PERMITTING MODIFICATION OF ARBITRAL AWARDS TO EXPEDITE THE DELAYED DISPOSAL OF S. 34 CHALLENGES – A CASE FOR RECALIBRATING THE LAKSHMAN REKHA

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ABSTRACT

The aim of this paper is to examine the history, scope, and judicial interpretations given to Section 34 of the Indian Arbitration and Conciliation Act, 1996. This is against the backdrop of an Order dated 20.02.2024 passed by the Supreme Court in SLP (C) Nos.15336-15337/2021 titled Gayatri Balasamy v ISG Novasoft Technologies Ltd[1] *- wherein, observing a divergence in precedents qua permissibility of modification of arbitral awards challenged under Section 34 of the 1996 Act, a three-judge bench referred the issue to a larger bench. The authors juxtapose the earlier provisions under the Indian Arbitration Act, 1940 which explicitly provided for modification with the present Indian Arbitration and Conciliation Act, 1996 and hypothesise that a purposive interpretation of the existing statutory language permits for modification of arbitral awards. Furthermore, the authors undertake a critical analysis of the landmark Supreme Court pronouncement in NHAI v M. Hakeem*[2]*, which attempted to resolve the divergence by holding that modification was impermissible under Section 34 of the 1996 Act. With the recently released Viswanathan Committee recommendations, suggesting amendments to make modification and part setting aside of awards in the legislation, the limited case sought to be canvassed for judicial intervention through modification of arbitral awards is analogous to minimal invasive*

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1. *Gayatri Balasamy v ISG Novasoft Technologies Ltd* 2024 SCC OnLine SC 1681 <https://main.sci.gov.in/supremecourt/2021/20788/20788_2021_4_15_50676_Order_20-Feb-2024.pdf>.
2. *NHAI v M. Hakeem* (2021) 9 SCC 1.

surgery, as opposed to a full-blown open surgery; that would facilitate course correction in line with the aim of arbitration - an expeditious mode of dispute resolution, while still preserving the sanctity of the Tribunal proceedings.

1. INTRODUCTION

Recently a three-judge bench of the Supreme Court considered whether the powers of the Court under Section 34 and 37 of the Arbitration and Conciliation Act, 1996, would include the power to modify an arbitral award[3], and referred the proposition to a larger bench, given a divided jurisprudence of the issue arising out of *NHAI v M. Hakeem*[4], in contrast to the decisions of other benches of two judges in *Vedanta Ltd v Shenzhen Shandong Nuclear Power Construction Co Ltd*[5], and three judges in *J.C. Budhraja v Orissa Mining Corpn Ltd*[6], *Tata Hydro-Electric Power Supply Co Ltd v Union of India*[7] among others wherein the Supreme Court has either modified or accepted modification of the arbitral awards under consideration. With the procedure for the process of arbitration clearly spelt out in the Act itself, this paper focuses on the post-award stage i.e. the stage of challenge to a given arbitral award. The broader goal of this paper is to examine the judicial questions framed by the three-judge bench, in light of the global legal position qua the permissibility of modifying arbitral awards by the courts and to inspect the former and extant statutory provisions in India for ascertaining the contours of powers of Courts under Section 34 of the 1996 Act to answer whether the power to set aside the arbitral award would include the power to modify the same. The authors undertake a critical analyses of some of the recent landmark rulings of the Supreme Court, particularly *NHAI v M. Hakeem*[8], whose ratio is rather sweeping in its scope and in also in the teeth of Supreme Court decisions *viz a viz* Article 142 that have consistently held that powers under Article 142 of the Constitution of India cannot be exercised beyond the scope of the statutes

3. *Gayatri Balasamy v ISG Novasoft Technologies Ltd* 2024 SCC OnLine SC 1681 <https://main.sci.gov.in/supremecourt/2021/20788/20788_2021_4_15_50676_Order_20-Feb-2024.pdf>.
4. *NHAI v M. Hakeem* (2021) 9 SCC 1 followed in *Larsen Air Conditioning & Refrigeration Co v Union of India* (2023) 15 SCC 472 : 2023 SCC OnLine SC 982 and *S.V. Samudram v State of Karnataka* (2024) 3 SCC 623.
5. *Vedanta Ltd v Shenzhen Shandong Nuclear Power Construction Co Ltd* (2019) 11 SCC 465 along with *Oriental Structural Engineers (P) Ltd v State of Kerala* (2021) 6 SCC 150 and *M.P. Power Generation Co Ltd v ANSALDO Energia SpA* (2018) 16 SCC 661.
6. *J.C. Budhraja v Orissa Mining Corpn Ltd* (2008) 2 SCC 444.
7. *Tata Hydro-Electric Power Supply Co Ltd v Union of India* (2003) 4 SCC 172.
8. *NHAI v M. Hakeem* (2021) 9 SCC 1.

governing the issue. Furthermore, the authors assess the recommendations of the recently released Viswanathan Committee Report on the Arbitration Framework in India, to conclude by proposing a test that could be adopted – a discretionary grant of leave to modify the awards, upon satisfaction by the Courts that there are elements present which could be addressed by the modification of the award, without the need of remitting the case back to the Arbitral Tribunal.

2. EVOLUTION OF ARBITRATION LEGISLATIONS IN INDIA

Arbitration[9] is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court. Presently, arbitration in India is governed by the Arbitration & Conciliation Act, 1996[10] which is predominantly modelled on the UNCITRAL Model Law on International Commercial Arbitration.[11] Further, India is a signatory to the New York Convention on Enforcement and Recognition of Foreign Arbitral Awards as well as the Geneva Convention on the Execution of Foreign Arbitral Awards.[12]

The India Arbitration Act, 1940 (hereinafter, "the 1940 Act" was modelled on the provisions of the English Arbitration Act, 1934 and was designed to be a comprehensive code for arbitration law.[13] Under the Indian 1940 Act, an award could not be enforced without approval of the Court, and by securing a judgment in terms of the award. Further, the Court had the power to modify, remit, or set aside the award.[14]

There was a recognised need to standardise the law by aligning it with the United Nations Commission on International Trade Law (UNCITRAL)

9. World Intellectual Property Organization, 'What is Arbitration?' (WIPO Arbitration and Mediation Center) <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> accessed 14 August 2024.
10. Preamble to the Arbitration & Conciliation Act, 1996 <https://www.indiacode.nic.in/bitstream/123456789/1978/3/a1996-26.pdf>.
11. Alternative Dispute Resolution in India <https://legalaffairs.gov.in/sites/default/files/arbitration-and-mediation.pdf>.
12. Sumit Kumar and Avani Tiwari, 'Recognition and Enforcement of Foreign Arbitral Award in India: In Search of a Formidable Shore' <https://www.scconline.com/blog/post/2021/07/28/foreign-arbitral-award-in-india/>.
13. Law Commission of India, *Amendments to Arbitration and Conciliation Act, 1996* (Law Com. No. 246 2014).
14. 1940 Act, ss 15 and 16.

Model on Commercial International Arbitration, 1985. This led to the enactment of the Indian Arbitration and Conciliation Act, 1996. The 1996 Act, intended to be a comprehensive code, was established to consolidate and amend the existing laws related to domestic arbitration. It also aimed to define conciliation and create a unified legal framework for the fair and effective resolution of disputes. Based on the Model Law, the 1996 Act replaced the 1940 Act, focusing on reducing delays in arbitration proceedings. It further consolidated the laws related to domestic arbitration, international commercial arbitration, and the enforcement of foreign arbitral awards, with its primary goals being expedited arbitration processes and minimal judicial intervention. The key objectives[15] of the Arbitration and Conciliation Act, 1996 emphasise a minimal supervisory role of courts along with speedy and cost-efficient settlement of disputes.

A. Law Commission Reports and Recommendations

In its 176th Report[16] issued in 2001, The Law Commission conducted a thorough review of the 1996 Act. The Commission noted that while the principle of minimal judicial interference in setting aside an award was appropriate for international arbitral awards, it could not be fully applied to domestic arbitrations. Consequently, it recommended the addition of two grounds for challenging a domestic award under Section 34: a substantial error of law, apparent on the face of the award; and the absence of reasons in the arbitral award.

In 2014, the Law Commission was again tasked with reviewing the 1996 Act. In its 246th Report,[17] the Law Commission provided a detailed analysis of India's arbitration law and suggested several significant amendments. This paved the way for the Arbitration and Conciliation (Amendment) Act, 2015. Some of the key amendments made include: interim orders of arbitral tribunal were made enforceable in the same manner as if were a decree of a court,[18] obligation for arbitrators to disclose their independence,[19] fast

15. Ministry of Law and Justice, Government of India, *Alternative Dispute Resolution in India*, <https://legalaffairs.gov.in/sites/default/files/arbitration-and-mediation_0.pdf> accessed on 14 August 2024.
16. Law Commission of India, *The Arbitration Act & Conciliation Amendment Bill, 2001* (Law Com. No. 176, 2001).
17. Law Commission of India, *Amendments to Arbitration and Conciliation Act, 1996* (Law Com. No. 246, 2014).
18. Arbitration and Conciliation Act 1996, ss 9 and 17.
19. Arbitration and Conciliation Act 1996, s 12 read with schs 5 and 7.

track procedure[20] for arbitration, statutory recognition of 'patent illegality' as a ground to set aside a domestic award under Section 34, fixed timeline for courts to dispose of challenges to arbitral awards within one year[21], no automatic stay of awards merely upon challenging the award,[22] etc.

3. CHALLENGE TO ARBITRAL AWARDS

The process of arbitration under the Arbitration and Conciliation Act of 1996 begins upon issuance of request or notice of arbitration to the opposite party[23] and ends with an arbitral award being granted by an arbitrator appointed in terms of the agreement, the consent of the parties or by the court. Section 34 of the 1996 Act permits setting aside of arbitral award upon an application being made under Sub sections (2) and (3) on the grounds of:[24]

i. Incapacity of a party

ii. Improper composition of the arbitral agreement or invalidity of the arbitration agreement under the law to which the parties have subjected it;

iii. The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

iv. The award deals with a dispute not contemplated by, or not falling within the terms of the submission or it contains decisions on matters beyond the scope of the submission to arbitration.

v. the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

vi. the arbitral award is in conflict with the public policy of India

vii. the award is vitiated by patent illegality appearing on the face of the award

In dispute resolution practice, every ground is availed of as a matter of right, to assail the arbitral award, to a point where the pleadings can be

20. Arbitration and Conciliation Act 1996, s 29A.
21. Arbitration and Conciliation Act 1996, s 34(6).
22. Arbitration and Conciliation Act 1996, s 36(2).
23. Arbitration and Conciliation Act 1996, s 21.
24. Arbitration and Conciliation Act 1996, s 34.

tailored to retrofit or couch them in the narrow remit of challenge. These are considerations like unreasoned findings without evidence, omission to appreciate vital evidence or extraneous/irrelevant considerations by the arbitral tribunal as laid down by the Supreme Court in *Associate Builders v DDA*[25] and *Ssangyong Engg & Construction Co Ltd v NHAI*[26] Keeping in view a scrupulously distant examination of the award, before a court can undertake that exercise, it is tasked with a delicate role of peregrinating around the merits, followed by entertaining the challenge on the limited technical grounds.

When an arbitral award is challenged under Section 34, there are four outcomes possible:

a) The award is upheld in its entirety.

b) The award is set aside in its entirety and remitted back to the Tribunal to be decided afresh.

c) A severable part of the award is permitted to be excised for fresh adjudication and the rest is upheld.

d) If so requested by a party, the proceedings are adjourned for a period of time in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.[27]

A. Permissibility of Arbitral Award Modification by Courts

The earlier Indian Arbitration Act, 1940 had explicitly granted courts the power to modify or correct an arbitral award under Section 15:

> *"15. Power of Court to modify award- The Court may by order modify or correct an award-*
>
> *(a) where it appears that a part of, the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or*

25. *Associate Builders v DDA* (2015) 3 SCC 49.
26. *Ssangyong Engg & Construction Co Ltd v NHAI* (2019) 15 SCC 131.
27. Arbitration and Conciliation Act 1996, s 34(4).

(b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or

(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission."

The Apex Court, in *Larsen Air Conditioning & Refrigeration Co v Union of India*[28] and *S.V. Samudram v State of Karnataka*[29], observed that that power to modify had been consciously omitted by the Parliament, while enacting the Arbitration Act, 1996. The court held that the Parliamentary intent was to exclude the power to modify an award, in any manner, by courts. Moreover, in the scheme of the 1996 Arbitration Act, Section 5 prohibits intervention by any judicial authority, except to the extent provided in Part I of the Arbitration Act.

It is the case of the authors that the repurposing of Section 15 of the 1940 Act may not have been the outcome of a conscious legislative discourse, but perhaps a hasty adoption of Article 34 of UNCITRAL Model Law, 1985 on International Commercial Arbitration. The 1940 Act was introduced to improve the Arbitration Act 1899, which did not allow courts to alter or amend an award. The discussion from the 76th Law Commission Report[30] is germane in this context, which termed Section 15, Arbitration Act, 1940 as "salutary" and consciously observed that there was no requirement to effect any change in it. The nuance and importance of Section 15 in the 1940 Act is likely to have gotten brushed under the carpet, as its quiet omission was conspicuously absent in the 176th Law Commission Report[31] or the 246th Law Commission Report[32] which suggested amendments to the Arbitration Act 1996. A table is provided to illustrate the comparison of provisions in the 1940 and 1996 Act.

28. *Larsen Air Conditioning & Refrigeration Co v Union of India* (2023) 15 SCC 472 : 2023 SCC OnLine SC 982.
29. *S.V. Samudram v State of Karnataka* (2024) 3 SCC 623 : 2024 SCC OnLine SC 19.
30. Law Commission of India, *Sixth Report on Arbitration Act, 1940* (Law Com. No. 76, 1978).
31. Law Commission of India, *The Arbitration Act & Conciliation Amendment Bill, 2001* (Law Com. No. 176, 2001).
32. Law Commission of India, *Amendments to Arbitration and Conciliation Act, 1996* (Law Com. No. 246, 2014).

Provision	1940 Act	1996 Act
Power to modify award	Section 15	-
Severability	Section 15 (a)	Section 34(2) Proviso
Amending of errors or imperfection	Section 15(b)	-
Clerical Mistake rectification	Section 15(c)	Section 33

B. Will Permitting Courts to Modify Arbitral Awards Violate the Principle of Kompetenz-Kompetenz?

The principle that arbitrators have jurisdiction to consider and decide the existence and extent of their own jurisdiction is referred to as the *kompetenz-kompetenz* principle or the question of 'who decides'[33]. Section 16(1) of the 1996 Act enunciates the principle of *kompetenz-kompetenz*, granting the arbitral tribunal the power to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement.[34] The principle of *kompetenz-kompetenz* has further been postulated to have two precepts: positive and negative.[35] While the positive effect of *kompetenz-kompetenz* refers to an arbitral tribunal's power to rule on its jurisdiction[36], the negative effect takes the said principle a step further by establishing a notional chronological priority for the tribunal with respect to resolving jurisdiction questions.[37] The negative effect prioritises a priority in favour of the arbitral tribunal in the event of *lis-pendens* with court proceedings qua the same subject matter, and excludes actions aimed at confirming or denying the validity of the arbitration agreement and, more broadly, the jurisdiction of the arbitral tribunal; the latter could only be controlled by the Courts in an application to set aside the decision – preliminary or final – of the arbitral tribunal or at the enforcement stage.[38] This begs the question, does reading Section 34 of the 1996 Act as including the power to modify the award, violate the principle of *kompetenz-kompetenz*? The answer that the authors propose would be - no, as the principle of *kompetenz-kompetenz* is concerned with

33. Gary B Born, *International Commercial Arbitration* (2010) 853.
34. Arbitration and Conciliation Act 1996, s 16.
35. Pratyush Panjwani and Harshad Pathak, 'Assimilating the Negative Effect of Kompetenz-Kompetenz in India: Need to Revisit the Question of Judicial Intervention?' 2013 2(2) Indian Journal of Arbitration Law.
36. Amokura Kawharu, 'Arbitral Jurisdiction' (2008) 23 NZ Univ L Rev, 238, 243.
37. *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Emmanuel Gaillard and John Savage eds 1999) 397; Stephen Schwebel, *International Arbitration: Three Salient Problems* (1987) 2.
38. Gaillard, (n 37), at 660.

the jurisdictional aspects of a dispute. The arbitration process is conducted before a competent tribunal, which, based on the statement of claims and counter-claims, passes an award. When this award is challenged under Section 34, modification by the court would not violate the jurisdiction of the arbitral tribunal as the award is the outcome of a jurisdictionally competent forum.

This also gets support from the purposive interpretation of Section 34 by the Delhi High Court in *Union of India v Modern Laminators Ltd*[39], in which the Court read into Section 34 of the 1996 Act, the "obvious error" and "the slip rule" found in Section 15 of the 1940 Act. The Court observed that the power given to the court to set aside the award, would necessarily include a power to modify the award, notwithstanding absence of express power to modify the award, as under the 1940 Act, reasoning that if the powers of the court under Section 34 were restricted to not include power to modify, the courts power to impart a finality to the litigation through curing of manifest infirmities would cease, making arbitration as a form of alternative dispute resolution more cumbersome than the traditional judicial process. However, this decision rightly qualifies the scope of such interference with the award, by precluding the substitution of the opinion of the arbitrator or an exercise of fresh finding or adjudication of intricate questions of law. The decision further elaborated that this extent interference through modification of award will be a species of "setting aside" only and would be "setting aside to a limited extent". For any further fact finding or adjudication of intricate questions of law, the appropriate decision was to grant parties the right to avail remedies before the forum of their choice.

4. JUDICIAL REVIEW AND MODIFICATION OF ARBITRAL AWARDS: LEGAL POSITIONS IN UNITED KINGDOM, UNITED STATES OF AMERICA, AUSTRALIA AND SINGAPORE

In the **United Kingdom**, under the English Arbitration Act, 1996[40], courts have the authority to alter an award if challenged on substantive grounds or when an appeal is made on a question of law. Courts are empowered to set aside an award, in whole or in part[41], upon hearing an application to challenge the tribunal's substantive jurisdiction[42]. Where the ground for

39. *Union of India v Modern Laminators Ltd* 2008 SCC OnLine Del 956.
40. UK Arbitration Act 1996, s 67.
41. David St John Sutton et al, *Russell on Arbitration* (Sweet and Maxwell, 23rd edn 2007) 361.
42. UK Arbitration Act 1996, s 67(3)(c).

challenge is a serious irregularity[43] or the application is in the nature of an appeal against the award on a point of law[44], the court will only set aside the award (in whole or in part) if it is satisfied that it would be inappropriate to remit it to the tribunal for reconsideration. An application under Section 67 of the English Arbitration Act, 1996, challenging any award as to the arbitrator's jurisdiction confers, on the court, a strictly limited jurisdiction which is confined to determining whether an *award as to jurisdiction should be confirmed, varied or set aside in whole or in part*[45]. If and to the extent that an award covers both jurisdiction and substantive issues as to the merits of the case the court has the power to declare the whole or part of that section of the award which deals with the merits to be of no effect depending on the court's conclusion on jurisdiction[46].

The effects of the Court's intervention with respect to the award are as follows:

1. Where the award is varied, the variation has effect as part of the tribunal's award[47];

2. Where the award is remitted to the tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct[48]; and

3. Where the award is set aside or declared to be of no effect, in whole or in part, the court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, is of no effect as regards the subject matter of the award or, as the case may be, the relevant part of the award[49].

43. UK Arbitration Act 1996, s 68(3).
44. UK Arbitration Act 1996, s 69(7).
45. David St John Sutton et al, *Russell on Arbitration* (Sweet and Maxwell, 23rd edn 2007) 361; s 67(3) of the Arbitration Act 1996.
46. *Ronly Holdings Ltd. v JSC Zestafoni G Nikoladze Ferroalloy Plant England and Wales High Court* [2004] EWHC 1354 (Comm), S 30(1)(b) of the UK Arbitration Act 1996 which is also included in the definition of "substantive jurisdiction" by s 82(1) of the Act.
47. UK Arbitration Act 1996, s 71(2).
48. UK Arbitration Act 1996, s 71(3).
49. UK Arbitration Act 1996, s 71(4).

Fence Gate Ltd v NEL Construction Ltd[50], before the England and Wales High Court has some relevant observations from the Judge, who discusses the dilemma of being statutorily empowered to vary or modify an award, leaning initially in favour of remitting the matter back to the Tribunal, but eventually deciding to vary the award instead, as a remission would entail additional costs and delay of a rehearing before the arbitrator, which would have to be concluded within three months, with the potential for yet further costs and delay in a possible subsequent court challenge of the new award.

The Judge then goes on to discuss an interesting and rare outcome, about the retention of jurisdiction of the original arbitrator, once the Court has exercised the power to modify the award. Leaving it to the parties assent to confirm the same, the Court holds:

> ***107.*** *The further question is whether it would be appropriate for the arbitrator to retain jurisdiction to assess the detailed costs of the claim and the counterclaim under section 63 of the Act and Rule 13.10 of CIMAR once the award, as varied by me, has been finalised. Both parties suggested that it would remain appropriate for the arbitrator to conduct this final stage of the dispute even if I had previously conducted a variation hearing of the costs award. I agree with this jointly held view."*

In the **United States**, the United States Federal Arbitration Act, 1925 Act[51] allows courts to modify or correct an award under three conditions: an evident material mistake; the award addresses an issue not submitted for arbitration or the award is imperfect in form without affecting the merits. The Supreme Court of Mississippi in *D.W. Caldwell Inc v W.G. Yates & Sons Construction Co*[52], expounds on the power of a Court to vary or modify an award, yet construes it in a narrow sense, on account of the volitional choice of parties to enter into the arbitration proceedings:

> *"13. A defining characteristic of arbitration is its finality and the binding disposition of a controversy. See Schaefer v Co, 63 Ohio St. 3d 708, 590 N.E. 2d 1242 (1992). Parties to an arbitration enter the process knowing that the arbitrator's award will signal the factual end of their dispute, rather than leaving open the door to the possibility of future appeals. With this in mind, courts confirm,*

50. 2001 EWHC 456 (TCC).
51. United States Federal Arbitration Act of 1925, s 11.
52. 242 So 3d 92 (Miss 2018).

*or [**10] modify an arbitrator's award do so through an extremely limited lens."*

In **Australia**, courts can only set aside an award under Section 34 of the International Arbitration Act,1974. This section is also similarly worded as Section 34, Arbitration & Conciliation Act, 1996. However, Section 34-A, added later, allows for an appeal through which modifications can be made.

In **Singapore**, courts can not only modify an award under an independent provision but also modify and set aside an award in the same proceeding by combining Sections 51(2), 48, and 49 of the Singapore Arbitration Act, 2001[53]. Section 48 which empowers the Court to set aside an Award is almost identically worded as Section 34 of the Indian Act and it speaks only about setting aside an Award. But Section 49, which provides for a remedy of Appeal, empowers the Court, under subsection (8) even to vary the Award[54].

5. INDIAN JUDICIAL PRONOUNCEMENTS ON S. 34 OF THE 1996 ACT AND THE PERMISSIBILITY OF COURTS TO MODIFY THE ARBITRAL AWARD

The Apex Court, in *Vedanta Ltd v Shenzhen Shandong Nuclear Power Construction Co Ltd*[55], allowed the modification of the award by reducing the interest rate awarded by an arbitral tribunal, reasoning that such interest rate did not reflect the prevailing economic conditions.

The Supreme Court, in *Mcdermott International Inc v Burn Standard Co Ltd*[56] held inter-alia that the court could not correct errors of the arbitrators. It could only quash the award leaving the parties free to begin the arbitration again if it is desired.

In *NHAI v M. Hakeem*[57], the Apex Court observed that Section 34 of the Arbitration Act, 1996 could not be held to include within it, the power to modify an award. It further observed that the Arbitration Act was modelled on the UNCITRAL Model Law on International Commercial Arbitration

53. Singapore Statutes Online, 'Arbitration Act 2001' <https://sso.agc.gov.sg/Act/AA2001?ProvIds=P19-> accessed 14 August 2024.
54. *Gayatri Balaswamy v ISG Novasoft Technologies Ltd* 2014 SCC OnLine Mad 6568 : (2015) 1 Arb LR 354 (Madras) para 49.
55. *Vedanta Ltd v Shenzhen Shandong Nuclear Power Construction Co Ltd* (2019) 11 SCC 465.
56. *Mcdermott International Inc v Burn Standard Co Ltd* (2006) 11 SCC 181.
57. *NHAI v M. Hakeem* (2021) 9 SCC 1.

1985, under which no power to modify an award was given to a court hearing a challenge to an award. While Section 15 of the Arbitration Act, 1940 provided specifically for modification of an award, the Arbitration Act, 1996 did not, as it was in alignment with the Model Law. In jurisdictions like England, the United States, Canada, Australia and Singapore, there were express provisions that permitted the varying of an award but in the case of Section 34 of the Indian Arbitration Act, 1996, the Parliament very clearly intended that no power of modification of an award existed.

The Supreme Court in *Dyna Technologies (P) Ltd v Crompton Greaves Ltd*[58] set aside an arbitral award on the ground of it being unintelligible and unreasoned. Observing that while it could have been cured under Section 34(4) of the 1996 Act by remitting the award back to the arbitral tribunal, the 25 year pendency did not merit that course of action. Accordingly, the Supreme Court set aside the award and directed the respondent therein to pay the claimant an amount to provide quietus to the litigation. Supreme Court further observed that the legislative intent of providing Section 34(4) in the Arbitration Act was to make the award enforceable, after giving an opportunity to the Tribunal to undo the curable defects. Thus, a challenge under Section 34 of the Arbitration Act of 1996 was maintainable only when there was complete perversity in the reasoning. Observing that if a case took too long for its adjudication, remanding the same to the Tribunal was not beneficial as the purpose of arbitration as an effective and expeditious forum itself stood effaced.

6. THE PROBLEM WITH DIVERGENT RULINGS

The divergent interpretations by courts entails that the parties would readily invoke Articles 226/227 of the Constitution of India, or in the alternative, continue the cycle of challenge till the Supreme Court – through an invocation of the statutory provisions of Sections 34 37 of the 1996 Act, followed by a Special Leave Petition ***["SLP"]*** under Article 136, to attempt obtaining relief under Article 142 of Constitution of India. A pertinent question that emerges is whether constitutional and discretionary provisions like the SLP could be banked upon to resolve commercial disputes arising out of a special legislation that places prime importance on expeditious disposal of contractual disputes. The quandary is strange, quite similar to the lack of recognition of irretrievable breakdown of marriage as a ground for divorce, and how the parties after consecutive appeal dismissals, finally reach the Supreme Court to obtain a dissolution of their marriage, which

58. *Dyna Technologies (P) Ltd v Crompton Greaves Ltd* (2019) 20 SCC 1.

is granted by the Supreme Court under Article 142 of the Constitution of India. What separates the Arbitral proceedings, from the example of non-recognition of irretrievable breakdown of marriage as a ground for divorce is the time bound legislative intent to resolve the disputes promptly in the former.

7. THE CONFLICT BETWEEN ARTICLE 142 OF CONSTITUTION OF INDIA AND EXPRESS STATUTORY PROVISIONS

An interesting rationale given by the Supreme Court in *NHAI v M. Hakeem*[59] with respect to modification of arbitral awards was that Article 142 of Constitution of India could be invoked in order to achieve complete justice between parties. It reasoned that although the main goal of arbitration was to ensure minimal judicial interference, practical considerations also came into play. It went on to observe that in instances where the Supreme Court had adjusted awards under Article 142 of the Constitution to correct obvious mistakes and deliver complete justice, such modifications were reasonable and stemmed from judicial insight.

The authors submit that this reasoning is in conflict with established judicial precedents of the Supreme Court itself that have underscored the wide amplitude of powers under Article 142, yet caution exercising it in cases where statutory provisions hold the field. In a recent decision by the Constitutional Bench of the Supreme Court in *High Court Bar Assn v State of U.P.*[60], the Court reiterated the scope of power under Article 142 of the Constitution of India as observed in *Prem Chand Garg v Excise Commr*[61]:

> *"12. ....The powers of this Court are no doubt very wide and they are intended to be and will always be exercised in the interest of justice. But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws. Therefore, we do not think it would be possible to hold that Article 142(1) confers upon this Court powers which can contravene the provisions of Article 32."*

59. *NHAI v M. Hakeem* (2021) 9 SCC 1.
60. *High Court Bar Assn v State of U.P.* (2024) 6 SCC 267.
61. *Prem Chand Garg v Excise Commr* 1962 SCC OnLine SC 37.

Another Constitution Bench, in *Supreme Court Bar Assn v Union of India*[62] held thus:

> *"47. The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent "clogging or obstruction of the stream of justice". It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly.*
>
> *48. … Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."*

62. *Supreme Court Bar Assn v Union of India* (1998) 4 SCC 409.

8. PENDENCY OF S.34 CHALLENGES AND THE NEED FOR JUDICIAL INTERVENTION

While the statute and courts have been circumspect in review of the award, this process of analysing the matters with a hands-off approach without going into the merits has created a bottleneck. The intent of expeditious disposal of the matters under section 34 (within one year from date of service of notice[63]) stands vitiated in practice. Take for example Delhi High Court where, as on 01.07.2024, there are 2,178 petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 pending before the Delhi High Court. The disposal of Section 34 petitions is on average taking 1,368 days or roughly more than 3.5 years.[64] The disposal of enforcement petitions under Section 36 also does not fare better. There are 890 enforcement petitions pending, with an average final disposal taking 1,064 days or around 3 years.[65]

A. Reasons and Necessity for Permitting Modification

The "purposive" view would be that the Court under Section 34 of the Act can "modify" portions of an arbitrator's award and the power under the Section 34 is not restricted to only setting aside the award[66]. Benefits of modification are:

a) Judicial Intervention to cure deficiencies in the arbitral award and course correction to prevent parties from being relegated to *de novo* proceedings before the Tribunal.

b) Expeditious and timely disposal of S. 34 challenges.

c) Judicial and precedential consistency.

d) Minimizing challenges before 226/227 writ courts.

63. Arbitration and Conciliation Act 1996, s 34(6).
64. Amer Vaid, 'Section 34 of Arbitration Act and Timely Disposal: Two Roads that Never Meet' *Bar and Bench* <https://www.barandbench.com/columns/section-34-and-timely-disposal-two-roads-that-never-meet>; Delhi High Court — Institution, Disposal and Pendency of Commercial Cases During the Month of July, 2024 <https://delhihighcourt.nic.in/uploads/CommercialCourt/110466973666b601fab6bb6.pdf≥ accessed 13 August 2024.
65. ibid.
66. Nakul Dewan, *Enforcing Arbitral Awards in India* (New York: LexisNexis, 1st edn 2017).

e) Parties would not be left with a discretionary remedy under Article 142

f) Bring parity with international provisions to challenge arbitral awards.

g) Make India a viable commercial partner/ Ease of doing business (World Bank rank/stats) – India ranks 63 out of 190 countries in the World Bank's Ease of Doing Business[67] rankings. However, in the specific area of Enforcing Contracts, India significantly underperforms and is presently ranked at 163.

9. SOLUTIONS FOR INDIA

A. Severability and the Issuance of Practice Guidelines by HCs to Employ the Severability Test at the Threshold

Both the Model Law[68] and the 1996 Act[69] acknowledge the application of severability while remitting arbitral awards under S.34(4) of the 1996 Act.

An examination of the Model Law's legislative history indicates that the doctrine of severability was very much within the scheme of Art.34[70]. Draft Art. 41 on recourse against the arbitral award prepared by UNCITRAL Secretariat exclusively provided that "a court may, where appropriate, set aside only a part of the award, provided that this part can be separated from the other parts of the award".[71] When the Draft Articles were presented before the Working Group on International Contract Practices in its Fifth and Sixth Session, the Working Group adopted it without any objection, thereby affirming the application of the doctrine of severability while setting aside arbitral awards.

The proviso to S. 34(2)(a)(iv) provides that if the decisions on matters submitted to arbitration can be separated from those not so submitted,

67. World Bank Group, 'Doing Business: Rankings' (Doing Business 2020) <https://archive.doingbusiness.org/en/rankings> accessed 14 August 2024.
68. Pieter Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* (Alphen Aan Den Rijn: Kluwer Law International 2004).
69. *K.K. John v State of Goa* (2003) 8 SCC 193.
70. Howard M Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Alphen Aan Den Rijn: Kluwer Law International 1989) 954-956.
71. United Nations General Assembly, *Report of the Working Group on International Contract Practices on the Work of its Fifth Session* (1983) 32-34.

only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside.[72]

In *J.G. Engineers (P) Ltd v Union of India*[73], Apex Court held that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent.

Recently, a Ld. Single Judge of the Delhi High Court, in *NHAI v Trichy Thanjavur Expressway Ltd*[74], extensively considered the law on this aspect. It was observed that if an award was composed of separate components, each standing separately and independent of the other, there was no hurdle in adopting the doctrine of severability to partly set aside an award. The power so wielded would continue to remain confined to "setting aside", and would thus constitute a valid exercise of jurisdiction under section 34 of the Act. While discussing the judgment in *N. Hakeem*, the Delhi High Court held that the term 'modify' used in Hakeem meant a variation or modulation of the ultimate relief that could be accorded by an arbitral tribunal. However, when a Section 34 Court exercised its power to partially set aside an award, it did not amount to a modification or variation of the award. Such setting aside was confined to the offending and unsustainable part of the award coming to be annulled and set aside. It is this distinction between a modification of an award and its partial setting aside that had to be borne in mind. Therefore, the expression "setting aside" as employed in section 34 included the power to annul a part of an award, provided it was severable and did not impact or eclipse other components of the award.

B. Viswanathan Committee Report Recommendations on Legislative Amendments to Revive a Qualified Equivalent of Section 15 of the 1940 Act

On 07.02.2024, the Viswanathan Committee[75] submitted a report to the Law Ministry, examining the proposal to permit courts to modify or vary an arbitral award, while setting aside such an award in exercise of its Section

72. Arbitration and Conciliation Act 1996, s 34(2)(a)(iv) proviso.
73. *J.G. Engineers (P) Ltd v Union of India* (2011) 5 SCC 758.
74. *NHAI v Trichy Thanjavur Expressway Ltd* 2023 SCC OnLine Del 5183.
75. 'Expert Committee on Arbitration Law Proposes Complete Overhaul of Arbitration and Conciliation Act, 1996' (*LiveLaw* 5 March 2024) <https://www.livelaw.in/arbitration-cases/expert-committee-on-arbitration-law-proposes-complete-overhaul-of-arbitration-and-conciliation-act-1996-251306≥ accessed 14 August 2024.

34 jurisdiction. This is proposed to be achieved by amending sub-section (2) and sub-section (2A) of S. 34 of the 1996 Act. The Committee however, goes on to qualify that such orders must be made only in exceptional circumstances to meet the ends of justice. This will enable a S. 34 Court to provide a quietus to the matter, so as to avoid further litigation. It has proposed to substitute the words *"set aside by the Court"* with the words *"set aside in whole or in part by the Court"* and add a proviso for partly varying the award in exceptional circumstances.

The Committee recommends amendment to sub-sections (2) and (2A) of section 34 to substitute the words "set aside by the Court", with the words "set aside in whole or in part by the Court" and to add a proviso, namely:

> *"Provided that in cases where the Court sets aside the arbitral award in whole or in part, the Court may make consequential orders varying the award only in exceptional circumstances to meet the ends of justice".*

The authors propose that in addition to a mandatory severability assessment by the Section 34 Courts, there could be provision included by the legislature, for grant of leave to modify to ascertain whether modification would be permitted. An example of a salubrious checking provision can be inspired from the Australian Section 34A(8), Commercial Arbitration Act, 2017 which states that

> *"The court must not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration".*

This would tie in harmoniously with Section 34(4) of the Act,1996 in India that already exists. The import of this interpretation would mean that the power to set aside u/s 34 would entail 5 outcomes based on the language of Section 34 that exists as is:

a) Non interference

b) Setting aside severable components of the award.

c) Setting aside of the award completely

d) Remitting the matter back to the Tribunal under Section 34(4), Act, 1996

e) Modifying the offending/assailed part of the award.

10. CONCLUSION

The prevalent legal position that exists today is that the present statutory regime does not permit for modification of the arbitral awards, given that the statute does not expressly provide for it. *Hakeem* explains the 1996 Act to have been modelled on the UNCITRAL regime - completely de hors the 1940 Act. Thus, as per Hakeem, although the awards challenged under the 1940 Act would be amenable to modification but those governed by the 1996 Act are *stricto sensu* barred from being touched on merits by the courts - which can only affirm the award, remand it back, sever the offending parts (if severable) or set it aside - wiping the slate clean and starting the process afresh before the Tribunal.

The authors would respectfully like to disagree with the sweeping scope that the ratio of *Hakeem* attempts to lay down. Even though the dominant textualist view that the courts have taken and the Supreme Court has pre-eminently underscored is that modification is not permissible under Section 34 of the 1996 Act; the second plausible interpretative line that has permitted modification also continues to exist and remains in force for the 34 courts to rely upon as stare decisis, until it is overruled.

In fact the observations of the Supreme Court in *Hakeem*, that the modifications ratified by the Supreme Court were under the powers of Article 142 of Constitution of India, in the opinion of the authors, bolsters the second view - that modification is in fact impliedly permissible under the present statutory regime as the very contours of 142 do not permit the Supreme Court to bypass the statutory framework of Section 34 of the 1996 Act. In *Prem Chand Garg v Excise Commr*[76] and *Supreme Court Bar Assn* v *Union of India*[77] it was the Supreme Court itself, which enunciated that Article 142 could not be exercised to negate the statutory provisions.

Naturally this discordance has manifested itself in the evolving context of commercial disputes, which is why the question has been referred to a larger bench of the Supreme Court. Recognising this schism, the Viswanathan committee recommendations are salient and salutary, as they implore the legislative codification of this latent power to modify. What remains to be seen is whether the larger Supreme Court Bench decides on the permissibility of modification under the present framework first, or the Parliament expressly provides for modification in line with the Committee

76. *Prem Chand Garg v Excise Commr* 1962 SCC OnLine SC 37.
77. *Supreme Court Bar Assn v Union of India* (1998) 4 SCC 409.

recommendations before the Court decides the issue. Regardless, as the authors spelled out earlier in the paper, the power to modify would have to be hedged with strict guidelines to allow for modification in the fittest of cases. As discussed earlier, a self-adopted test by the Court, for grant of leave to modify to ascertain whether modification would be warranted would be a valuable preliminary checkpoint to ward off abuse of the provision for modification. This would be akin to a writ of certiorari or the discretion vested with the Court under Article 136

An interesting upshot of powers to modify awards would be on the approach of the Counsels and in the nature of pleadings in the Section 34 petitions by the litigants. Quite often, whether or not an award is perverse or not, the present approach to Section 34 challenges is akin to sledgehammer litigation, wherein for a minor discrepancy, a possibly defaulting party can avail the right to disturb and vitiate the entire arbitral process. Recognition of modification would not just empower the Court to sequester and pinpoint the infirmity and correct the same; it would also place the onus on the challenging party to narrow down and specify the infirmity, and then get a limited redressal of its grievance, without having the dilatory entitlement to frustrate the entire award. In absence of a definitive ruling, the recourse under Articles 226/227 of the Indian Constitution before the High Courts and through SLPs under Article 136 of the Indian Constitution before the Supreme Court, would continue to be availed by the parties in a disorganised manner that defies the purpose of the arbitration process being a proverbial highway.