

Interpretation of Contracts in Arbitration – Scope, Limits and Manner

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I. ABSTRACT

This article examines the evolving boundaries of arbitral discretion in the interpretation of contracts under Indian arbitration law, with particular reference to Section 28(3) of the Arbitration and Conciliation Act, 1996. The article commences by tracing the jurisprudential shift from ONGC v. SAW Pipes Ltd., which entrenched judicial interference through a rigid textualist approach, to the 2015 amendment and the Supreme Court's clarification in Ssangyong Engineering v. NHAI, which confined violations of Section 28(3) to the narrower ground of patent illegality. The analysis demonstrates that while arbitral tribunals lack authority to disregard or rewrite express contractual terms, they retain interpretive autonomy where ambiguity exists, provided their construction is commercially plausible. The article further interrogates the limited role of implied terms emphasising that such doctrines cannot be used to undermine express language of the contract. The article also discusses entire agreement clauses, which further limit the scope of interpretation to the written word of the contract and ignoring any pre-contractual discussion and negotiation. Through a descriptive process, the article attempts to delineate a nuanced framework for arbitral interpretation: tribunals must respect contractual text while exercising sufficient discretion to uphold the parties' commercial bargain. The paper concludes that evolution of the arbitral jurisprudence towards contractual interpretation is a step towards stabilising the powers of Arbitral Tribunals relating to interpretation of contracts and in turn leading to greater trust in the Indian Arbitration ecosystem.

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II. Introduction

1. Interpretation of contracts in arbitration proceedings presents a curious paradox. While arbitral tribunals derive their authority from the contract itself, they are often called upon to “*interpret*” the very words that constitute their own source of power.
2. The tension becomes especially acute in India, while attempting to understand the powers of the Arbitral Tribunal to interpret the contract when seen from the lens of Section 28(3) of the Arbitration and Conciliation Act, 1996 (“**the Arbitration Act**”). Prior to its amendment in 2015, the clause instructed tribunals to decide disputes “*in accordance with the terms of the contract,*”.
3. The power to interpret however also cannot be absolute and the Tribunal is not a strictly judicial body. Therefore, the article attempts to dissect and decode judgments of the Courts which discusses the limits of the power and the manner in which the power can be exercised, to provide a roadmap for making arbitrations effective and not a process similar to litigations whose efficiency is marred by delays and multiple appellate procedures.
4. The purpose of this article, therefore, is to create a framework for arbitrators and practitioners on the contours of the powers of arbitral tribunals to interpret the contract and what tools can be used to do the same.

III. Section 28(3) of the Arbitration Act: Evolution of a Constraint

5. Section 28(3) of the Arbitration Act (as it stood prior to its amendment in 2015) mandated that “[i]n all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract...” At first glance, the provision appears uncontroversial especially considering that the Arbitral Tribunals are creatures of the contract. However, a rigid application of the above provision would create a situation where pathological clauses in the contract which fall foul of the Indian Contract Act, 1872 (Contract Act) or any other statute which governs the private relationship between parties are interpreted in a manner which is unreasonable.

6. In *ONGC v. SAW Pipes*,³ the Hon'ble Supreme Court set aside an arbitration award because the award disregarded certain aspects of the contract and went slightly astray from the exact terms. The Court emphasized that an arbitrator cannot “*ignore the terms of the contract and award an amount despite the contract to the contrary*”. In effect, *SAW Pipes* introduced a curial “*second-look*” doctrine, under which adherence to contractual text became a threshold requirement not just for correctness but for enforceability.
7. The implications of the above were significant as not only was arbitral discretion curtailed, but even a commercially reasonable interpretation could be struck down if it deviated from textual fidelity. Consequently, an era of literal interpretation emerged, where post-award scrutiny limited the use of other modes of interpretation of contracts where business and commercial factors and purposive interpretation based on an assessment of the intention of parties by the Tribunal became impermissible.
8. This judicial trend drew sustained critique, culminating in the 246th Report of the Law Commission of India, (“**246th Report**”) which identified *SAW Pipes* as a source of excessive judicial interference and erosion of arbitral finality. The Commission observed that the expression “*in accordance with the terms of the contract*” must be simmered down to “*taking into account the terms of the contract*” and must be further balanced with “*consideration of trade usages applicable to the transaction*”. Notably, the 246th Report proposed a more calibrated approach which would preserve party autonomy and commercial sensibility without reducing arbitral decision making to mechanical activity of strict textual application. The relevant extract of the 246th Report which specifically outlined the reason for the amendment is extracted hereunder:

Amendment of Section 28

16. In section 28,

.....

(ii) In sub-section (3), after the words “tribunal shall decide” delete the words “in accordance with” and add the words “having regard to”

³ *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705

[Note: This amendment is intended to overrule the effect of ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705, where the Hon'ble Supreme Court held that any contravention of the terms of the contract would result in the award falling foul of Section 28 and consequently being against public policy.]

9. Subsequently, the proposed amendment in the 246th Report was accepted, and the Arbitration Act was accordingly amended in 2015. Prior to the amendment, in 2014, the Hon'ble Supreme Court of India in ***Associate Builders v. Delhi Development Authority ("Associate Builders")***⁴ provided a detailed restatement of the law of setting aside of an arbitral award. Pertinently, the above judgment provided a softened view of the restrictions to the powers of the Arbitral Tribunal under Section 28(3) to interpret the terms of the contract.
10. The Hon'ble Supreme Court held that *(a)n Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.* Although, the above judgment was passed in 2014 i.e., prior to the amendments brought about in 2015 to the Arbitration Act, however, the said judgment was already in line with the softened view provided under the Amendments of 2015.
11. The effect of the amendments made to Section 28(3) of the Arbitration Act cannot be truly understood, unless the changes made to the ground of public policy and patent illegality provided for in Section 34 of the Arbitration Act under the 2015 amendment is understood. The 2015 Amendment Act, in addition to the amendment to Section 28(3) of the Arbitration Act, *inter alia*, also removed patent illegality from the ambit of public policy and made it a separate ground under Section 34(2A) of the Arbitration Act. This was done with a view to ensure that public policy of India under Section 34 of the Arbitration Act was equivalent to public policy of India under Section 48 of the Arbitration Act which in essence is the

⁴ *Associate Builders v. DDA*, (2015) 3 SCC 49.

fundamental policy of Indian Law as understood in *Renusagar Power Co. Ltd. v. General Electric Co.*, (“*Renusagar*”).⁵

12. Notably, patent illegality as a ground under Section 34(2A) of the Arbitration Act was not made applicable to international commercial arbitrations and only to purely domestic arbitrations between Indian parties seated in India. The ground for challenge of award for violation of Section 28(3) of the Arbitration Act continued to remain a part of the ground of patent illegality, but because of the amendment, would now be applicable only to purely domestic arbitrations.

IV. Status of the Law relating to Section 28(3) post amendment in 2015

13. The Hon’ble Supreme Court’s decision in *Associate Builders*⁶ had already signalled a shift in judicial approach by tempering the language surrounding public policy and broadening the Tribunal’s interpretive authority with respect to contractual terms. Post the amendment the judicial approach towards interpretation of the contract by the arbitral tribunal became clearer.
14. The Hon’ble Supreme Court in *Ssangyong Engineering & Construction Co. Ltd. v. NHAI* (“*Ssangyong*”) ⁷, clarified the precise legal consequence of the amendment, i.e., a violation of Section 28(3) of the Arbitration Act would henceforth constitute a ground for challenge solely under the doctrine of patent illegality. This ground was now available under Section 34(2A) of the Arbitration Act. Importantly, such a violation could no longer be invoked under the expansive notion of public policy, as had been permissible prior to the legislative amendment. The relevant extract of the *Ssangyong*⁸ judgment highlighting the above is as below:

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of

⁵ *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644.

⁶ *Associate Builders v. DDA*, (2015) 3 SCC 49

⁷ *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131.

⁸ *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131.

the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

15. The aforesaid position was also explained and affirmed by the Hon'ble Delhi High Court in the case of **ONGC Petro Additions Ltd. v. Tecnimont S.P.A.**,⁹ wherein the Court was adjudicating a setting aside application under Section 34 of the Arbitration Act for an award in an India seated International Commercial Arbitration. In the above case, the Petitioner argued that the Arbitral Tribunal had not “*taken into account the terms of the contract*” and was therefore in violation of Section 28(3) of the Arbitration Act. Since the challenge was in case of an International Commercial Arbitration, the Hon'ble Delhi High Court rejected the above argument of the Petitioners at the threshold as the violation of Section 28(3) under the ambit of patent illegality under Section 34(2A) which was only available to challenge domestic arbitration awards and not in a challenge from an international commercial arbitration. Pertinently, the Delhi High Court relied on the **Ssangyong**¹⁰ case in support of its decision.¹¹
16. As far as the change in the position of law under Section 28(3) relating to powers of the Arbitral Tribunal is concerned, the same was discussed and explained by the Hon'ble Bombay High Court in the case of **State of Maharashtra v. Khare & Tarkunde Infrastructure (P) Ltd.**¹² Para 15 & 16 of the Judgment is relevant and extracted hereunder:

15. I must hasten to add that Section 28(3) of the Act is not a license to ignore the terms of the contract at all, but it is a statutory recognition that when parties invest their trust in an Arbitral Tribunal to adjudicate their disputes, the Arbitral Tribunal would take into account the terms of the contract as opposed to the earlier position of adjudicating only “in accordance with” the contract. It is in extraordinary situations such as the matter at hand, that it is arguable that the scheme of the fine balance of reciprocal promises that the parties wove together may be required to be given business efficacy where it otherwise presents

⁹ *ONGC Petro Additions Ltd. v. Tecnimont S.P.A.*, 2023 SCC OnLine Del 8415 [Para 72-74].

¹⁰ *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131.

¹¹ *ONGC Petro Additions Ltd. v. Tecnimont S.P.A.* 2023 SCC OnLine Del 8415 [Para 91-92].

¹² *State of Maharashtra v. Khare & Tarkunde Infrastructure (P) Ltd.*, 2026 SCC OnLine Bom 3796 [Para 15 & 16]

completely irrational and absurd consequences. Therefore, the evident objective is that the informal, non -Court adjudication must be given greater leeway to do justice without ignoring the terms of the contract but equally taking into account the contract rather than adjudicating only in accordance with the contract while ignoring how the parties conducted themselves.

16. The term “in accordance with” entails a mandatory stipulation while the term “take into account” would entail factoring in the terms of the contract. Therefore, if the contract in question contains a provision of limiting damages, needless to say, it cannot be wished away or ignored. However, when the statutory stipulation is to “take into account” such provision of the contract, as a conscious departure from the phrase “in accordance with”, the legislature in its wisdom has specifically held that the Arbitral Tribunal must have regard to the contract. Yet, in a peculiar situation such as this, where the ROW has simply not been provided for an inordinately long period of time with the Appointed Date fixed by the PWD being ignored by the PWD itself, the empowerment of the Arbitral Tribunal to decide the validity of the limit in the contract introduced by Section 28(3) cannot be ignored.

(Emphasis Supplied)

17. In summation therefore, the law post 2015 amendment, as discussed above, clearly demonstrates that arbitral tribunals retain a measure of discretion to interpret the terms of a contract. However, that discretion is not without limits. Where the tribunal’s interpretation is wholly implausible or manifestly unreasonable, the resulting award may be set aside on the ground of patent illegality. It must be underscored that this ground is available exclusively in the context of domestic arbitration. Consequently, in an international commercial arbitration seated in India, a dispute concerning the interpretation of contractual provisions cannot serve as a basis for setting aside the award under the doctrine of patent illegality. This is because a violation of Section 28(3) of the Arbitration Act, which underlies such a challenge, is not recognized as a permissible ground for annulment in the international context.
18. In the following sections, the authors will examine the precise scope of an arbitral tribunal’s authority to interpret contractual terms, the circumstances in which such interpretive authority may be exercised, and the judicial safeguards that have been articulated through precedent to ensure that such authority is not exercised in excess of its proper bounds.

V. Ambiguity as a trigger to interpret a contract

19. In cases of ambiguity, construction of the terms of the Contract is the sole prerogative of the Arbitral Tribunal. Even if there is a possible alternative interpretation of the contract, the same should not be interfered with if the Arbitral Tribunal has taken a particular view¹³ and the same is a possible view that was reasonable and was arrived at with a fair-minded approach.¹⁴
20. In cases of ambiguity, therefore guidance on the general interpretation of contracts is provided by the Hon'ble Supreme Court in the case of **Bangalore Electricity Supply Co. Ltd. v. E.S. Solar Power (P) Ltd. ("BESCOM")**¹⁵ wherein the Apex Court stated as below:

16. Before embarking on the exercise of interpretation of the agreement it is necessary to take stock of the well-settled canons of construction of contracts. Lord Hoffmann in Investors Compensation Scheme Ltd. v. West Bromwich Building Society [Investors Compensation Scheme Ltd. v. West Bromwich Building Society, (1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)] summarised the broad principles of interpretation of contract as follows : (WLR pp. 912-13)

“(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract...”

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification...

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words...the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean...

(5) The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language,

¹³ *NHAI v. Hindustan Construction Co. Ltd.*, (2024) 6 SCC 809 [Para 16]; *Consolidated Construction Consortium Ltd. v. Software Technology Parks of India*, 2025 SCC OnLine SC 956 [Para 28].

¹⁴ *Konkan Railway Corpn. Ltd. v. Chenab Bridge Project*, (2023) 9 SCC 85 [Para 19 & 20]; *Somdatt Builders-NCC-NEC (JV) v. NHAI*, (2025) 6 SCC 757 [Para 37].

¹⁵ *Bangalore Electricity Supply Co. Ltd. v. E.S. Solar Power (P) Ltd.*, (2021) 6 SCC 718.

the law does not require Judges to attribute to the parties an intention which they plainly could not have had.”

17. The duty of the court is not to delve deep into the intricacies of human mind to explore the undisclosed intention, but only to take the meaning of words used i.e. to say expressed intentions (Kamla Devi v. Takhatmal Land [Kamla Devi v. Takhatmal Land, (1964) 2 SCR 152 : AIR 1964 SC 859]). In seeking to construe a clause in a contract, there is no scope for adopting either a liberal or a narrow approach, whatever that may mean. The exercise which has to be undertaken is to determine what the words used mean. It can happen that in doing so one is driven to the conclusion that clause is ambiguous, and that it has two possible meanings. In those circumstances, the court has to prefer one above the other in accordance with the settled principles. If one meaning is more in accord with what the court considers to be the underlined purpose and intent of the contract, or part of it, than the other, then the court will choose the former or rather than the latter... Every contract is to be considered with reference to its object and the whole of its terms and accordingly the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause. Bihar SEB v. Green Rubber Industries [Bihar SEB v. Green Rubber Industries, (1990) 1 SCC 731].

21. The aforesaid observations of the Hon’ble Supreme Court in **BESCOM** clearly provide a roadmap to the interpretation of contracts, more importantly, in cases of ambiguity or multiple interpretations.
22. As per the Apex Court, the interpretation which is closest to the underlying intent and purpose of the Contract must be preferred and the intention of the parties and the object of the contract is to be understood on the holistic reading of the entire contract and the surrounding circumstances when they were entered into, even though the immediate exercise is to understand the meaning of an isolated clause. In other words, the meaning of an isolated clause is to not be understood in isolation of the entire contract but rather understood from the lens of the object and purpose of the entire contract and the surrounding circumstances when it was entered into.

23. The above explanatory observations of the Court in **BESCOM** has been subsequently cited with approval by the Supreme Court in **Food Corpn. of India v. Abhijit Paul**¹⁶ and **Cox & Kings Ltd. v. SAP India (P) Ltd.**¹⁷
24. It is interesting to note that even if there exists an ambiguity, the general rule as propounded in the BESCOM Judgment (while placing reliance on **Investors Compensation Scheme Ltd. v. West Bromwich Building Society, (1998) 1 WLR 896**) is that previous negotiations of the parties and their declarations of subjective intent is to be ignored when interpreting the final written contract between the parties. What however, becomes apparent is that this restriction is necessary so as to focus only on the written word of the contract and to not rely on the previous negotiation which may contain intentions which may have changed once the final contract was entered into.
25. More recently, the Hon'ble Supreme Court reaffirmed the law relating to the interpretation of contracts by the Arbitral Tribunal in the case of **OPG Power Generation (P) Ltd. v. Enxio Power Cooling Solutions (India) (P) Ltd.**,¹⁸ as follows:

Scope of interference with the interpretation/construction of a contract accorded in an arbitral award

84. An Arbitral Tribunal must decide in accordance with the terms of the contract. In a case where an Arbitral Tribunal passes an award against the terms of the contract, the award would be patently illegal. However, an Arbitral Tribunal has jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties including correspondences exchanged, circumstances of the case and pleadings of the parties. If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not interfere [See : SAIL v. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16; Pure Helium India (P) Ltd. v. ONGC, (2003) 8 SCC 593; McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181; MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] . But where, on a full reading of the contract, the view of the Arbitral Tribunal on the terms of a contract is not a possible view, the award would be considered perverse and as such amenable to interference [South East Asia

¹⁶ *Food Corpn. of India v. Abhijit Paul*, (2023) 15 SCC 40 [Para 20].

¹⁷ *Cox & Kings Ltd. v. SAP India (P) Ltd.*, (2024) 4 SCC 1 [Para 95].

¹⁸ *OPG Power Generation (P) Ltd. v. Enxio Power Cooling Solutions (India) (P) Ltd.*, (2025) 2 SCC 417 [Para 84].

Marine Engg. & Constructions Ltd. v. Oil India Ltd., (2020) 5 SCC 164 : (2020) 3 SCC (Civ) 1].

26. The aforesaid judgment therefore clarifies the position of interpretation of contracts under the Arbitration Act, i.e., the power of the Arbitral Tribunal to interpret the terms of the Contract only activates when there exists a certain ambiguity in a clause between multiple clauses of the Contract itself. It is in that scenario that the plausible and possible view test applies.
27. In a multi-clause contract, if one clause is to be interpreted in a manner that inflicts violence upon another part of the contract, it would follow that both such clauses would need to be reconciled. When the arbitral tribunal performs such an exercise it is not re-writing the terms of the contract and is rather reconciling the multiple provisions in a cohesive manner so as to give them a logical meaning, because not doing so would have led to an ambiguity and absurdity in the interpretation of the terms of the contract.¹⁹

VI. Disregarding terms of the contract OR Reading the contract as a whole

28. As discussed, and explained above, the question regarding the powers of the Arbitral Tribunal to interpret the Contract only arises in cases of ambiguity. As a corollary it is absolutely clear that when the terms of the Contract are clear, express, and unambiguous, the Arbitral Tribunal has no power to override or disregard the same²⁰ or seek recourse to any tools of interpretation.²¹ Disregarding such terms of the Contract would be a clear violation of Section 28(3) of the Arbitration Act and accordingly the award passed therein would be liable to be set aside as being patently illegal. The Hon'ble High Court of Delhi in *ONGC Ltd. v. JSIW Infrastructure (P) Ltd.*,²² has succinctly laid out the law in this regard as below:

52. In State of Chhattisgarh v. Sal Udyog Private Limited, 2021 SCC OnLine SC 1027, the Hon'ble Supreme Court, held that an arbitrator's failure to render a decision in accordance with the terms of the contract attracts the ground of

¹⁹ *State of Maharashtra v. Khare & Tarkunde Infrastructure (P) Ltd.*, 2026 SCC OnLine Bom 3796 [Para 38 & 41]

²⁰ *Jindal Rail Infrastructure Ltd. v. Union of India*, 2024 SCC OnLine Del 3065 [Para 18].

²¹ *Union of India v. Jindal Rail Infrastructure Ltd.*, 2022 SCC OnLine Del 1540 [Para 76].

²² *ONGC Ltd. v. JSIW Infrastructure (P) Ltd.*, 2025 SCC OnLine Del 3811.

“patent illegality”. Such a lapse constitutes a flagrant breach of Section 28(3) of the Act, which mandates that the arbitral tribunal shall have due regard to the terms of the contract while delivering an award. This form of patent illegality is not only manifest on the face of the award but also strikes at the very core of the dispute, thereby warranting judicial interference and hence the reliance of the Appellant on the decision of the Hon’ble Supreme Court in HRD Corpn. (supra), wherein it is held that the construction of the terms of the contract is primarily the function of the arbitrator is not relevant when an arbitrator has ignored the clear and unambiguous terms of the contract. When there is only one view possible, it is open for the Court while exercising jurisdiction under Section 34 of the Act to set aside the Award when the view expressed by the arbitrator is not a plausible view.

29. In the guise of interpretation of the Contract, therefore, the Arbitral Tribunal is not empowered to ignore or disregard the terms of the Contract. Disregarding mandatory terms of the contract, unilateral addition or alteration of the terms of the contract is in effect a rewriting of the contract, which the Arbitral Tribunal has no authority to do.²³ It is trite law that while arbitrators have exclusive power to interpret contract provisions, they must operate strictly within the contract's boundaries.²⁴
30. Further, even in cases of clauses of the contract which restrict certain types of damages, the Courts have been clear that such clauses have to be upheld.²⁵ To this extent, an Arbitral Award which granted loss of profit claims, in violation of express bar under the contract towards grant of such damages on account of a possible breach, was set aside by the Hon’ble High Court of Delhi and the same was upheld by the Division Bench in **PLUS91 Security Solutions v. NEC Corpn. India (P) Ltd.**²⁶ The Court, while setting aside the arbitral award, examined the historical jurisprudence in the context of restricting certain types of damages for breach caused by a party. The Hon’ble Delhi High Court concluded that “(i) if the parties have agreed that a particular type of damages would not be paid, the

²³ *PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust*, (2023) 15 SCC 781 (Para 85).

²⁴ *GMR Kamalanga Energy Ltd. v. SEPCO Electric Power Construction Corpn. Tower*, 2023 SCC OnLine Ori 5882; *Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum*, (2022) 4 SCC 463; see also Sneha Rath and Gaurav Rai, ‘Interpretation of Contract v. Disregard of the Terms of the Contract’ (*Arbitration Workshop*, 20 May 2022) <https://www.thearbitrationworkshop.com/post/interpretation-of-contract-v-disregard-of-the-terms-of-the-contract>

²⁵ Gaurav Rai, ‘Exclusionary Clauses in Construction Contracts – Development of Jurisprudence Vis-à-Vis Arbitration’ (*Arbitration Workshop*, 27 October 2020) <https://www.thearbitrationworkshop.com/post/exclusionary-clauses-in-construction-contracts-development-of-jurisprudence-vis-à-vis-arbitration>

²⁶ *PLUS91 Security Solutions v. NEC Corpn. India (P) Ltd.*, 2024 SCC OnLine Del 5114 (Para 79-82).

said agreement is required to be implemented. In terms of Section 28(3) of the A&C Act, the Arbitral Tribunal is required to render a decision having regard to the terms of the contract."²⁷ The Court reiterated that not honouring such clauses in the contract would in effect amount to rewriting the bargain between the parties and the same could not be permitted.²⁸

VII. Entire Agreement Clauses and express restrictions on the power of the Tribunal to look into prior negotiations

31. In *McDermott International Inc. v. Burn Standard Co. Ltd.*²⁹ the Hon'ble Supreme Court held that *the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties.*³⁰
32. Contracts today, however, have gone one step ahead and restricted the power of the Courts and Tribunal to utilise any past conduct of the parties as a tool to interpret the contract. Even in the **BESCOM**³¹ case discussed above, the Hon'ble Supreme Court has cautioned against relying on pre-contract negotiations to interpret the contract. The caution has rather been crystallised by parties out of abundant caution by resorting to incorporate an *Entire Agreement Clause*. Such a clause effectively cordons off arbitral discretion by declaring that the written agreement constitutes the full understanding between the parties, rendering external negotiations, implied obligations, past dealings and conduct, inadmissible in interpreting the contract.

²⁷ *PLUS91 Security Solutions v. NEC Corpn. India (P) Ltd.*, 2024 SCC OnLine Del 5114 [Para 76].

²⁸ *PLUS91 Security Solutions v. NEC Corpn. India (P) Ltd.*, 2024 SCC OnLine Del 5114 [Para 63 & 64].

²⁹ *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181

³⁰ *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181 [Para 112]

³¹ *Bangalore Electricity Supply Co. Ltd. v. E.S. Solar Power (P) Ltd.*, (2021) 6 SCC 718.

33. The true extent and meaning of such clauses was discussed in *JSIW Infrastructure v. ONGC*,³² where the Delhi High Court held that once parties consciously enter into an “entire agreement clause”, the arbitrators have no scope to look beyond the defined contractual corpus. The relevant extract highlighting the above observation of the Delhi High Court is as below:

48. The impugned judgment has correctly held that when the terms of the contract were unambiguous, the negotiations between the parties in the contract should not have been looked into considering clause 1.2.5 of the GCC, which stated that the contract constitutes an entire agreement and supersedes all past negotiations, communications and agreements entered into between the parties prior to the execution of the contract. Ignoring an explicit clause of the contract or acting contrary to the terms of the contract amounts to patent illegality. The above law has been settled in the decision of the Hon'ble Supreme Court in Indian Oil Corporation Ltd. (supra).

34. Cumulatively, the judgments cited above illustrate that once the parties have fixed their interpretive reference frame, the Arbitral Tribunal is not permitted to deviate from it, as the same will amount to a violation of Section 28(3) of the Arbitration Act and consequently make the award amenable to challenge under Section 34(2A) of the Arbitration Act.

VIII. Implied Terms can be read into the Contract, but only to lend Business Efficacy

35. In the interpretation of a contract, it is a recognised aspect that even a fundamental and obvious term of the contract may be inadvertently omitted from the express language of the document by the parties. In such a situation, the Courts are empowered to imply such a term into the Contract under the assumption that the parties always intended the same to be a term of the Contract. Such an exercise is done to provide business efficacy to the terms of the Contract. This principle has been re-affirmed and applied by the Hon'ble Supreme Court in *Nabha Power v. Punjab State Power Corporation (“Nabha Power”)*.³³ In the above case, the Hon'ble Supreme Court relied on the *penta* test propounded by the English Courts for implying terms into a commercial contract. The *penta* test, which was set out in

³² *ONGC Ltd. v. JSIW Infrastructure (P) Ltd.*, 2025 SCC OnLine Del 3811. See also, *Joshi Technologies International Inc. v. Union of India* (2015) 7 SCC 728; *Lindsay International Pvt. Ltd. v. Laxmi Niwas Mittal* [(2017) SCC OnLine Cal 270].

³³ *Nabha Power v. Punjab State Power Corporation* (2018) 11 SCC 508.

B.P. Refinery (Westernport) Proprietary Limited v. The President Councillors and Ratepayers of the Shire of Hastings³⁴ stipulate that the following five conditions need to be satisfied for implying terms into a commercial contract: (a) the exercise of implying terms must be reasonable and equitable; (b) implying terms must be necessary to give business efficacy to the contract; (c) the officious bystander test which posits that the missing term was so obvious in the contract that a reasonable third party would also agree that it was an obvious term; (d) the implied term(s) is capable of clear expression and (e) the implied term must not contradict any express term of the contract. The aforesaid principles on business efficacy as stipulated by the Nabha Power judgment were relied upon and followed by the Hon'ble Supreme Court in ***Adani Power (Mundra) Ltd. v. Gujarat ERC***.³⁵

36. In subsequent judgments of the Supreme Court, however, a more simplified criterion has been formulated for implying terms into the Contract. The same has also been cautioned so to not violate the clear, express and unambiguous terms of the contract while implying a term into the Contract. In ***Maharashtra State Electricity Distribution Co. Ltd. v. Ratnagiri Gas & Power (P) Ltd. ("Ratnagiri Power")***, the Hon'ble Supreme Court held that that the interpretation of a commercial document cannot be arrived at in a manner which is at complete odds of its original intent and purpose and that certain implied terms can be read into the Agreement if the same is in line with the original intent and purpose and does not go against the express terms of the Contract.³⁶ In *Ratnagiri Power*, the Supreme Court also placed reliance on its previous judgment in ***Transmission Corpn. of Andhra Pradesh Ltd. v. GMR Vemagiri Power Generation Ltd.***, in which the Court held that "*if the contract is capable of interpretation of its plain meaning with regard to the true intention of the parties it will not be prudent to read implied terms on the understanding of*

³⁴ *B.P. Refinery (Westernport) Proprietary Limited v. The President Councillors and Ratepayers of the Shire of Hastings* [1977] UKPC 13. See also, *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, (1998) 1 All ER 98 and *Attorney General of Belize and Ors. v. Belize Telecom Ltd. and Anr.*, (2009) 1 WLR 1988.

³⁵ *Adani Power (Mundra) Ltd. v. Gujarat ERC* (2019) 19 SCC 9

³⁶ *Maharashtra State Electricity Distribution Co. Ltd. v. Ratnagiri Gas & Power (P) Ltd.*, (2024) 1 SCC 333 [Para 36].

*a party, or by the court, with regard to business efficacy.”*³⁷ Hence, we can see that the interpretative liberty granted to the Courts and Tribunals are always cautioned and tempered with restraints so as to disallow them from running around like an unruly horse.

37. The judgment and the principles of ***Nabha Power*** relating to business efficacy and implied terms principles were cited with approval and explained in the case of ***OPG Power Generation (P) Ltd. v. Enxio Power Cooling Solutions (India) (P) Ltd.***³⁸ wherein the Hon’ble Supreme Court remarked as below:

“Whether unexpressed term can be read into a contract as an implied condition

85. Ordinarily, terms of the contract are to be understood in the way the parties wanted and intended them to be. In agreements of arbitration, where party autonomy is the grund norm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions used [Balco v. Kaiser Aluminium Technical Services Inc., (2016) 4 SCC 126 : (2016) 2 SCC (Civ) 580] .

86. However, reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by the parties thereto. An unexpressed term can be implied if, and only if, the court finds that the parties must have intended that term to form part of their contract. It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them. Rather, it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, forms part of the contract [Adani Power (Mundra) Ltd. v. Gujarat ERC, (2019) 19 SCC 9 : (2020) 4 SCC (Civ) 330] .

87. But before an implied condition, not expressly found in the contract, is read into a contract, by invoking the business efficacy doctrine, it must satisfy the following five conditions:

- (a) it must be reasonable and equitable;*
- (b) it must be necessary to give business efficacy to the contract, that is, a term will not be implied if the contract is effective without it;*
- (c) it must be obvious that “it goes without saying”;*
- (d) it must be capable of clear expression;*

³⁷ *Transmission Corpn. of Andhra Pradesh Ltd. v. GMR Vemagiri Power Generation Ltd.*, (2018) 3 SCC 716 [Para 26].

³⁸ *OPG Power Generation (P) Ltd. v. Enxio Power Cooling Solutions (India) (P) Ltd.*, (2025) 2 SCC 417.

(e) it must not contradict any terms of the contract [Nabha Power Ltd. v. Punjab SPCL, (2018) 11 SCC 508 : (2018) 5 SCC (Civ) 1, followed in Adani Power case, (2019) 19 SCC 9 : (2020) 4 SCC (Civ) 330] .

38. What becomes clear is that the arbitral tribunal has the power to lend business efficacy to the contract by implying terms which are derived from the purpose and intendment of the parties to enter into a contract. The implied terms however cannot go beyond the clear, express and unambiguous terms which are to always be the guiding light to understand the original intent and understanding arrived at between the parties.

IX. Conclusion

39. The evolution of Section 28(3) of the Arbitration and Conciliation Act, 1996 aptly illustrates how Indian arbitration law has maintained the equilibrium between arbitral autonomy and judicial supervision. The Hon'ble Supreme Court in *ONGC v. SAW Pipes Ltd.*, imposed a rigid standard of fidelity to contract that left little room for interpretative discretion. The 246th Law Commission Report and the 2015 Amendment to the Arbitration Act recalibrated this standard by requiring tribunals to “*take into account*” rather than to “*decide in accordance with*” contractual terms, thereby signalling a more deferential stance toward arbitral interpretation. Subsequent cases such as *Ssangyong Engineering* confirmed that arbitral tribunals are entitled to interpret ambiguous contractual provisions, even on points of law, provided their construction is reasonable and not perverse.
40. At the same time, emerging jurisprudence clarifies that awards remain vulnerable to challenge on the ground of patent illegality in domestic arbitrations where tribunals disregard clear contractual language. This nuanced approach recognises that, although tribunals have interpretive latitude, their authority is not unbounded and must remain anchored in party autonomy. Indian arbitration law increasingly treats legitimacy as resting on a careful balance: granting sufficient deference to arbitral interpretation to preserve finality and efficiency, while retaining judicial oversight to prevent manifest excess. The broader trajectory of contractual interpretation reflects a system moving toward international best practices. Greater stability and maturity in Indian jurisprudence on contractual interpretation will, in turn, strengthen the confidence of businesses and chambers of commerce in arbitration as an efficient and reliable mode of dispute resolution.