

## Statutory Arbitration under The Micro, Small and Medium Enterprises Development Act, 2006

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**Introduction:** Normally an arbitration is maintainable only when there is a arbitration agreement between the parties. But the Government by a statute can empower certain category of people to invoke arbitration, even though there is no arbitration clause between the parties. These types of arbitrations are known as statutory arbitrations. In India one such empowerment is given to Micro, small and Medium Industries to invoke arbitration even though there is no arbitration clause between the Parties. There is doubt in the minds of even in the mind of each and every arbitration lawyer in India and each and every law firm in India, whether the said statutory arbitration is a full-fledged arbitration or not. The endeavour of the author is to confirm that the said statutory arbitration is a full-fledged arbitration and hence neither the parties nor any arbitration lawyer in India, should have a doubt about it.

### **The interest on Delayed payments to small scale and Ancillary Industrial undertakings Act, 1993:**

Since many large scale industries are not making payments to small scale industries Government of India brought an Act in the name of “The interest on Delayed payments to small scale and Ancillary Industrial undertakings Act, 1993” in which there was a provision for statutory arbitration done by the “Industry Facilitation Council’, constituted by the State Government of the State, by way of a notification in the official Gazette. The said statutory arbitration provided that the above said, Industry Facilitation Council shall have the powers to apply the provision of Arbitration and Conciliation Act, 1996 if a small scale industry refers a dispute to the Council, and conduct the arbitration as if the arbitration or conciliation were

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pursuant to an arbitration agreement referred to in Sub-section (1) of Section 7 of the Arbitration and Conciliation Act, 1996. For the Convenience of the readers, S.6 of: “The Interest on delayed payments to small scale and ancillary industrial undertakings Act, 1993” is reproduced below:-

*“S.6 - **Recovery of amount due.** –[1] The amount due from a buyer, together with the amount of interest calculated in accordance with the provisions of section 4 and 5, shall be recoverable by the supplier from the buyer by way of a suit or other proceeding under any law for the time being in force. [2] Notwithstanding anything contained in sub-section (1), any party to a dispute may make a reference to the Industry Facilitation Council for acting as an arbitrator or conciliator in respect of the matters referred to in that sub-section and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such disputes as if the arbitration or conciliation were pursuant to an arbitration agreement referred to in sub – section (1) of section 7 of that Act.”*

1. **The Micro, Small and Medium Enterprises Development Act, 2006:** Later in the year 2006, government of India chose to repeal the above said Act and brought in a new Act with an objective to bring a much better and elaborate protection for Micro, Small and Medium enterprise in the name of “The Micro, Small and Medium Enterprises Development Act, 2006”, which came into effect from 16<sup>th</sup> June 2006. This new Act also provides for a reference by a party to “Micro, Small and Medium scale Enterprises Facilitation Council” and the disputes between parties shall be resolved by way of an arbitration, as if the arbitration agreement referred to in sub-section (1) of Section. 7 of the Arbitration and Conciliation Act, 1996. For the Convenience of this Hon’ble Court S. 18 of “The Micro, Small and Medium Enterprises Development Act, 2006” is extracted and reproduced below: -

*18. (1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.*

*(2) On receipt of a reference under Sub-section (1), the Council shall either itself conciliate in the matter or seek the assistance of any institution or centre providing alternate dispute resolution service by making a reference to such an institution or centre, for conducting conciliation and the provision of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.*

*(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and 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.*

*(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator and a buyer located anywhere in India.*

*(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.”*

2. The above said S. 18 of the “The Micro, Small and Medium Enterprises Development Act, 2006” makes it clear that if a Micro or Small or medium Enterprises has referred a matter to the facilitation council then the facilitation council will conduct the arbitration, as if there was a valid arbitration Agreement as per S.7 of the Arbitration and Conciliation Act, 1996 even though in fact there is no arbitration agreement between the parties. The above said “The Micro, Small and Medium Enterprises Development Act, 2006” is in practice in all the states

of India including the state of Karnataka and the state of Maharashtra. For the convenience, the above said S.20 of the “The Micro, Small and Medium Enterprises Development Act, 2006” is extracted and reproduced below:

*20. The State Government shall, by notification, establish one or more Micro Small Enterprises Facilitation Councils, at such places, exercising such jurisdiction and for such area, as may be specified in the notification.*

3. **No Need for an Arbitration clause between parties:** In a case between secure Industries Ltd., and Godrej & Boyce Mfg. Co. Ltd., Hon’ble Supreme Court of India dealt with the nature of the proceedings before the Industry facilitation council under a proceeding initiated under “Interest on delayed payments to small scale and Ancillary Industrial Undertaking Act, 1993”. The Hon’ble Supreme Court of India held that the facilitation council is fully empowered to exercise powers under Arbitration and conciliation Act, 1996 even though there is no arbitration clause between the parties. Moreover, Supreme Court of India held that the court can issue orders in such proceedings only as provided under the Arbitration and conciliation Act, 1996. The relevant paragraphs of the Supreme Court judgement **Secure Industries Ltd. Vs. Godrej (2004) 3 SCC 447** is reproduced below for the convenience of this court:-

*8. Section 6 of the Act provides as follows:*

*“6. Recovery of amount due. – (1) The amount due from a buyer, together with the amount of interest calculated in accordance with the provisions of Sections 4 and 5, shall be recoverable by the supplier from the buyer by way of a suit or other proceeding under any law for the time being in force.*

*(2) Notwithstanding anything contained in sub-section (1), any party to a dispute may make a reference to the Industry Facilitation Council for acting as an arbitrator or conciliator in respect of the matters referred to in that sub-section and the provisions of the Arbitration*

*and Conciliation Act, 1996 (26 of 1996) shall apply to such dispute as if the arbitration or conciliation were pursuant to an arbitration agreement referred to in sub-section (1) of Section 7 of that Act."*

*b 9. Sub-section (2) of Section 6 expressly incorporates the provisions of the 1996 Act. Apart from such express incorporation, sub-section (2) of Section 6 goes further and creates a legal fiction whereby disputes referred are to be deemed to have been made pursuant to an arbitration agreement as defined in sub-section (1) of Section 7 of the 1996 Act.*

*c 10. Incorporation of the provisions of the 1996 Act into Section 6(2) of the Act has also been effected by sub-sections (4) and (5) of Section 2 of the 1996 Act which say:*

*"2. (4) This Part except sub-section (1) of Section 40, Sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration*

*d agreement and as if that other enactment were an arbitration agreement, except insofar as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder.*

*(5) Subject to the provisions of sub-section (4), and save insofar as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto."*

*e (emphasis added)*

*11. The "Part" referred to in this sub-section is Part I of the 1996 Act which deals with domestic arbitrations. The proceedings before the Council, therefore, are proceedings under the 1996 Act, pursuant to a deemed agreement between the parties to the dispute. With the applicability of Part I of the 1996*

*f Act in all its force, the extent of judicial intervention in arbitrations is limited by the non obstante provisions of Section 5 of the 1996 Act, which stipulate:*

*"5. Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."*

g *The City Civil Court was right in its approach when it said that the court could only intervene in respect of matters expressly provided for in the 1996 Act.*

The above said judgement makes it clear that the party has right to invoke arbitration under Arbitration and conciliation Act, 1996 by making a reference to the facilitation council, even though there is no arbitration clause between the parties. It also further confirmed that the courts can exercise only the powers given to the courts under the said Arbitration & conciliation Act, 1996. That means the Courts can grant the prayers of the parties, under arbitration and Conciliation Act,1996 including the interim orders under S.9 of the Act.

4. **Counter claim also can be filed by the Respondent:** That the Hon'ble Allahabad High Court while deciding a Writ Petition Challenging the refusal of the facilitation council to entertain a counter claim by the respondent in the matter of AIR 2009 All 155 categorically held that even though there is no arbitration clause between the parties, since the arbitration proceeding is no less than a regular arbitration proceeding as if there was an arbitration clause between the parties, the counter claim also should be allowed to be raised. The relevant portion of the above – said judgement is extracted and re-produced below for the convenience of this court:

*23. This Court now proceeds to examine the issue on merit. As already noticed herein above, from the simple reading of Section 18(3) of Act, 2006, it is apparently clear that arbitral proceedings commence after conciliation has failed, and it is to be treated as they are in pursuance to an arbitration agreement between the parties as per subsection (1) of Section 7 of the Act, 1996. Provisions of Act, 1996 will therefore, apply as a whole including the provisions for counter claim. What logically follows is that arbitral proceeding in respect of a dispute, referred to in sub-section (3) of Section 18 by virtue of Section 7(1) of the Act, 1996 would be tried and decided as if a reference made under the provisions of Act, 1996. Since the counter claim can be pleaded by respondent in an arbitral proceeding under Act, 1996, it follows that in arbitral*

*proceedings made under Section 18 of Act, 2006, such counter claim can also be set up before the Arbitral Council by the respondent.*

Hence it is evident from the above judgement that as per S. 18 (3) of (The Micro, Small and Medium Enterprises Development Act, 2006) arbitration proceedings commence after conciliation has failed and it is to be treated as they are in pursuance to an arbitration agreement between the parties as per subsection (1) of section.7 of the Arbitration and Conciliation Act, 1996. It should also be understood that the parties have all the rights given under Arbitration and Conciliation Act, 1996 while filing a reference under MSMED Act, 2006.

5. **The Later Act, automatically applies:** The Hon'ble High Court of Karnataka dealt with both Interest on delayed payments to small scale and Ancillary Industrial undertakings Act, 1993" Act, 1993 (IDPSSAIU Act) (Repealed) and The Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act) together, while dealing with an arbitration initiated under IDPSSAIU Act and also continued after the repealing of the said Act. Karnataka High Court held that the said continuation after repealing of the earlier Act should be treated as a continuation of the arbitration under MSMED Act, 2006. For the convenience of the readers, relevant paragraphs of **Crompton Greaves Vs Annapurna Electronics AIR KANT R 549** is reproduced below:-

*13. In this backdrop, it is seen that the first respondent had invoked the provisions of the Repealed Act by answering all the requirements and compliances therein and the proceedings had commenced under that Act on 27.12.2005 as is evident from the writ papers. If this is in perspective and sub-Section (2) of Section 32 of MSMED Act is closely considered, the same makes it very clear that "anything done or any action taken" under the Repealed Act are deemed to have been done or taken under the corresponding*

*provisions of the MSMED Act. Therefore, it is clear in law that reference sought and commenced under the Repealed Act seeking recovery of the amount in the manner provided therein, is an action taken under the Repealed Act. When the person seeking reference thereunder had answered the definition of 'Supplier' as on the date of commencement of the proceedings under the Repealed Act, such person will be entitled for continuation of the same under the corresponding provisions of the MSMED Act even without complying any additional requirements under the MSMED Act as the compliance of those requirements would be relevant for a proceeding to be commenced for the first time under the MSMED Act. Hence, in the instant facts also since the proceedings for recovery had commenced on 27.12.2005 and the MSMED Act has come into force on 16.06.2006, the proceedings had rightly been continued and concluded as per law. Hence, the contention that the proceedings were without jurisdiction and the Award is a nullity on that ground cannot be accepted.*

From the above said Judgement of High Court Karnataka it can be understood that the arbitration under MSMED Act is legally recognised and the parties have all the rights under the Arbitration and Conciliation Act, 1996, while filing a reference under MSMED Act.

6. **Facilitation Council is an Arbitral tribunal:** The Punjab & Haryana High Court while dealing with a petition filed under S. 11 of the Arbitration and conciliation seeking to appoint a separate arbitrator after filing the reference under (The Micro, Small and Medium Enterprises Development Act, 2006), held that the facilitation council itself is an arbitrator and hence no need of appointing another arbitrator. The relevant paragraph of Punjab & Haryana High Court judgement in Welspur corp. Ltd., Vs. Micro and small Medium Enterprises Facilitation Council, Punjab & others in C.W.P. No. 23016 of 2011 is reproduced below for the convenience of the court :-

*(6) In this case, if there was a contract between the parties to have an arbitration made under the Act, 1996 and the Conciliator had proposed to terminate its conciliatory*



*postures, it was competent for it to treat itself as an Arbitrator and proceed the arbitral process in the manner contemplated under Section 18(3). I cannot read Section 18(3) in the manner canvassed by the learned counsel that Section 18(3) will apply only if there is no contract between the parties for a reference to arbitration under the Act, 1996. On the contrary, the latter part of Section 18(3) that the provisions of the Act, 1996 would apply to a dispute as if the arbitration was in pursuance of an arbitration agreement shall be read in such a way that it is applicable only to a situation where the Council deems fit to refer to any institution for an alternate dispute resolution services for such an arbitration. Section 18(3) provides for two procedures: (i) on termination of conciliation, it can either take up the arbitration itself or (ii) refer the matter to arbitration as though there is an arbitral agreement between the parties. It is possible for a Council to make a reference to arbitration even in the absence of an arbitration agreement.*

From the above judgement it can be understood that the facilitation council has powers to conduct arbitration between the parties, in absence of an arbitration agreement between the parties.

Conclusion: From the above discussion on the basis of the law settled by the Courts in India, the statutory arbitration conducted under “The Micro, Small and Medium Enterprises Development Act, 2006” is a full-fledged arbitration and parties have every right, under Arbitration & Conciliation Act,1996. Hence every lawyer in India, law firm in India and the parties need not have any doubt about the arbitration under the above said Act.

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