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MESSAGE BY PATRON IN CHIEFS

S.B. UPADHYAY

PAWAN UPADHYAY

At the heart of UNUC Legal LLP lies a legacy built on pioneering vision and relentless pursuit of excellence. Shri S.B. Upadhyay, Senior Advocate, whose commitment to institutional legal reform and jurisprudential development remains unparalleled, laid the foundation of UNUC Legal LLP with a single goal—to provide strategic, insightful, and client-first legal services in the most complex commercial and infrastructure disputes. This vision was inherited and expanded by Advocate Pawan Upadhyay, under whose leadership UNUC Legal LLP has scaled new heights.

The firm today commands the trust of some of India's leading conglomerates and PSUs, having steered infrastructure arbitration disputes cumulatively valued at over Rs. 2,500 crores. Beyond private litigation, both patrons-in-chief have played an instrumental role in shaping the Arbitration and Conciliation Act, 1996, laying the very framework on which the present Indian arbitration regime stands.

From the hallowed halls of the Supreme Court to various High Courts across the country, UNUC Legal LLP has led arguments in over 5,000 cases—spanning commercial, civil, and criminal domains—with several matters contributing directly to the evolution of modern Indian jurisprudence. It is in continuation of this tradition of thought leadership that we are proud to inaugurate the first edition of our arbitration-focused newsletter. This platform shall serve as both a repository of advanced legal analysis and a source of practical insight for in-house legal professionals navigating the complexities of commercial arbitration.

MESSAGE BY EDITORS IN CHEIF

Sharmila Upadhyay

Sarada Prasana Mohanty

Rishab Khare

It is with great pleasure that we present the third edition of our newsletter , a publication conceived with the aim of delivering high-quality, practice-relevant insights into the evolving landscape of arbitration law in India.

This issue brings together literature that addresses some of the most pressing and nuanced developments in arbitral practice, ranging from technical delay analysis in infrastructure disputes to the enforceability of emergency arbitrator orders, and from the jurisprudence surrounding unilateral appointments to the narrowing scope of "public policy" under Section 34.

Each piece is rooted in contemporary case law, statutory evolution, and procedural strategy, offering a solution-oriented perspective informed by real-world challenges. The intention behind this initiative is not merely to document developments, but to analyze them critically and constructively, with a view to equipping practitioners, counsel, and stakeholders with actionable takeaways.

As India continues to strengthen its arbitration ecosystem, we hope this newsletter contributes meaningfully to that momentum. We welcome your feedback and suggestions as we look forward to curating future editions that remain current, relevant, and thought-provoking.

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Joint Ventures and the Bar under Section 69 of the Partnership Act: Position in Arbitration

The legal status of a Joint Venture (JV) has always been a grey area in Indian jurisprudence. While a JV may be structured as a company, a consortium, or even a simple contractual arrangement, in practice many JVs function in the nature of partnerships or quasi-partnerships. This characterization becomes crucial when determining whether such JVs are barred from instituting legal proceedings under Section 69 of the Indian Partnership Act, 1932. Section 69 expressly prohibits unregistered partnership firms from suing to enforce contractual rights, thereby creating a significant hurdle for unregistered entities.

The issue assumes particular relevance in arbitration, since commercial JVs often seek to recover dues or enforce obligations through arbitral proceedings. The central question before the courts has been whether the bar under Section 69 extends to arbitration proceedings as well, or whether arbitration enjoys a distinct standing.

Section 69 of the Indian Partnership Act is explicit in its terms. Sub-sections (1) and (2) state that an unregistered partnership firm cannot institute a suit in any court to enforce rights arising from a contract, while sub-section (3) extends the disability even to set-offs and "other proceedings."The legislative intent is clear: partnerships should be registered in order to enjoy legal competence, ensuring both transparency and accountability. As such, if a joint venture is treated as a partnership but is unregistered, it suffers the statutory disability imposed by Section 69.

The difficulty arises from the fact that a JV is not defined under Indian statutes. Courts, however, have frequently described JVs as "quasi-partnerships,"particularly when they involve mutual obligations, profit sharing, and a joint pursuit of business. Unless such an arrangement is incorporated as a company or LLP, an unregistered JV may be treated in the same way as a partnership firm for the purposes of Section 69. The Supreme Court's ruling in Ashok Firm v. CIT (1955) made this principle clear. The Court held that an unregistered firm faces a legal disability in enforcing contractual rights and that registration is a precondition for competence to sue. This judgment reinforced the mandatory nature of Section 69 and the strict consequences of non-registration.

The bar under Section 69, however, has been tested in the context of arbitration. A key precedent is Umesh Goel v. Himachal Pradesh Cooperative Group Housing Society Ltd. (2016), where the Supreme Court examined whether an unregistered partnership firm could pursue arbitration. The Court clarified that arbitration proceedings are not "suits" or "other proceedings" within the meaning of Section 69(3). As a result, arbitration claims by unregistered firms are not barred, even though such firms would lack competence to institute suits in court. Importantly, the Court noted that while arbitration itself is permissible, difficulties may still arise at the stage of enforcement of an arbitral award in court, where the statutory bar could be re-invoked. The ruling in Umesh Goel thus drew a critical distinction: unregistered firms may not sue in courts, but they may pursue arbitral remedies.

Another significant judgment is Cox & Kings Ltd. v. SAP India Pvt. Ltd. (2023), where the Supreme Court considered the applicability of the "Group of Companies" doctrine in arbitration. Although the case was not directly about Section 69, it illustrated the judiciary's commercial and pragmatic approach towards joint ventures. The Court held that in appropriate cases, even non-signatory entities in a JV or corporate group could be bound by arbitration agreements. The ruling reflects the courts' tendency to give effect to the substance of business arrangements rather than allow technical barriers to defeat arbitration agreements. From these authorities, the legal position can be summarized clearly. Unregistered JVs, if treated as partnerships, remain barred under Section 69 from instituting suits in court. However, arbitration proceedings are not affected by this bar, as confirmed in Umesh Goel. At the same time, enforcement of arbitral awards in court may still run into obstacles if the JV is unregistered. Nevertheless, the judiciary has increasingly adopted a commercial, pro-arbitration stance, as seen in Cox & Kings, particularly in cases involving multiple entities and complex joint venture structures.

In conclusion, a joint venture not incorporated as a company or LLP will generally be treated as a quasi-partnership. If such a JV is unregistered, it cannot sue in court to enforce contractual rights due to the bar under Section 69. Yet arbitration provides an alternate pathway, as the Supreme Court has clarified that arbitral proceedings remain outside the scope of the bar. While Ashok Firm reaffirmed the statutory disability, Umesh Goel carved out the arbitration exception, and Cox & Kings demonstrated the judiciary's willingness to extend arbitration to non-signatories in the commercial interest of justice. For JVs, this means that while registration remains the safest course to ensure legal competence, arbitration continues to serve as a viable and effective mechanism to enforce rights despite the statutory bar.

Improper Evaluation of Time Impact Analysis in Construction Projects: Extension of Time and Liquidated Damages

In modern construction projects, Time Impact Analysis (TIA) plays a vital role in assessing the effect of delays and determining whether an extension of time (EOT) should be granted. As a prospective delay analysis method, TIA involves inserting a delay event into the project's critical path schedule to measure its effect on project completion. When properly conducted, it provides both parties—owner and contractor—with an objective basis to evaluate responsibility for delays and the need for time extensions.

However, the improper evaluation of TIA is a recurring challenge in the construction industry. It can create unnecessary disputes, particularly concerning the imposition of liquidated damages (LDs). If a TIA is ignored, delayed, or incorrectly assessed, the consequences can be severe. Contractors may be deprived of legitimate extensions of time, while employers may wrongfully impose LDs for delays not attributable to the contractor. Furthermore, it is increasingly common for employers to reserve the right to impose LDs only at project completion, which often results in unwarranted disputes and cash flow stress.

For a TIA to be credible, certain fundamentals must be met. First, the project must have a well-defined and mutually agreed baseline schedule. Without this baseline, it is nearly impossible to quantify the impact of delay events. Second, contemporaneous project records—daily and monthly progress reports, site hindrance registers jointly signed by both parties, minutes of meetings, and timely correspondence—are essential to substantiate when delay events began, how long they lasted, and what caused them. Third, the schedule itself must reflect realistic durations and actual sequences of work as per drawings and instructions. Each delay event must be properly incorporated, considering whether it is excusable, non-excusable, or concurrent, and its actual impact on the critical path.

Performing a TIA requires not only sound scheduling software but also expertise in construction practices and delay analysis methodologies. Contracts often prescribe strict timelines within which contractors must submit their TIA along with an EOT application. Yet in practice, contractors frequently fail to adhere to these timelines, depriving owners of the chance to evaluate delays promptly. Conversely, even when contractors submit timely TIA and EOT claims, employers often delay their evaluation and approval, sometimes for months. This imbalance leaves contractors unable to mitigate their own delays, even when only partially responsible, because the necessary time extensions remain undecided.

The difficulties are compounded when employers issue provisional extensions of time without proper contractual backing. In many projects, work is allowed to continue in the extended period through provisional EOTs, but without examining contract provisions or properly evaluating TIAs. Legally, such provisional extensions lack standing: courts have clarified that once a provisional EOT is granted without contractual basis, the number of days cannot later be reduced during final approval.

Improper evaluation of TIA has multiple consequences. If the analysis is flawed, owners may grant insufficient time extensions, compressing the contractor's schedule and forcing acceleration at their own expense. In other instances, an incorrect attribution of responsibility may lead to the wrongful imposition of LDs for delays caused by external or employer-related events. Disputes over time inevitably escalate into disputes over cost, often ending in arbitration or litigation.

Liquidated damages, in principle, are pre-agreed sums designed to compensate the employer for losses arising from late completion without requiring proof of actual damages. When based on a fair and accurate TIA, LDs serve as a reasonable and efficient remedy. However, if LDs are imposed following an inaccurate or incomplete TIA, they risk becoming punitive rather than compensatory. This unfair practice has significant repercussions: unjustified LDs drain a contractor's cash flow, jeopardize their ability to complete ongoing work, and may even hinder their eligibility for future contracts.

One problematic practice observed in public contracts is the nominal imposition of LDs. For example, an employer may approve an EOT of over 100 days but levy a token penalty of ₹50,000. Reverse calculation in such cases often reveals that the contractor was only responsible for a few hours' delay, while the remaining extension was due to employer-related factors. By imposing LDs in this way, the employer effectively admits that most of the delay was not attributable to the contractor, yet still imposes a penalty—an approach inconsistent with contractual fairness.

Another widespread issue is the reservation of the right to impose liquidated damages at project completion. Employers often grant EOTs during the project but defer the assessment of LDs until the end. While this practice appears to give flexibility, it creates several adverse effects. Contractors are forced to work without clarity on their financial exposure throughout the project. Delays and potential liabilities are not addressed contemporaneously but accumulate into large, contentious disputes at close-out. This uncertainty hampers resource planning, prevents corrective action, and increases the likelihood of adversarial claims at the project's conclusion.

In government and public sector projects, this has become almost a trade practice. Contractors are allowed to proceed with conditional EOTs, subject to later assessment of LDs. If contractors continue work without protest, they expose themselves to the risk of maximum LDs being levied at a later stage. Such practices can result in revocation of security deposits and withholding of payments, ultimately leading to avoidable disputes. Current legal principles hold that unless contractors explicitly protest such conditional extensions, they may suffer adverse consequences in subsequent proceedings.

To prevent these disputes, both owners and contractors must adopt proactive measures. Delays should be analyzed and their impacts determined in real time, with transparent communication of outcomes. Both parties must act equitably in applying contract provisions on time extensions and LDs. Contracts should clearly define the procedure for delay analysis, the timeline for submission and approval of TIA, and the method for determining LDs. Most importantly, employers must avoid the practice of deferring LD decisions until project completion, and contractors must assert their rights contemporaneously when conditional EOTs are issued.

In conclusion, improper evaluation of Time Impact Analysis, combined with unjustified imposition of liquidated damages and the widespread practice of reserving LDs until project completion, has created a highly contentious environment in the construction sector. A proactive, transparent, and timely approach to delay management is essential. By ensuring fairness in TIA evaluation, granting extensions promptly, and applying LDs consistently with actual delay responsibility, owners and contractors alike can promote successful project delivery while avoiding unnecessary disputes.

What Constitutes a "Non-Est" Filing Under Section 34 of the Arbitration & Conciliation Act?

The issue of non-set filing arose in the matter reported as Pragmatic Construction Union of India. Our firm has been representing the case from the outset, and the matter was ultimately referred to a Full Bench of the Hon'ble High Court.

By order dated 07.02.2025, the Hon'ble Court held that non-filing of the Vakalatnama and even the affidavit would not render the petition defective; however, the filing of the arbitral award is mandatory. This order was thereafter challenged by UNUC Legal LLP before the Hon'ble Supreme Court of India by way of a Special Leave Petition, which is presently pending consideration. Our Managing Partner, Ms. Sharmila Upadhyay, is contesting the matter before the Hon'ble Supreme Court, contending that the non-filing of the award cannot be treated as fatal to the petition, as such a requirement does not find mention under Section 34 of the Arbitration and Conciliation Act, 1996. Accordingly, it is being urged that the absence of filing the award should not amount to non-set filing.

The jurisprudence surrounding challenges to arbitral awards under Section 34 of the Arbitration and Conciliation Act, 1996 has consistently underscored the importance of not merely filing a petition, but of filing it in a manner that is legally effective. In certain circumstances, petitions filed under this provision are regarded as "non-est", i.e., as though they had never been filed at all.

The expression non-est is derived from Latin, meaning "non-existent." When applied in this context, it signifies that the petition is devoid of legal effect. The consequences are far-reaching: limitation continues to run, the petition does not arrest the enforceability of the award, and the right to challenge may be irrevocably lost.

This crucial distinction between fatal and curable defects has been elaborated in several judicial pronouncements, and was recently emphasized by Ms. Sharmila Upadhyay, Senior Partner at UNUC Legal LLP, in her arguments before the court.

Distinction from Curable Defects

It is important to distinguish fatal defects from procedural irregularities, which are generally curable and do not vitiate the filing. Examples include:

- Absence of verification or statement of truth,
- Defects in pagination, attestation, or formatting,
- Incomplete documentation not affecting the core of the challenge.

In such instances, the petition remains valid, subject to rectification within a reasonable period.

The courts have identified certain defects which go to the root of the petition, thereby rendering the filing non-est:

1. Absence of the Arbitral Award

The arbitral award is the very foundation of a challenge under Section 34. A petition presented without annexing the award has been held to be non-est, as the court cannot assess the grounds of challenge in the absence of the impugned document.

2. Filing Beyond the Statutory Period of Limitation

Section 34(3) prescribes a period of three months, extendable by a further thirty days, within which an award may be challenged. Any filing beyond this period is time-barred, and treated as non-est. In such cases, the court has no jurisdiction to entertain the petition.

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Conclusion

The jurisprudence on non-est filings under Section 34 reinforces a vital lesson for both practitioners and litigants:

- Fatal defects—such as omission of the award or filing beyond limitation—render the petition legally non-existent.
- Curable defects—such as clerical or procedural lapses—do not vitiate the filing, provided they are remedied expeditiously.

Ultimately, arbitration challenges demand both speed and accuracy. The outcome of a dispute may hinge not only on substantive legal arguments but also on whether the petition survives the threshold scrutiny of being a valid filing.

The Costs Regime in Indian Arbitration

In recent years, India has overhauled its approach to awarding costs in arbitration. Traditionally, arbitral tribunals in India often did not award substantial costs to the winning party and frequently each side bore its own expenses or the costs were split, regardless of the outcome. This approach, coupled with prolonged proceedings, meant that even a successful party could be left shouldering heavy legal and arbitral expenses. Such a regime was out of step with the "costs follow the event" (loser pays) principle prevalent internationally.

To address this, the Arbitration and Conciliation (Amendment) Act, 2015 introduced a new Section 31A into the Arbitration and Conciliation Act, 1996, ushering in a more robust costs regime. This provision, along with subsequent judicial interpretations, aims to ensure that cost awards in arbitrations are fair, reasonable, and serve to discourage frivolous claims or defenses.

This article examines Section 31A and how it has been applied by Indian courts and tribunals in landmark cases such as ONGC Ltd v Afcons Gunanusa JV Arbitration Petition (Civil) No. 05 of 2022. The recent jurisprudence has have shaped the emerging costs regime in Indian arbitration. These developments are especially relevant for lawyers, law students, and in house counsel dealing with arbitration, as they illustrate the principles governing who pays, what can be recovered, and under what circumstances Indian courts will shift or limit cost liabilities.

The default rule in Section 31A embodies the common law doctrine that the losing party should ordinarily bear the winning party's costs. The theoretical justification is twofold.

First, it is a matter of fairness and causation: if Party A is compelled by Party B's wrongful or obstinate conduct to incur legal expenses, the costs naturally relate to the merits of A's claim. As one English court observed, a party forced to litigate to vindicate rights should not be saddled with the expense of enforcing rights that "should have been respected in the first place.

”Second, a“loser pays”rule provides a deterrent against frivolous or unmeritorious claims, and incentivizes early settlement. Courts have long warned that routine cost shifting prevents parties from dragging out weak cases at others’expense (see Salem Advocates Bar Assn. v. Union of India, 2005 4 SCC 189). In sum, the policy behind cost shifting is to promote efficient and reasonable litigation behavior.

Prior to Section 31A, Indian arbitration rarely enforced these principles. Historically Indian courts and tribunals were reluctant to burden a losing litigant with costs, reflecting a pro access (“socialist”) approach where every litigant should have a fair chance. In domestic arbitration, it was common (and often still is) for arbitrators simply to make each party bear its own costs, or award only token amounts.
Law Commission reports and commentators have noted that before 2015 over 90% of Indian arbitrations resulted in parties paying their own costs, even when one side clearly lost on the merits.

This“each-pay-own”practice lagged behind international norms. Leading arbitral institutions (like ICC, ICDR and SIAC) have long adopted costs follow event as a presumptive rule, and the UNCITRAL Rules envisage a similar approach. By introducing Section 31A the legislature explicitly rejected the Indian status quo and signaled alignment with global practice. The Law Commission expressly said the goal was to disincentivize frivolous claims and align with the Supreme Court’s endorsement of winner pays principles.

Section 31A’s cost regime has immediate practical consequences. Parties and counsel must now factor in cost risk at every stage. Before or during arbitration, the prevailing counsel should advise clients that losing could entail paying not only their own fees but also a significant portion of the opponent’s expenses.

This tends to encourage early settlement negotiations. A party with a weak case is more likely to make a reasonable offer when it knows a refusal could lead to a costly award.

Conversely, a party with a good case may insist on settlement only if the other side puts forward fair terms and then be in a better position with costs. Practitioners should document any formal settlement offers (or counter offers), as evidence of reasonableness under Section 31A(3)(d).

In case management, lawyers might prepare (and tribunals might request) a preliminary cost budget, setting out projected arbitrator fees, legal fees and other expenses. Although not expressly required by the Act, the budgeting exercise promotes transparency and allows parties to control costs. During discovery or document disclosure, parties should focus on relevant materials and avoid overly broad or obstructive requests.

Unnecessary document battles can significantly increase costs; refusing reasonable disclosure or lodging frivolous objections could be later reflected as "party conduct" justifying adverse cost orders. In practice, counsel should keep records of litigation costs and settlement communications, so that if the tribunal ultimately fixes costs, a detailed and justified calculation can be presented.

Arbitral tribunals must likewise adjust practice. Tribunals should state in their procedural orders that costs will be decided at the end and invite submissions on costs as per Section 31A. At the award stage, arbitrators need to specifically address costs: either apply the default loser pays rule or explain why they deviate. Awards should detail how costs were computed (for example, by reference to an institutional schedule or previous orders), especially since tribunals may only award reasonable legal fees. Best practice may include ordering time records or invoices to be filed in camera for review.

If a tribunal decides to split costs (say, each party pays its own, or pays pro rata), the award should state clear reasons (e.g. both sides partially succeeded, or one side withdrew claims). Institutions can help by providing cost guidelines or a schedule of fees (like the Fourth Schedule for arbitrators) to give tribunals an objective basis for "reasonableness."

In sum, Section 31A encourages all participants to be cost-conscious: claimants to file only bona fide claims, respondents to settle genuine claims promptly, and arbitrators to manage proceedings economically. The knowledge that costs will follow the event generally motivates efficient behavior and prudent litigation strategy.

Despite its strengths, Section 31A leaves several open questions. The most fundamental is the wide discretion given to tribunals. There is no presumption that costs must always be awarded, or that full costs must be recovered. This discretion can lead to inconsistent outcomes: some tribunals may faithfully apply the default rule and award substantial costs, while others may simply split costs to avoid hard decisions. The Act provides no quantitative guidance on what counts as"reasonable"legal fees or how to treat expert or consultant fees. In practice, tribunals may shy away from awarding significant counsel fees or complex expense claims unless convinced by parties'submissions.

To strengthen the cost regime, a multi pronged approach is advisable. Legislatively, one option would be to clarify that the default rule is presumptive, not merely permissive—for example, by changing"general rule" to"shall"for awarding costs to the successful party except for good reason. The Act might also require tribunals to give a brief written explanation whenever they depart from the default. The vague term "reasonable"could be narrowed by encouraging institutional or court made schedules for legal fees (as with arbitrator fees), or by requiring cost submissions to be supported by affidavits or itemized bills. Parliament could even mandate that tribunals invite parties'inputs on costs at an early stage or include cost budgets in schedule.

Finally, judicial support is key. High Courts and the Supreme Court can develop robust jurisprudence reinforcing Section 31A. Consistent enforcement of cost awards (for example, by penalizing refusal to pay an award's cost component) will underscore that cost orders are not mere dicta. Judges should also award costs in related court proceedings to deter dilatory appeals (echoing the Law Commission's view that set aside applicants should not have a free shot at all).

In conclusion, Section 31A has the potential to make Indian arbitration more efficient and equitable by attaching a price to frivolous conduct. Its success depends on thoughtful application by tribunals and counsel, and on gradual refinement of the law. By adopting clear procedures and respecting the"costs follow event"mandate, stakeholders can ensure that the cost regime promotes fairness and predictability rather than confusion.

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