and Small Enterprises to expeditiously recover the amounts due for supplies made by them. This is in conformity with the object of the Act to minimise the incidence of sickness in Small and Medium Enterprises and to enhance their competitiveness. It is understood that the Small and Medium Enterprises do not command a significant bargaining power and -

[3] Development Act (n 1)
[4] *Bharat Heavy Electricals Limited v The Micro and Small Enterprises Facilitation Centre* 2017 SCC OnLine Del 10604
[5] Micro, Small and Medium Enterprises Development Act 2006, s 15-23

as indicated in the statement of object and reasons of the Act - the object of the Act is, inter alia, to extend the policy support and provide an appropriate legal framework for the sector to facilitate its growth and development. It is, apparently, for this reason, that Section 18 (3)[6] does not contemplate an arbitration to be conducted by an arbitrator who is to be appointed by either party, but expressly provides that the same would be conducted by MSEFC or by any institution or a centre providing alternate dispute resolution services."

MSMED ACT AND ITS BENEFICIAL PROVISIONS

The MSMED Act is a 'special' Act enacted to protect MSMEs in situations where the buyer of goods fails to pay the MSME within the stipulated or agreed time period. Furthermore, it facilitates the quickest mode of recovery of admitted bill amounts from defaulting buyers to ensure that the MSMEs survive in the market. This act provides relief to both manufacturing and service entities. It also addresses policy issues affecting MSMEs along with the sector's investment ceiling and coverage. To ensure the subsistence of MSMEs, several beneficial provisions were enacted.

Firstly, the buyers are duty-bound to settle the seller's debts and make payment on or before the date agreed in writing between the MSME and the buyer, or, if no such agreement exists, before the 'appointed day,' i.e. the day following immediately after the expiry of the period of fifteen days from the day of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier. Furthermore, it capped the time period by stating that in no case the timeframe decided upon between the MSME and the buyer in writing shall exceed 45 days from the day of acceptance or the day of deemed acceptance where 'The day of acceptance' means (a) the day of the actual delivery of goods or the rendering of services; or (b) where any objection is made in writing by the buyer regarding the acceptance of goods or services within fifteen days from the day of the delivery of goods or the rendering of services, the day on which such objection is removed by the supplier and 'The day of deemed acceptance' means 'where no objection is made in writing by the buyer regarding the acceptance of goods or services within fifteen days from the day of the delivery of goods or the

[6] Micro, Small and Medium Enterprises Development Act 2006, s 18(3)

rendering of services, the day of the actual delivery of goods or the rendering of services' under section 2(b) of the said act.[7] Thus, the dominant buyers could no longer force the MSME suppliers to accept long payment periods and delay the payments endlessly and were liable to make the payment at most by 45 days.

Secondly, heavy penalties were imposed on buyers who did not pay MSME suppliers for the goods supplied within the agreed period, which could be no longer than a period of 45 days as per section 15 of the said act.[8] Under section 16 of the Act,[9] the buyer is liable to pay the MSME supplier three times the bank rate established by the Reserve Bank in compound interest with monthly rests on the outstanding amount. This delay penalty rate supersedes any agreement between the two parties, i.e. buyer and seller, and also any other law for the time being in force. Therefore, even if a dominant buyer forces the seller to sign an agreement with a lower delay penalty rate, the higher rate of three times the bank rate notified by the RBI would override. Such high penalty rates meant that the buyers could no longer continue to delay making the payments due to such exorbitant rates.

Thirdly, the buyers have to mandatorily deposit 75% of the decree or award amount to file an appeal as given under section 19 of the MSMED Act.[10] As per this section, no court could consider an application to set aside an award or decree unless the appellant (who was not a supplier) had deposited an amount equivalent to 75% of the decree or award. This ensured that buyers did not file appeals only to further delay the matter, only to frustrate the MSME seller and the law. Moreover, this restriction of pre-deposit did not apply if the MSME attempted to challenge an unfavourable order.

Fourthly, the MSME seller has preference over the territorial jurisdiction as given under section 18(4) of the Act.[11] The MSME's location determines the territorial jurisdiction of the proceedings, while the buyer can be located anywhere in the country. Therefore, a dominant

[7] Micro, Small and Medium Enterprises Development Act 2006, s 2(b)
[8] Micro, Small and Medium Enterprises Development Act 2006, s 15
[9] Micro, Small and Medium Enterprises Development Act 2006, s 16
[10] Micro, Small and Medium Enterprises Development Act 2006, s 19
[11] Micro, Small and Medium Enterprises Development Act 2006, s 18(4)

buyer could not prevent an MSME from approaching Micro and Small Enterprise Facilitation Council (MSEFC hereinafter) in its closest proximity by forcing it to sign an arbitration clause where the seat of arbitration is further away from its location, thereby increasing the expenses.

Fifth, the cost of filing and contesting a case under the MSMED act is usually quite a bit cheaper than before an ad-hoc arbitrator or arbitration tribunal. This significantly relieves the financial pressure of the MSME in circumstances of non-payment of dues by the buyers and providing a more even playing field for both the parties to the dispute since a dominant buyer can no longer delay the matter just to put the MSME in deep financial distress.

These are a few of the main reasons for which an MSME prefers to file a case for dispute resolution related to non-payment or delayed payment of dues by the buyer under the MSMED Act 2006 instead of invoking the Arbitration Clause and proceeding under Arbitration and Conciliation Act 1996.[12]

THE CONFLICT BETWEEN MSMED ACT AND ARBITRATION ACT

Defaulting buyers invariably try to avoid contesting a case under the MSMED act due to the hefty and severe punishment and penalty imposed on the buyer under the provisions of this act. The prerequisite of depositing 75% of the award or decree amount for filing an appeal only on the buyer along with a delayed penalty three times the RBI rate is the paramount reason that discourages the buyers from submitting to the jurisdiction of the MSMEFC. Moreover, section 18(4)[13] of the Act also renders the seat of arbitration as irrelevant and inoperable.

As a result, the question of law as to whether a dispute would be resolved under the Arbitration Act or the MSMED Act has become the basis of many legal disputes between buyers and MSME sellers. Advancing under the Arbitration Act favours the buyer or non-MSME entity because the dispute is then adjudicated exclusively under the Arbitration Act, with no 'special' benefits or privileges bestowed on the MSME entity. While the MSME prefer to proceed under the MSMED Act since it highly favours the MSME and offers a significantly

[12] Arbitration and Conciliation Act 1996
[13] Micro, Small and Medium Enterprises Development Act 2006, s 18(4)

higher interest rate of delay penalty and can also be quicker in some instances since the MSEFC are under the obligation to decide the arbitration part of the matter within 90 days as provided under section 18(5) of the said act.[14] The root cause of conflicts arising is due to the fact that parties to the dispute invariably have an Arbitration Clause in either their Agreement, Contract, Purchase Order, or have an entire separate Arbitration Agreement altogether.

Moreover, the MSMED Act's dispute resolution mode is conciliation under Section 18(2) of the act[15] and in the event of its failure and termination, Arbitration under section 18(3)[16] of the Act. Furthermore, the MSMED Act 2006 states that the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996[17] shall apply to such a dispute as if the conciliation was initiated under Part III of that Act[18] and that the provisions of the Arbitration and Conciliation Act, 1996 shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.[19] The conciliation or arbitration under the MSMED Act is to be conducted either by the Facilitation Council or the MSEFC can seek assistance from any institution or centre providing alternate dispute resolution services by referring to such an institution or centre.[20]

Section 24 of the Act,[21] states that 'the provisions of sections 15 to 23,[22] shall have an overriding effect if anything is inconsistent therewith contained in any other law for the time being in force.' As a result, Section 18 of the MSMED Act,[23] introduces an 'interplay' between the Arbitration and MSMED Acts because it begins with a non-obstante phrase, which creates a dispute between the two Acts' applicability.

[14] Micro, Small and Medium Enterprises Development Act 2006, s 18(5)
[15] Micro, Small and Medium Enterprises Development Act 2006, s 18(2)
[16] Micro, Small and Medium Enterprises Development Act 2006, s 18(3)
[17] Arbitration and Conciliation Act 1996, s 65-81
[18] Development Act (n 1)
[19] *Ibid*
[20] *Ibid*
[21] Micro, Small and Medium Enterprises Development Act 2006, s 24
[22] Micro, Small and Medium Enterprises Development Act 2006, s 15-23
[23] Micro, Small and Medium Enterprises Development Act 2006, s 18

LIMITATION OF MSMED ACT – INSTANCES WHERE THE MSME SELLER CANNOT PROCEED UNDER THE MSMED ACT

Due to the nature of the MSMED Act, only disputes related to non-payment of dues or delayed payments by a buyer can be registered under the MSMED Act. Thus, if the subject of the dispute is anything except non-payment of dues by a buyer, the MSME seller cannot approach an MSEFC, instead has to utilize the Arbitration agreement. Another limitation of the MSMED Act is that an MSME seller can only register a case related to an admitted due or an accepted or deemed accepted invoice. Therefore, if any dispute related to an invoice already exists and the buyer has notified the seller prior to the filing of the case under the MSMED Act, the complaint of the MSME seller, in all probability, would be rejected.

INTERPLAY

The two Acts are greatly intertwined and are so linked that one takes the place of the other. However, despite depending on the Arbitration Act's procedural rules, the MSMED Act intends to override the Arbitration Act by offering unique incentives to MSMEs only. Over the years, many cases have been filed before the respective high courts on the question of law as to whether a dispute would be resolved under the Arbitration Act or the MSMED. Although the courts have dealt with and settled numerous disputes on this topic, there are still many occasions where the terms and applicability of the two Acts are in dispute.

MAINTAINABILITY OF INVOCATION OF ARBITRATION CLAUSE BY A BUYER AGAINST AN MSME AFTER IT HAS APPROACHED THE MSEFC

In the cases where the buyer invokes the arbitration clause after the MSME supplier has already started proceedings under section 18 of the MSMED Act,[24] the Courts have held in a plethora of cases that the presence of an arbitration agreement between the parties would not invalidate arbitration proceedings that have been initiated under the MSMED Act. Being a 'special' statute, any contract between the parties would be overridden by the MSMED Act.

[24] *Ibid*

The Hon'ble Gujrat High Court[25] in the matter of Principal Chief Engineer vs Manibhai And Bros (Sleeper) held that:

"It cannot be disputed that the Act 2006 is a Special Act and as per Section 24 of the Act, 2006, the provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, Section 18 of the Act, 2006 would have an overriding effect or any other law for the time being in force, including Arbitration Act, 1996 and therefore, if there is any dispute between the parties governed by the Act, 2006, the said dispute is required to be resolved only through the procedure as provided under Section 18 of the Act, 2006." The Hon'ble Supreme Court of India[26] in the matter of Principal Chief Engineer vs Manibhai and Bros (Sleeper) upheld the interpretation of section 18 of the MSMED Act. 'We are satisfied that the interpretation placed by the High Court on Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006, in the impugned order, with reference to the arbitration proceeding, is fully justified and in consonance with the provisions thereof.'

In one of the first cases on this issue, the Bombay High Court in the matter of ***Bharat Sanchar Nigam Limited vs Maharashtra Micro and Small Enterprises***[27] ruled that because one of the parties had already invoked Section 18(1) of the MSMED Act,[28] conciliation under Section 18(2) was binding.[29] Parties were free to invoke the arbitration clause in their agreement after exhausting the conciliation method.[30] This interpretation did not stand the test of time and was later overruled.

In Bharat Heavy Electricals Limited vs The Micro and Small Enterprises Facilitation Centre[31], it was held by the High Court at Delhi that it was "*respectfully, unable to concur with the view of the*

[25] *Principal Chief Engineer v M/s Manibhai and Brothers (Sleeper*) AIR 2016 GUJ 151
[26] *Ibid*
[27] *Bharat Sanchar Nigam Limited v Maharashtra Micro & Small Enterprises* Arbitration Petition No 990 of 2014
[28] Micro, Small and Medium Enterprises Development Act 2006, s 18(1)
[29] Micro, Small and Medium Enterprises Development Act 2006, s 18(2)
[30] 'Overlap Between MSMED Act And Arbitration Act' (*Amlegals.com*, 2020) <https://amlegals.com/overlap-between-msmed-act-and-arbitration-act/> accessed 07 August 2021
[31] *Bharat Heavy Electricals* (n 4)

Bombay High Court in M/s Steel Authority of India vs The Micro, Small Enterprise Facilitation Council. It further held that:

Section 18 (3) of the Act expressly provides that in the event the conciliation initiated under Section 18 (2) of the Act does not fructify into any settlement, MSEFC would take up the disputes or refer the same to any institution or centre providing alternate dispute resolution services for such arbitration. It is at once clear that the provision of Section 18(3) of the Act does not leave any scope for a non-institutional arbitration. In terms of Section 18 (3) of the Act, it is necessary that the arbitration be conducted under the aegis of an institution -either by MSEFC or under the aegis of any Institution or Centre providing alternate dispute resolution services for such arbitration.

As noticed above, Section 24 of the Act,[32] contains a non-obstante provision and expressly provides that the provisions of Section 15 to 23 of the Act will have an overriding effect. Thus, the provisions of Section 18(3) of the Act cannot be diluted and must be given effect to notwithstanding anything inconsistent, including the arbitration agreement in terms of section 7 of the A&C Act.[33] In the matter of GE T&D India Limited vs Reliable Engineering[34], the Delhi High Court held that in the light of the fact that the statutory mandate emanates from a special statute providing a special dispute resolution mechanism for the benefit of MSMEs, therefore no arbitration agreement nor any contractual provisions could override the statutory mandate.

In the present case, therefore, the Court is satisfied that the MSMED Act, to the extent it provides for a special forum for adjudication of the disputes involving a 'supplier' registered thereunder, overrides the Act, i.e. the Arbitration and Conciliation Act 1996. The Allahabad High Court in the matter of Bharat Heavy Electricals Limited vs State of UP[35] diverged from the view taken by the High Court at Bombay in the matter of Steel Authority of India and held that: "The proceedings had been entertained by the Council in pursuance of the provisions of the Act. Though there may be an arbitration agreement between the parties, the provisions of

[32] Micro, Small and Medium Enterprises Development Act 2006, s 24
[33] Arbitration and Conciliation Act 1996, s 7
[34] *Ge T&D; India Limited vs Reliable Engineering Projects* (2017) 238 DLT 79
[35] *Bharat Heavy Electricals Limited v State of UP* (2014 (4) ALJ 52

Section 18(4) specifically contain a non-obstante clause empowering the Facilitation Council to act as an Arbitrator. Moreover, Section 24 of the Act states that Sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

The Punjab and Haryana High Court in the case of Welspun Corp. Ltd. vs The MSEFC, Punjab, and others[36] held that Section 24 of the MSMED Act contains an express provision that lays forth the Act's overriding effect. The Court decided that because Section 18 of the Act[37] established a specific mechanism for arbitration, and it also established a specific method for putting aside an arbitrator's award; those provisions would take precedence over the Arbitration Act.

The Bombay High Court, following the order in **Gujarat State Petronet Ltd. vs MSEFC & Ors.** [38] has consistently taken the view that once a reference is already made to the Facilitation Council, an application u/s 11 of the Arbitration Act[39] would not be maintainable. Therefore, in such cases where the seller has initiated proceedings u/s 18 of the MSMED Act before the purchaser invoked arbitration agreement, the MSMED Act will have an overriding effect on the Arbitration Clause, and the dispute would be governed by the MSMED Act, and the arbitration petition filed by a buyer in such instances would not be maintainable.

MAINTAINABILITY OF INVOCATION OF ARBITRATION CLAUSE BY A BUYER AGAINST AN MSME BEFORE SELLER APPROACHES THE FACILITATION COUNCIL

Such a scenario wherein the Buyer invoked arbitration clause and wherein dispute wasn't referred to the Facilitation Council was dealt with by Bombay High Court in the matter of *Porwal Sales vs Flame Control Industries*[40]. In this case, the Court dealt with a situation wherein the question of law was whether the power of the court to appoint an arbitral tribunal u/s 11

[36] *Welspun Corp Ltd v The MSEFC, Punjab & Ors* CWP No 23016 of 2011
[37] Micro, Small and Medium Enterprises Development Act 2006, s 18
[38] *M/s Porwal Sales v M/s Flame Control Industries* Arbitration Petition No 77 of 2017
[39] Arbitration Act 1996 (n 11)
[40] *Porwal* (n 38)

of the Arbitration Act was taken away merely because the respondent was falling under the MSMED Act even though it had made no application u/s 18 of the Act.

In this case, the Buyer submitted an application for the appointment of an arbitral tribunal u/s 11 of the Arbitration Act, pursuant to an arbitration agreement between the parties. One of the respondents' objections was that because it was a supplier under the MSMED Act, the court's jurisdiction to hear an application under section 11 of the Arbitration Act would be invalidated by section 18(4) of the MSMED Act, which prohibits the institution of any proceedings other than as provided under section 18(1) of the MSMED Act.

It was held by the court that "If the argument as advanced on behalf of the respondent that Section 18(4) creates a legal bar on a party who has a contract with a Small Scale Enterprise, to take recourse to Section 11 under the Arbitration and Conciliation Act, 1996[41] for appointment of an arbitrator, then the legislation would have so expressly provided, namely that in case one such party falls under the present Act, the arbitration agreement, as entered between the parties would not be of any effect, and the parties would be deemed to be governed under the MSMED Act in that regard. However, sub- section (4) of Section 18 of the MSMED Act does not provide for such a blanket consequence in the absence of any reference made by a party to the Facilitation Council. Also, if Section 18 is read in the manner the respondent is insisting, it would lead to a two-fold consequence – firstly, it would amount to reading something in the provision which the provision itself does not provide, which would be doing violence to the language of the provision; secondly, such interpretation in a given situation would render meaningless an arbitration agreement between the parties, and it may create a situation that the party who is not falling within the purview of Section 17 and Section 18(1) would be foisted a remedy, which the law does not actually prescribe. Further sub-section (1) uses the word 'may' in the context of a dispute which may arise between the parties under Section 17. In the present context, the word 'may' as used in sub-section (1) of Section 18 cannot be read to mean 'shall', making it mandatory for a person who is not a supplier (like the petitioner) to invoke the jurisdiction of the Facilitation Council. Thus, the interpretation of sub-section (4) of

[41] Arbitration and Conciliation Act 1996, s 11

Section 18 as urged on behalf of the respondent of creating a legal bar against the petitioner to file a petition under section 11 of the Arbitration and Conciliation Act cannot be accepted."[42] The court further held that mandatory language wasn't used in the MSMED Act and thus allowed buyers/ purchasers to invoke the arbitration agreement even in cases concerning payment issues, in situations where the dispute hasn't previously been referred to the Facilitation Council.

In the matter of Microvision Technologies Private Limited vs UOI,[43] the Bombay High Court concluded that regardless of MSEFC's authority under Section 18(3) of the MSMED Act to act as an arbitrator or submit the issue to arbitration, an arbitration agreement between the parties shall not terminate to have an effect. Accordingly, it held that the Facilitation Council should nonetheless have the authority to take up a matter for arbitration or refer it to an institution or a centre for arbitration, despite anything in the parties' arbitration agreement. The arbitration agreement, however, will remain in effect even if the Facilitation Council's powers under Section 18 are used.

CONCLUSION

The Bombay High Court's decision that independent arbitration agreements would continue to exist even if ad hoc arbitration was provided, in the Steel Authority of India v/s MSEFC case, was ruled to be untenable. This judgement established a contrast between institutional or statutory arbitration, on the one hand, and ad hoc arbitration, which is commenced unilaterally based on a contract between the parties, on the other. The pronouncement of the Hon'ble High Court at Bombay in Porwal Sales[44] The case has emphasized an ambiguity in the MSME Act: if a disagreement arises between parties, and one of the parties is a Supplier, and the Supplier initially invokes the Council's jurisdiction, the MSME Act's provisions will govern the dispute. However, if the purchaser seeks arbitration first under the parties' contract, the MSME Act's regulations may not apply to the arbitration procedures. This largely means that if a Buyer/ Purchaser wishes to circumvent arbitrate under the MSMED Act, it only needs to

[42] *Porwal* (n 38)
[43] *Microvision Technologies Pvt Ltd v Union of India* Commercial Notice of Motion (L) No 2043 of 2019
[44] *Porwal* (n 38)

invoke arbitration under the arbitration agreement signed between the two parties before the Supplier approaches the Facilitation Council.

Thus, if the MSME Supplier refers the dispute to the Council first, then the provisions of the MSMED Act will apply to the dispute. However, if the Buyer invokes arbitration first under the arbitration agreement signed between the parties, the provisions of the MSME Act might not apply to such arbitration proceedings, thereby resulting in the MSME to lose on the high rate of delay penalty equivalent to 3 times the RBI rate and statutory requirement of pre-deposit of 75% for filing of appeal which prevents frivolous attempts to delay the payment. Therefore, it can be said that it is the first mover's advantage. As per the interpretation made by the Bombay High Court in the matter of Porwal Sales vs Flame Control Industries, a case under both the acts can exist simultaneously in the situation where there is one dispute related to an amount due u/s 17 of MSMED Act and the other being a dispute related to any other subject matter such that the arbitration agreement had to be invoked, also, the seller must approach the Facilitation Council before the Arbitration Clause is invoked.

Therefore, it can be concluded that the MSMED Act being a 'Special' Statute, overrides the Arbitration Clause in case of inconsistencies meaning thereby that Section 18(3) will preside over any arbitration agreement. Though, the Arbitration agreement doesn't automatically become redundant. Rather, it continues to exist and be valid even if Section 18 of the MSMED is invoked. The overlap of the two statutes is still developing, and the Supreme Court has yet to define the legal position on various connected aspects.

However, the recent interpretations of matters related to the MSMED Act by the High Court of Delhi and Bombay have ruled in favour of the buyers, contrary to the intent of the Act, which was to safeguard the MSME suppliers. Most importantly, arbitration under Section 18 can only be invoked in the case of non-payment or delay in payment by buyers and can only be attracted if the dispute is over an amount payable u/s 17 of the MSMED Act.[45] For disputes relating to any other subject matter, an arbitration agreement shall prevail.

[45] Micro, Small and Medium Enterprises Development Act 2006, S 17