The Appointment Tug-of-War: Exploring the Overlap Between MSMED Act 2006 and Arbitration & Conciliation Act 1996

Khaitan & Co

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1. Introduction

The Micro, Small and Medium Enterprises Development Act, 2006 **("MSMED Act")** was enacted to facilitate the promotion and development of micro and small enterprises (MSEs), by guaranteeing timely payments and providing for a special dispute resolution mechanism in case of any default by the buyers (usually non-MSEs). Section 18 of the MSMED Act provides for a statutory arbitration mechanism for disputes between registered MSEs and buyers, involving a mandatory conciliation process before the Micro and Small Enterprises Facilitation Council **("MSEF Council").** If conciliation fails, the MSEF Council is to refer the matter to arbitration which is governed by the Arbitration and Conciliation Act, 1996 **("A&C Act").**

However, the interplay between the two Acts has created interpretational difficulties, especially when the MSEF Council fails to discharge its obligation of referring the dispute to arbitration under Section 18 of the MSMED Act. This raises a critical question: Can a party approach the High Court under Section 11 of the A&C Act to appoint an arbitrator in such cases? The issue becomes even more complex when parties either lack a contractual arbitration clause or, despite having one, initially invoke the statutory process under Section 18 of the MSMED Act.

To address this issue, the Courts have taken divergent approaches, creating a doctrinal confusion. This article attempts to analyse the key judgments on the issue and also examine whether Section 11 is a viable remedy—or a jurisdictional overreach—in cases of Council inaction.

2. The Judicial Divide

The issue first came for consideration in ***Shobha Gupta v. Atlas Cycles***[1]. The High Court of Delhi held that, in the absence of a contractual arbitration clause, a petition filed under Section 11 is not maintainable. The Court observed that a valid arbitration agreement under Section 7 of the A&C Act is *sine qua non* for appointment of an arbitrator under Section 11 of the A&C Act. It further held that the failure of the MSEF Council to refer a dispute to arbitration under Section 18 of the MSMED Act does not, by itself, mean that a petition under Section 11 of the A&C Act can be filed. The appropriate remedy, the Court said, would be to independently challenge the inaction of the MSEF Council, rather than seeking recourse under Section 11 of the A&C Act.

A contrary view was taken by the High Court of Bombay in ***Microvision Technologies v. Union of India***.[2] The Court held that a petition filed under Section 11 of the A&C Act would be maintainable upon the failure of MSEF Council to refer the dispute to arbitration in terms of Section 18(3) of the MSMED Act. The Court held that Section 11 of the A&C Act comes into play not only upon party failures but also applies when a designated institution fails to perform its function vis-à-vis appointment of arbitrator. The Court held that upon a harmonious interpretation of both statutes, it would be permissible to appoint the arbitrator under Section 11 of the A&C Act upon the failure of

the MSEF Council to act in terms of Section 18 of the MSMED Act. The Court also clarified that the remedy to challenge the inaction of MSEF Council need not be limited to a writ petition and that statutory arbitration under the MSMED Act can still be enforced by filing a petition under Section 11 of the A&C Act..

However, in ***Bafna Udyog v. MSEF***,[3] the High Court of Bombay took a different view, distinguishing ***Microvision*** on its facts. The Court noted that ***Microvision*** involved a contractual arbitration clause, which justified the invocation of Section 11 of the A&C Act. The Court emphasized that Section 11 of the A&C Act is intended only for contractual arbitrations and held that statutory arbitrations under the MSMED Act become governed by the A&C Act only after the MSEF Council appoints the arbitrator. Therefore, in cases where the Council has not initiated the appointment process, recourse under Section 11 may not be available.

The debate again resurfaced in ***Vallabh Corporation v. SMS India Pvt Ltd***,[4] where the High Court of Delhi favoured the reasoning in ***Microvision***. The Court held that a petition under Section 11 of the A&C Act would lie upon the failure of the MSEF Council to act in terms of Section 18 of the MSMED Act. The Court allowed the petition and held that the provisions of MSMED Act would continue to apply to such arbitration.

3. Analysis: Can Section 11 Be Invoked for Statutory Arbitration?

A perusal of the above decisions reflects not only a divergence between High Courts but even intra-court inconsistencies between the coordinate benches of the same High Court.

It is a settled law that when a contract contains an arbitration clause and the supplier is an MSME, both remedies—contractual arbitration and statutory arbitration—are available and the supplier may elect either.[5] However, once the statutory arbitration is opted, the question arises: can the supplier, upon the Council's failure to act, file a petition under Section 11 of the A&C Act and still claim the arbitration to be one under the MSMED Act?

It is worth noting that there are major legal implications that flow from the classification of arbitration as either statutory or contractual. The arbitrations under the MSMED Act attract stringent protections such as the imposition of penal interest (under Section 16 of the MSMED Act) and the prerequisite for the buyer to deposit 75% of the awarded amount to challenge the award (under Section 19 of the MSMED Act). These provisions do not apply to a contractual arbitration. Thus, the classification is not merely academic but affects the rights and obligations of both parties.

In the opinion of the authors, where a supplier chooses statutory arbitration and the MSEF Council fails to proceed with appointment of an arbitrator it may not be appropriate to invoke Section 11 of the A&C Act and still treat the resultant arbitration as one under the MSMED Act. By approaching the Court under Section 11 of the A&C Act without challenging the MSEF Council's inaction through an appropriate remedy (writ petition), the supplier may be seen as opting for contractual arbitration particularly where an arbitration clause exists in the underlying contract.

The remedy against MSEF Council's inaction would lie in writ jurisdiction, not under Section 11 of the A&C Act. Where a contract has no arbitration clause, invoking Section 11 should be impermissible. Where a clause exists and statutory arbitration is initially chosen, returning to filing petition under Section 11 of the A&C Act upon the Council's inaction must be treated as an election to proceed under the contractual route—divesting the arbitration of MSMED-specific benefits.

While it is important to uphold the beneficial nature of the MSMED Act, it is equally important to maintain the structural boundaries between different legal remedies. Extending Section 11 of the A&C Act to address such delays may offer interim relief but could lead to interpretive complications later—particularly at the stage of award

enforcement or challenge. A clearer demarcation of remedies—such as writ jurisdiction to address inaction by the Council and Section 11 of the A&C Act for enforcement of contractual arbitration clauses—can help preserve the coherence of both the A&C Act and the MSMED framework.

Khaitan & Co - Abhisaar Bairagi, Milind Sharma and Ausaf Ayyub