* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 06 July 2023**
Judgment pronounced on: 21 August 2023

\+ O.M.P. (COMM) 95/2023, I.A. 4057/2023 (Stay), I.A. 5361/2023

NATIONAL HIGHWAYS AUTHORITY OF INDIA
..... Petitioner

Through: Mr. Santosh Kumar, Standing Counsel with Mr. Daksh Arora, Mr. Manish K. Bishnoi and Ms. Pallavi Singh Bishnoi, Advs.

Versus

TRICHY THANJAVUR EXPRESSWAY LTD.
..... Respondent

Through: Ms. Kaadambari, Mr. Pankaj Agarwala, Mr. Sahil Khanna, Ms. Ayushi and Mr. Amir Zaidi, Advs.

AND

\+ O.M.P. (COMM) 106/2023
TRICHY THANJAVUR EXPRESSWAY LTD.
..... Petitioner

Through: Ms. Kaadambari, Mr. Pankaj Agarwala, Mr. Sahil Khanna, Ms. Ayushi and Mr. Amir Zaidi, Advs.

Versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA
..... Respondent

Through: Mr. Santosh Kumar, Standing

Counsel with Mr. Daksh Arora and Mr. Kushagra Amar, Advs. for NHAI.

Counsel Assisting the Court:-

Mr. Gautam Narayan and Ms. Asmita Singh, Advs.
Mr. Gaurav Pachnanda, Sr. Adv. with Ms. Nikita Jaitly and Ms. Anvi Sharma, Advs.
Mr. Ramesh Singh, Sr. Adv.
Mr. Rajshekhar Rao, Sr. Adv. with Ms. Mansi Sood and Mr. Areeb Amanullah, Advs.
Mr. Ciccu Mukhopadhyay, Sr. Adv. with Mr. Rishi Agarwala, Ms. Shruti Arora, Mr. KaranVir Singh, Adv.
Mr. Dayan Krishnan, Sr. Adv. with Mr. Rishi Agarwala, Mr. Shreedhar Kale, Mr. Sanjeevi Seshadri, Ms. Shruti Arora, Mr. Karan Vir, Advs.
Mr. Saurabh Banerjee, Sr. Adv. with Mr. Yashwardhan, Ms. Anjali Dwivedi, Mr. Rakesh T., Mr. T.S. Sundaram, Mr. S.P. Mukherjee, Advs.
Mr. George Pothan, Ms. Manisha Singh, Mr. Ashu Pathak and Ms. Jyoti Singh, Advs.
Mr. Ashim Sood, Adv.
Ms. Aarzoo Aneja, Adv.
Mr. R.A. Iyer, Adv.
Mr. Arjun Natarajan and Ms. Kamana Pradhan, Advs.
Dr. Amit George, Adv.
Mr. Rohan J Alva, Adv.
Mr. Karan Aggarwal, Adv.
Dr. Shashwat Bajpai, Mr. Akshay Anurag and Ms. Sanjana Sachdev, Advs.
Mr. Zafar Khurshid, Mr. Amit Singh Chauhan and Mr. Abhishek Sharma, Advs.
Mr. Manish Bishni, Mr. Nirmal Prasad, Adv.
Mr. Karan Agarwal, Adv.
Mr. Anurag Ojha and Mr. Udit Nagar, Advs.
Mr. Karn bhardwaj, Adv.
Mr. Naushad Ahmed Khan, Adv.

Ms. Payal Chawla and Ms. Hina Shaheen, Advs.
Mr. Amit Gupta, Adv.
Mr. Mozzam Khan, Adv.
Mr. Manish Bishnoi, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

J U D G M E N T

A. BRIEF OVERVIEW

1. These two cross petitions under Section 34 of the **Arbitration and Conciliation Act, 1996**[1] have come to be preferred seeking the following reliefs: -

> "O.M.P. (COMM) 95/2023
>
> "Set aside the Impugned Award dated 07.08.2022 as corrected *vide* order dated 15.11.2022 passed by the AT in the arbitration proceedings titled *"Trichy Thanjavur Expressway Ltd. Vs. National Highways Authority of India* " to the extent of the findings challenged above and the award of Claim No. 1 (b) and (g) and Claim No.8:"
>
> O.M.P. (COMM) 106/2023
>
> a) Set aside and quash the portion of the Impugned Arbitral Award dated 07.08.2022 to the extent of the rejection of the valid and legal claims of the Petitioner/Claimant (whereby claims worth INR 30,27,33,01,844/- were rejected) and to allow the claims which were wrongfully rejected by the Ld. Arbitral Tribunal, and award the same in favour of the Petitioner/Claimant.
>
> b) Alternatively, nominate and appoint an independent sole arbitrator to adjudicate the rejected part of the claims of the Petitioner/Claimant within a time bound manner."

[1] the Act

2. As would be evident from the reliefs claimed in the two petitions, the appellants question certain parts of the Arbitral Award dated 07 August 2022. While Trichy seeks quashing of a part of the Arbitral Award dated 07 August 2022 to the extent that it had rejected claims amounting to INR 30,27,33,01,844/-, **National Highways Authority of India**[2] seeks the setting aside of the Arbitral Award to the extent of the findings returned by it in respect of Claim No. 1(b) and (g) as well as on Claim No. 8. Additionally, the petitioner NHAI has moved I.A. 5361/2023 for eliminating grounds for setting aside under Sec 34(4) of the Act. When the two appeals were initially called before the Court on 21 March 2023, the question which was raised and stood duly noticed was with respect to whether parts of an award could be severed and whether it could be partially set aside. The attendant question which arose and was so noticed was whether the grant of such a relief would be contrary to the decision of the Supreme Court in **NHAI vs. M. Hakeem& Anr.**[3] and which had essentially held that the power to set aside as conferred by Section 34 cannot be read so as to include the power to vary or modify the award as rendered by the **Arbitral Tribunal**[4].

3. Taking note of the importance of the questions which arose and the fact that any decision rendered on the same would impact

[2] NHAI
[3] (2021) 9 SCC 1
[4] AT

numerous matters pending or yet to be instituted, the Court had published a notice calling upon learned counsels to address submissions.

4. Pursuant to the aforesaid liberty granted, learned counsels and members of the Bar were invited to address submissions on the questions formulated. The Court, at the very outset seeks to duly acknowledge the invaluable assistance that was rendered by the hon'ble members of the Bar of this High Court. Learned counsels who answered the call of the Court have placed on the record copious material in the shape of erudite written submissions, judgments rendered by courts in India as well as in various foreign jurisdictions, authoritative treatises and background material relating to the formulation of the Model Law, all of which has been of tremendous assistance in enabling it to obtain a comprehensive perspective both from a national and international viewpoint. For this the Court expresses its immense gratitude.

5. The issue arises in the context of Section 34 of the Act which comprises the power of the Court to set aside an Arbitral Award. The issue of severability stood raised principally on account of the Proviso appended to Section 34(2)(a)(iv), which prescribes that if decisions on matters submitted to arbitration can be separated from those which were not, the unsustainable part of the Arbitral Award and which contains decisions on matters not submitted to arbitration may alone

be set aside. The question which arose was whether the concept of partial setting aside or severance would stand restricted to a challenge to an Arbitral Award on grounds enumerated in clause (iv) of Section 34(2)(a) or would it also be applicable to other clauses falling in that Section. The second aspect which was canvassed for the consideration of the Court related to the scope and intent of Section 34(4) and which contemplates the Court adjourning proceeding on the request made by one of the parties in order to enable the AT to resume proceedings and take such further action as in its opinion would eliminate the grounds for setting aside the Arbitral Award itself.

6. Learned counsels who addressed submissions before the Court had placed for our consideration written submissions covering the various facets of the questions which stood raised. For the completeness of the record, we deem it apposite to extract the relevant parts of those written submissions hereinafter. The Court deems it appropriate to observe that it has chosen to reproduce abridged versions of the written submissions which were tendered for the sake of preciseness and brevity alone as also as to avoid the judgment itself becoming too protracted or discursive and thus failing to retain focus on the core issues that arise.

B. WRITTEN SUBMISSIONS EXTRACTS

7. The written submissions are extracted hereinbelow: -

(a) Mr. Gautam Narayan and Ms. Asmita Singh, Advocates Part-1

2. "PROPOSITIONS

2.1 *M Hakeem* does not stultify the power of the objection court to severe portions of an arbitral award:

2.1.1 In *M Hakeem* (*supra*), the Supreme Court after contrasting Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter, "the 1996 Act") with Section 15 of the Arbitration Act, 1940 came to the conclusion that the power vested in the court hearing objections against an award which extended to modifying an award under the 1940 Act had been curtailed by the 1996 Act to merely setting aside an award on satisfaction of any of the grounds specified under Section 34. In arriving at this conclusion, the Court found sustenance in the language employed by Article 34(1) and (2) of the UNCITRAL Model Law on International Commercial Arbitration, 1985.

2.1.2 Relying on the judgments in *Mc Dermott International Inc v Burn Standard Co. Ltd.*, *Kinnari Mullick v Ghanshyam Das Damani* and *Dakshin Haryana Bijli Vitran Nigam Ltd. v Navigant Technologies (P) Ltd.*, the Court negated the power to modify an award by the Section 34 Court and further went on to hold that any order to do so in light of the express statutory bar would be to transgress by way of creative interpretation a "judicial *Lakshman Rekha*".

2.1.3 At the outset, it is apposite to note that *M Hakeem* did not deal with the issue of severability in as much as the submission advanced by Ld.Counsel for the Respondent placing reliance on *inter alia* judgments of a Ld.Single Judge and Division Bench of the High Court of Madras and *Gayatri Balaswamy v ISG Novasoft Technologies Ltd.* and *ISG Novasoft Technologies Ltd. v Gayatri Balaswamy* was that the power to modify an award must necessarily be located in the Section 34 Court so as to avoid multiplicity of litigation.

2.2 International position on the Power to severe / " Partial Annulment of Award"

2.2.1 An examination of the relevant provisions of the 1996 Act, the UNCITRAL Model Law on International Commercial Arbitration, 1985 (hereinafter, "the Model Law"), the Arbitration

Act, 1996 of England and Wales, the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 leads one to the irresistible conclusion that severability of offending portions of an award is permissible. To wit, the Section 34 Court is empowered, nay authorised and vested with the authority and jurisdiction to separate portions of an award that fall foul of the thresholds prescribed under the various sub-clauses of Section 34(2).

2.2.2 While this is immediately apparent from a reading of the *proviso* to Section 34(2)(a)(iv), which empowers the Court to separate within the award, decisions on matters not submitted to arbitration and set those aside, there is good authority to suggest that this yardstick or principle can and, in fact, should be extended to other situations as well such as violations of public policy (Section 34(2)(b)(ii)) and procedural unfairness (Section 34(2)(a)(iii)) as noticed by Gary B Born.

2.2.3 This *proviso* is quite clearly inspired by Article 34(2)(a)(iii) of the UNCITRAL Model Law, which in turn echoes Article V(1)(c) of the New York Convention.

2.2.4 Having recognised that the effects of a successful challenge to an award would be determined by the grounds of challenge raised and the law applied thereto, it is observed in Redfern & Hunter that a Court may decide to confirm the award, refer it back to the Tribunal for reconsideration, vary it or *set the award aside in whole or in part*.

2.2.5 It is interesting to note that various provisions of the Arbitration Act, 1996 of the UK recognise the concept of severability *albeit* while seeking to provide for a varying nature of challenges to an arbitral award. Section 67 empowers the Court in case of a successful challenge to an award based on '*substantive jurisdiction*' to either confirm, vary or set aside the award *in whole or in part* under Section 67(3). Similarly, in case of a successful challenge on the ground of a '*serious irregularity*', Section 68 empowers the Court to either remit to the Tribunal in whole or in part for reconsideration the award, set aside *in whole or in part* or declare the award to be of no effect in whole or in part under Section 68(3). The English Act also contemplates an appeal on a point of law arising out of an award to a Court under Section 69(7) whereunder the Court in appeal is empowered to confirm, vary, remit for reconsideration

in whole or in part or set aside *in whole or in part* the award. Therefore, under Section 69, the Court is empowered to vary the award and substitute its own decision therefor.

2.2.6 Section 71(2) goes on to provide that where the Court makes an order under Sections 67, 68 and 69,

a) where the award is varied, the variation has effect as part of the tribunal's award;

b) where the award is remitted in whole or in part, the tribunal is required to make a fresh award in respect of matters which are remitted; and

c) where the award is set aside or declared to be of no effect, in whole or in part, the Court may in addition 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.

2.2.7 It is pertinent, however, to note that under the English Act, remission is the default rule and it is only when the Court finds that this option would be inappropriate, that the Court would proceed to set aside the award in whole or in part.

2.3 It, therefore, emerges from the aforesaid discussion that severability is a common strain that runs through the spirit of all statutory provisions dealing with challenges to arbitral awards.

3. <u>The position in India under Section 34 of 1996 Act</u>

3.1 A Full Bench of the Hon'ble High Court of Bombay constituted to answer a reference, in *RS Jiwani v Ircon International Ltd.*, recognised that severability is an established concept in law and held that there was no bar in applying the doctrine in cases where awards are severable. The Court held that the words "set aside" under Section 34 could not be construed to imply only a wholescale setting aside of the award as such an interpretation would be destructive of the legislative intent of expeditious disposal of disputes subjected to arbitration.

3.2 The Supreme Court in *JG Engineers v Union of India* while dealing with and interpreting Section 34 of the 1996 Act reversed the judgment passed by the High Court and held that the latter had erred in setting aside the award on claims qua which it

had not found any infirmity. It was held that where an award deals with and decides several claims separately and distinctly, even if the Court finds that the award in respect of some items is bad, the Court should segregate the items which did not suffer from any infirmity and uphold the award to that extent.

3.3 A Division Bench of the Telangana High Court in *Saptarishi Hotels Pvt. Ltd. v National Institute of Tourism & Hospitality Management (NITHM)* has recognised the power of the Court dealing with objections against an arbitral award to modify the award in part by severing offending portions while upholding others which do not suffer from any lacuna.

3.4 Similarly, a Division Bench of the High Court of Kerala in *M/s Navyuga Engineering Company Ltd. v Union of India*, after considering the effect of the law laid down in *Hakeem* (*supra*) has concluded that the doctrine of severability can be applied to proceedings under Section 34. Pertinently, a Special Leave Petition filed against the said judgment has been dismissed and therefore this enunciation of the law has been upheld by the Hon'ble Supreme Court *albeit* in exercise of jurisdiction under Article 136.

3.5 A Ld. Single Judge of the Hon'ble High Court of Bombay in *NHAI v Addl Commissioner, Nagpur* has after noticing the aforesaid judgments formed the opinion that where several distinct and independent issues were decided by the arbitrator, the Court is empowered to segregate and uphold the award in respect of items which do not suffer from infirmities.

3.6 Finally, it is apposite also to draw attention to a recent judgment rendered by a Ld. Single Judge of this Hon'ble Court in *Union of India v Alcon Builders and Engineers Pvt. Ltd.*, wherein after having traced the development of the law in India with regard to the doctrine of severability, it was concluded that the Court is empowered to set aside individual and severable claims or counterclaims without having to set aside the entire award and to do so would not amount to modification of the award.

4. <u>Conclusion</u>

4.1 In view of the aforesaid, it is respectfully submitted that, in cases where infractions of public policy are palpable or where substantial injustice has been visited on one of the parties, whether by reason of the Tribunal dealing with issues beyond its remit or by reason of the procedure adopted by it being unjust on

account of denial of grant of a fair and reasonable opportunity of hearing, the power to annul or set aside, in part, an arbitral award, must of necessity be recognised in the Section 34 Court. The alternative would be an anathema to the *raison d'être* of any proceeding i.e. to do full and complete justice between the warring parties.

4.2 It is, therefore, submitted that the principle of severability which has received statutory recognition as also the imprimatur of judicial interpretation applies with full rigour and force in situations where the Section 34 Court reaches the conclusion that the award suffers from illegalities or irregularities of the nature specified under Section 34(2). In such a situation, to set aside an award in its entirety is akin to throwing the baby out with the bath water. The consequence of such a course of action would be to require a *de novo* arbitration, which would be a daunting prospect even for the most resilient of parties, by reason not only of cost but also time factors and would therefore be doing a disservice to the concept of resolution of disputes via the medium of arbitration.

4.3 The wealth of contemporaneous academic and judicial thinking with regard to the applicability of the principle of severability would, it is respectfully submitted, suggest that *M Hakeem* (*supra*) is neither the last word on the subject nor does it in any manner, close the door on the sustainability of a partial affirmation of an arbitral award. This view gains all the more traction in light of the indisputable position that a contention on the anvil of severability was neither raised nor considered in *M Hakeem* (*supra*)."

(b) <u>Mr. Gautam Narayan and Ms. Asmita Singh, Advocates Part-2</u>

"**<u>Submissions on exercise of jurisdiction under Section 34(4) of the 1996 Act</u>**

2. The power of remission is derived from and circumscribed by national legislation. Section 34(4) of the 1996 Act is identical to Section 34(4) of the Model Law which has been widely regarded as essentially a "curative provision".

2.1 Redfern & Hunter in Para.10.19 draw reference to Section 68(3) of the Arbitration Act, 1996 to suggest that to remit an award to the Tribunal is the default rule and it is only when this option is

found not to be appropriate that the court hearing the objections against the award would exercise the power to set it aside in whole or in part. Arguably, such a course of action seems to tilt the scales in favour of the beneficiary of the award.

2.2 In para.10.20, the authors further suggest that in countries that follow the provisions of the Model Law in their national legislations, the power to remit to the Tribunal has been linked to the narrow grounds available for setting aside the award and, therefore, the power is in sum and substance a means to cure defects in the award which may otherwise require to be set aside.

2.3 As explained by the oft-quoted judgment of the Court of Appeals of Singapore in *AKN and another v ALC and others and other appeals*, Section 34(4) of the Model Law is a curative provision which enables the Court faced with a defective award which could be set aside to *forestall that consequence*. It is an alternative to setting aside of the award and the question of remission cannot arise for portions of the award which are set aside. Moreover, as held by the Court of Appeals in *Permasteelisa Pacific Holdings Ltd v Hyundai Engineering and Construction Co Ltd*, the question of remission in terms of Section 34(4) cannot arise for parts of the award which are not vulnerable to being set aside.

2.4 More recently, following the law laid down in *AKN* (*supra*), the Court of Appeals has further clarified that the power to remit under Section 34(4) can only be exercised by the High Court / court of challenge of first instance and not appellate courts such as itself.

2.5 The law laid down in *AKN* (*supra*) is widely considered to be the authority on the interpretation of Section 34(4) of the Model Law and has been relied upon in other jurisdictions such as Australia as well.

3. Indian courts have been grappling with Section 34(4) since coming into force of the 1996 Act and few recent decisions have clarified its scope and ambit on the lines of the decisions of the Court of Appeals as essentially a curative provision which cannot be invoked to remedy a ground of patent illegality sufficient for setting aside the award.

3.1 One possible view with regard to how Section 34(4) is to be

interpreted could be a situation in which an award under a particular claim is not supported by reasons as mandated by under Section 31(3) which was the case in *Dyna Technologies Pvt. Ltd. v Crompton Greaves Ltd.*

3.1.1 In such a situation, the Section 34 Court when dealing with an objection raised by the Respondent could at the request of the Claimant exercise the power under Section 34(4) to remit that part of the award to the Tribunal to enable the Tribunal to provide reasons for the award under that Claim.

3.1.2 It is of course understood that this could not empower the Tribunal to take fresh evidence or permit parties to raise new grounds in support of or in opposition of the claim remitted to it as pointed out by the Ld. Single Judge in *DMRC* (*supra*).

3.1.3 Moreover, as held in *I-Pay Clearing Services* (*supra*), such a course cannot save an award which fails to give "findings" as opposed to "reasons" on certain issues i.e. an award which fails to adjudicate altogether contentious issues.

3.2 A consequence of this interplay between Section 34(2) and 34(4) is that in a situation where a party that has suffered an adverse award and is able to convince the objection hearing court that the award or part thereof suffers from an error of the nature specified under Section 34(2), could then possibly be in a situation where at the request of a counter party as pointed out in *ONGC Petro Additions Ltd. v Tecnimont SPA & Anr.*, the matter is remanded to the Tribunal by the Section 34 Court thereby virtually affording another opportunity to the Tribunal to correct the error which would have otherwise merited the setting aside of the award in whole or in part.

3.3 This approach can be criticised on the ground that if upon remand, the Tribunal were to arrive at the same conclusion in the matter of awarding or rejecting the claims remanded to it, but on this occasion after curing the error or defect pointed out in the first round, it would seemingly work at least some degree of prejudice to the party against whom the award is rendered.

3.4 However, since arbitration as a species of alternate dispute resolution mechanisms derives its legitimacy from certain foundational principles such as party autonomy, expeditious adjudication of the *lis* by minimising of judicial intervention etc., this being the bargain chosen by parties consciously, such a

view should be an acceptable one that passes muster.

3.5 It is also possible to criticise the approach commended by Redfern on the logic that the exercise of discretion by the Section 34 Court to determine satisfaction of the "appropriateness test" must be on grounds independent of those specified under Section 34(2) instead of conflating the two provisions. In other words, grounds under Section 34(2) should lead to a setting aside, in whole or in part, of the award, while under Section 34(4), a Court could exercise its discretion of course on a request made by one of the parties to remit the award to the Tribunal on grounds independent of Section 34(2). However, the approach of Redfern appears to be in consonance with the interpretation of Section 34(4) of the Model Law as explained by the Court of Appeals of Singapore that remission under Section 34(4) is possible only in case the award suffers from a defect which is a ground for setting it aside which could extend to atleast some grounds under Section 34(2) as well such as Section 34(2)(b)(iii) as pointed out in *RS Jiwani v Ircon International Ltd."*

(c) <u>Mr. Dayan Krishnan, Senior Advocate</u>

3. "*<u>IT IS SUBMITTED THAT EVEN AFTER THE DECISION IN **M. HAKEEM** (SUPRA)UNDER **S. 34, A&C** ACT, **1996** THE COURT HAS THE POWER TO PARTIALLY SET ASIDE AN AWARD.</u>*

3.1. The Supreme Court in *M. Hakeem* **(supra)** was considering the power of a Court to modify/vary an award in proceedings under S. 34, A&C Act, 1996.

3.2. The fact situation in *M. Hakeem***(supra)**, pertained to cases where under S. 34, A&C Act, the Court had enhanced the compensation awarded by the authority to landowners under the NHAI Act.

3.3. In this context, the Court refers to the language of S. 34, A&C Act, 1996 to hold that the remedy prescribed therein is restricted only to the setting aside of awards.

3.4. The Court also refers to the *UNCITRAL Model Law on International Commercial Arbitration, 1985* and the authoritative textbook *Redfern and Hunter on International Arbitration* to support the interpretation that even under S. 34,

A&C Act, 1996 a reviewing Court would have no authority to modify or vary the terms of the Award.

3.5. It is important to note that the extract cited with approval from Redfern and Hunter, would show that under the UNCITRAL Model Law, **the reviewing Court has the power either all or part of an award null and void**.

> *"**10.06.** The purpose of challenging an award before a national court at the seat of arbitration **is to have that court declare all, or part, of the award null and void.** If an award is set aside or annulled by the relevant court, it will usually be treated as invalid, and accordingly unenforceable, not only by the courts of the seat of arbitration, but also by national courts elsewhere. This is because, under both the New York Convention and the Model Law, a competent court may refuse to grant recognition and enforcement of an award that has been set aside by a court of the seat of arbitration. It is important to note that, following complete annulment, the claimant can recommence proceedings because the award simply does not exist -that is, the status quo ante is restored. **The reviewing court cannot alter the terms of an award nor can it decide the dispute based on its own vision of the merits.** Unless the reviewing court has a power to remit the fault to the original tribunal, any new submission of the dispute to arbitration after annulment has to be undertaken by commencement of a new arbitration with a new Arbitral Tribunal."*

3.6. The Court thereafter makes it clear that the proceeding under S. 34, A&C Act, 1996 does not entail a review on the merits of the Award. Consequently, the possibility of awarding claims which were not awarded by the Tribunal, or varying the awarded claims does not arise.

3.7. The Court thereafter examines the views of various High Courts on this issue. Notably, a perusal of the relevant extracts would show that in each of these cases, the High Court was dealing with the issue of whether a claim which had been rejected by the Tribunal could be awarded or an awarded claim could be varied.

3.8. The Court also notes that the various judgments of the Supreme Court where modifications (such as a change in the rate of interest) were permitted, were orders passed under Article 142 of the Constitution.

3.9. In light of the above discussion, the Court once again citing the scope of a reviewing Court under the UNCITRAL Model Law as elucidated in Redfern and Hunter, **holds that there is no power under S. 34, A&C Act, 1996 to modify/vary the Award**.

3.10. In view of the above, it is submitted that the Supreme Court in *M. Hakeem***(supra)**, in fact **did not even consider whether a partial setting aside of an award as a modification/variation**.

.....

4. *THE PARTIAL SETTING ASIDE OF AN AWARD UNDER **S. 34, A&C ACT, 1996** WOULD BE GOVERNED BY THE PRINCIPLES OF SEVERABILITY.*

4.1. From the above, it is clear that the Court has the power under S. 34, A&C Act, 1996 to partially set aside an Award.

4.2. The guidelines for when a Court would be able to partially set aside an award has been laid down in decisions of the Supreme Court, this Hon'ble Court and other High Courts,

i. *J. C. Budhraja v. Chairman, Orissa Minig Co. Ltd. & Anr*., **(2008) 2 SCC 444,**

ii. *B. R. Arora v. Airports Authority of India*, **2019 SCC OnLine Del 7765**,

iii. *R.S. Jiwani v. Ircon International Ltd*., **2009 SCC OnLine Bom 2021**,

iv. *MMTC Ltd. (India) v. Alacari, SA (Switzerland)*, **2013 SCC OnLine Del 2932.**

4.3. It is therefore, humbly submitted, that where in the examination of an award under S. 34, A&C Act, 1996, the Court comes to a conclusion that the **offending part of the award may be severed without the same having any further effect on other findings, the Court may set aside only that offending portion.**

4.4. As an illustration, where in an arbitration, the Claimant has claimed compensation for loss of profit and overheads due to delay in completion caused by the Respondent. The Tribunal holds that the Respondent was responsible for the delay and awards compensation as prayed for.

Situation A:

i. The Court under S. 34, holds that the finding of the Tribunal on the attribution of delay is liable to be set aside.

ii. In such a situation, the finding on delay, which forms the substratum of the finding on compensation cannot be severed, and the entire Award would be set aside.

Situation B:

i. The Court does not interfere with the finding on delay, however, finds that the compensation for loss of profit was awarded without evidence.

ii. No infirmity is found with the finding on overheads.

iii. Here, the award for Loss of Profit, being severable from the award for Overheads can be severed and only that portion of the Award may be set aside.

.....

5.3. In view of the above enunciation of law, it is evident that a Court may at its discretion allow an application under S. 34(4), A&C Act, 1996 where the Tribunal may supply reasons in support of a finding already recorded. **However, where no finding exists, the power under S. 34(4) cannot be exercised.**

5.4. The scope of S. 34(4), A&C Act, 1996 has also been interpreted by a Ld. Single Judge of this Court to exclude the Tribunal **from taking any fresh evidence or re-appreciating the evidence already considered** [*Delhi Metro Rail Corporation Ltd. v. J. Kumar Crtg. JV*, **2022 SCC OnLine Del 1210**.

The Ld. Division Bench of this Court has also endorsed the position that **a party which seeks to set aside the award cannot simultaneously prefer and maintain an application under S. 34(4)** [*Canara Bank v. State Trading Corporation of India Ltd.*, **2022 SCC OnLine Del 3060**."

(d) Mr. Gaurav Pachnanda, Senior Advocate

"**Proposition 1: Under Section 34(2) of the A&C Act, the Court can set asidea part of an arbitral award, only and only if that part is severable from therest of the award.**

2. The Supreme Court of India has held in the case titled J.G. Engineers Private Limited v. Union of India, reported at (2011) 5 SCC 758 ("***J. G. Engineers' Case***"), that if an arbitral award deals with and decides several claims separately and distinctly, even if the Court finds that the arbitral award is bad with respect to some items, the Court will segregate the arbitral award from the items which do not suffer from any infirmity and uphold the arbitral award to that extent *[see paragraphs 24 and 25]*.

3. In the case titled R.S. Jiwani v. IRCON International Ltd., reported at 2010 (1) Mh. L.J. 547 ("***R. S. Jiwani's Case***"), the Full Bench of the Bombay High Court held that Section 34 of the A&C Act vests the Court with jurisdiction to apply the principle of severability to the arbitral award; and that the proviso to Section 34(2)(a)(iv) has to be applied *ejusdem generis* to Section 34 of the A&C Act as a whole *[see paragraphs 28, 30, 35, 36, 37 and 38]*.

4. The Division Bench of the Delhi High Court while noticing *R. S. Jiwani's Case* in the case titled Puri Construction P. Ltd. v. Larsen and Toubro Ltd., reported at2015 SCC OnLine Del 9126 ("***Puri Construction's Case***"), confirmed the arbitral award on the issue of liability but set aside certain (unsubstantiated) parts of an arbitral award with respect to quantum *[see paragraphs 114, 115, 118 and 119]*.

5. The Supreme Court of India did not discuss *J. G. Engineers' Case* in the case titled Project Director, National Highways, NHAI v. M. Hakeem, reported at(2021) 9 SCC 1 ("***Hakeem's Case***"), but the decision of the Division Bench of the Delhi High Court in *Puri Construction's Case* (which relied upon the Full Bench of the Bombay High Court in *R. S. Jiwani's Case*) was impliedly approved by the Supreme Court *[see paragraphs 30 and 31]*.

6. Therefore, it is respectfully submitted that the decision of the Supreme Court in *Hakeem's Case* does not appear to decide against partial setting aside of severable arbitral awards.

<u>Proposition 2</u>: However, there is a high threshold for holding that an arbitral award is severable.

7. Merely deciding the claims and counterclaims separately and distinctly may not by itself render the arbitral award severable in all cases. What would be required is an analysis of whether the good part(s) of the arbitral award, which is to be upheld, can be separately identified, without any correlation with or dependence on the invalid or bad part(s) of the arbitral award and that the setting aside of the bad part(s) would have no impact on the good part(s) of the arbitral award.

8. Therefore, in order to invoke the principle of severability, the Court must not only examine "textual severability" but also "substantial severability".

9. Where the bad part(s) of an arbitral award is intermingled, interconnected and/or interdependent upon the good part(s) of the arbitral award in a manner that it is practically not possible to sever the bad part(s) from the good, the principle of severability cannot apply.

10. *First*, this exercise of severing the good part(s) from the bad part(s) of an arbitral award can only be undertaken if it is *ex facie* possible to do so, with precision. It should not involve extensive dissection by the Court by delving not only into the bad part(s) but also the good part(s) of the arbitral award.

11. *Second*, whether it is possible to sever an arbitral award or not, will not only depend on the substance of the arbitral award but also on the form in which the arbitral award is made or fashioned.

12. For example, according to the decision of the Division Bench of the Delhi High Court in the case titled <u>Nussli Switzerland Ltd. v. Organising Committee Commonwealth Games</u>, reported at <u>2014 (145) DRJ 399</u>*[see paragraph 34]*, where the final awarded amount has been arrived at after netting off the claims and the counterclaims, it was held that the principle of severability of the arbitral award cannot be invoked at all. The Court held that: *"34. A party like the Organizing Committee which has its claims rejected, except a part, but which subsumes into the larger amount awarded in favour of the opposite party, even if succeeds in the objections to the award would at best have the award set aside for the reason the Arbitration and Conciliation Act, 1996 as distinct from the*

power of the Court under the Arbitration Act, 1940, does not empower the Court to modify an award… …".

The netting off of claims and counterclaims results in a composite award where as single awarded amount is enforceable by the successful party, based on the broad principle embodied in Order VIII Rule 6F of Civil Procedure Code, 1908. This would also have an impact on the amount of stamp duty payable on the arbitral award for the purpose of execution, as the stamp duty is payable on the composite amount and not on constituent amounts awarded for claims and counter claims before netting."

(e) <u>Mr. Ciccu Mukhopadhaya, Senior Advocate</u>

"**Issue (ii): Is partial setting aside of an arbitral award permissible under Section 34 of the Arbitration & Conciliation Act, 1996 (the "Act")? If so, in what circumstances?**

7. While submitting that the court does have the power to partially set aside an award in certain circumstances, reliance has been placed on the judgement of the Hon'ble Supreme Court in **J.G. Engineers Pvt. Ltd vs Union of India**, (2011) 5 SCC 758 (paragraph 25) by all counsels supporting this proposition.

8. Interestingly, paragraph 25 of the said judgment starts with the words "*It is now well settled ….*". However, there is no reference to any earlier decision of the Hon'ble Supreme Court in respect of the Act, in which the issue arose for consideration, and the Hon'ble Supreme Court held that in respect of discreet claims being awarded, a court could partially set aside one or more of the claims while enforcing an award in respect of other claims.

9. As such these submissions attempt to address this issue independent of the decision of the Hon'ble Supreme Court in *JG Engineers (supra).*

10. The first question that, in essence, arises therefore is whether, a partial setting aside of an award of findings which are severable from other findings would amount to a modification, variation or alteration of an award in terms of the law laid down by the Hon'ble Supreme Court in *Hakeem*.

11. If a partial setting aside would result in a modification, variation or alteration of an award, as meant in *Hakeem*, then the answer would be that a partial setting aside of an individual claim

would not be permissible save in circumstances where Section 34(2)(a)(iv) of the Act would apply.

12. If however a partial setting aside of one or more claims out of several in an award would not result in a modification, variation or alteration as referred to in *Hakeem*, then the question for the court to address would be, whether on a true interpretation of Section 34 of the Act, a partial setting aside of the award would be impermissible or prohibited, failing which the answer must be that a partial setting aside of an award would be permissible in law.

13. It is submitted that in the process of analysis, the starting point ought to be the object and reason for parties agreeing to arbitrate their disputes. One of the indisputable reasons, internationally accepted, is the expeditious redressal of commercial disputes. It is that objective which has largely led to the limited scope for setting aside and the minimal supervisory role of the courts.

14. It is submitted that the analysis must then consider what an arbitral award in essence is. Blacks' Law Dictionary defines an "arbitration award" as "*a final decision by an arbitrator or a panel of arbitrators*" (2019, 11th Edition, Page 130).

15. The Act only defines an arbitral award as including "the interim award" (Section 2(1)(c)).

16. Section 31 deals with form and contents of an award. Section 31 does not in fact address what the essence of an award isbut does provide for certain procedural formalities and substantively that save for the two exceptions in Section 31(3)(a) & (b), the award must state the reasons upon which it is based.

17. Further, Section 31(6) of the Act provides or empowers an arbitral tribunal to make "*an interim arbitral award on any matter with respect to which it may make a final arbitral award*".

18. The language of Section 31(3) of the Act provides that "the arbitral award" shall state the reasons upon which it is based. This must mean that the arbitral award is in essence what is traditionally known as the dispositive section of an award i.e. what the tribunal has finally awarded in terms of money, declarations, injunctive relief etc. i.e. matters which would be ultimately the subject matter of enforcement, if not voluntarily complied. The reasons are the basis on which the dispositive award is made.

19. The dispositive section of an award may be in various forms. Typically, in arbitrations where there are several claims under different heads of claims, made in an arbitration, a dispositive section would (or should) read as follows:

> "The Tribunal therefore finds that:
>
> (i) the Claimant is awarded a sum of …… towards Claim No.1 for ……;
>
> (ii) the Claimant is awarded a sum of …… towards Claim No.2 for ….."
>
> and so forth.

20. Where there are declarations coupled with award of money, the dispositive section may read, for example,:

> "(i) The Tribunal declares that the termination of the contract was invalid (or wrongful or illegal);
>
> (ii) The Claimant is awarded a sum of …. against Claim No.1towards loss of profit;"

and so forth.

21. The submission therefore is that, in effect, each such declaration or award of money is an independent arbitral award so long as they are independent and distinct from others and not predicated on another part of the award.

22. For example, if a tribunal grants a declaration that the termination of a contract was illegal and accordingly grants, for example, some amount towards loss of profit, if the court were to set aside the finding of illegal termination, necessarily, the award for loss of profit would be set aside as well. The two would not be severable.

23. As a procedural matter, there could be instances where different heads of claims are made as typically made in a construction contract. One or more heads may be connected to a finding of entitlement before quantification. If the challenge is to the finding of entitlement and that challenge is upheld, all consequential quantification of claims awarded under separate heads dependent upon that threshold finding must also be set aside.

24. However, where the finding of entitlement is not disturbed but with respect to one or more heads of claims arising from that finding of entitlement, a court finds that the amount awarded was without any evidence whatsoever, or that the amount awarded had failed to consider a significant amount, which otherwise should have been awarded, the court could set aside that part of the award alone.

25. If the award of each claim is in fact or in essence a separate award, then a partial setting aside would not amount to a modification, variation or alteration of an award as the court would not be increasing or decreasing the amount awarded under a particular claim but either upholding it or setting aside the amount awarded under a particular claim as a whole. The court would not be substituting its own view over that of the Tribunal. The party autonomy would be preserved.

27. Thus, an award dealing with a 'dispute not contemplated by, or not falling within the terms of the submissions to arbitration', as also an award which decides matters beyond the scope of submission to arbitration, is void for want of jurisdiction to that extent. In case the valid and void parts of the award are integrally connected with one another, and are incapable of being separated, the whole award will be liable to be set aside (See for instance **Grid Corpn. of Orissa Ltd. v Balasore Technical School,** (2000) 9 SCC 552).

28. The concept of severability therefore is inherent in Section 34 of the Act. Section 34(2)(a)(iv), it is submitted must be read as being clarificatory in nature, i.e. that merely because an award does include or deal with a dispute outside the tribunal's jurisdiction or scope of the submission, does not mean that a court should set aside the whole of the award but that it must then, so long as such a decision is severable from the rest, be set aside only to that extent.

34. So long as from the award, it is discernible that separate heads have been addressed and separate amounts found due against each head, even if, in the ultimate dispositive section, a tribunal were to make one dispositive award adding all of the amounts awarded, the setting aside of one or more heads of award and resultantly reduction in the ultimate amount awarded would not be a modification, variation or alteration of the award as per the meaning thereof in *Hakeem*.

Since a setting aside of award results in restarting of arbitration (and for which Section 43(4) of the Act protects limitation), a partial setting aside is conducive to the speedy resolution of disputes as the fresh arbitration, if at all resorted, would be limited in its scope. Indeed, there are likely to be instances where the partial setting aside may result in a party accepting the same rather than restarting arbitration which is more likely if the whole award is set aside merely because one or two heads out of many are set aside by the court. Thus, partial setting aside is conducive to speedy resolution."

(f) Mr. Gourab Banerji, Senior Advocate

"B. Is it open to the Court under Section 34 of the Arbitration and Conciliation Act, 1996 to modify an award?

1. Under Section 34 of the Arbitration Act, the court may either dismiss the objections filed, and uphold the award, or set aside the award if the grounds contained in sub-sections (2) and (2-A) are made out. There is no power to modify an arbitral award.

2. An interpretation that would read into Section 34 a power to modify, revise or vary the award would ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration.

3. Parliament intended that no power of modification of an award exist in Section 34 of the Arbitration Act, 1996.

4. The 'limited remedy" under Section 34 is coterminous with the "limited right", namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.

C. Is it open to the Court to partially set aside an award under Section 34? If so, on what basis is the test of severability to be applied?

1. 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 extend.

2. When the arbitrator's decision on multiple claims and counter-claims are *severable and not inter-dependent*, the court is empowered under section 34 to set-aside or uphold the arbitrator's decisions on *individual and severable* claims or counter-claims, without having to set-aside the entire arbitral award."

"E. What is the true scope and ambit of Section 34(4) of the Act?:

1. On receipt of an application under sub-section (1), in appropriate cases, on a request by a party, Court may adjourn the proceedings for a period determined by it in the order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of Arbitral Tribunal, will eliminate the grounds for setting aside the arbitral award.

2. The power vested under Section 34(4) of the Arbitration Act to cure defects can be utilized in cases where the arbitral award does not provide any reasoning of if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34 of the Arbitration Act.

3. The ground for setting aside the award must be capable of being eliminated and that the order discretionary in nature. Section 34(4) excludes reconsideration of the Award for the purpose of eliminating the grounds on which the Award can be challenged under Section 34(1), 34(2) and 34(2A).

4. Merely because an application is filed under Section 34(4) of the Act by a party, it is not obligatory on the part of the Court to remit the matter to Arbitral Tribunal.

5. The legislative intention 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.

6. The discretionary power conferred under Section 34(4) of the Act, is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award.

7. When an application is filed under Section 34(4) of the Act, the same is to be considered keeping in mind the grounds raised in the

application under Section 34(1) of the Act and the grounds raised in the application under Section 34(4)."

(g) Mr. Rohan J. Alva, Advocate

"**I. Court can partially set aside an arbitral award under Section 34 of the A&C Act**

3. It is submitted that under Section 34 of the A&C Act, the court is empowered to only set aside an arbitral award on the specific grounds mentioned therein. Neither Section 34 nor any other provision of the A&C Act confers on the court the power to modify/alter the terms of an arbitral award.

4. If the court finds that some parts of the award cannot be sustained under Section 34 of the A&C Act whereas other portions of the award can be upheld, then by applying the doctrine of severability the court adjudicating an application under Section 34 can uphold the award in part. In other words, Section 34 does not impose a bar on a court from partially upholding the arbitral award. **(Ref: Compilation of Case Law, Section I)**

5. In using the term 'set aside' in Section 34 without any qualifications or conditions, the court has the power to judge the arbitral award in respect of each of the claims that have been adjudicated upon by the arbitral tribunal to determine if the findings comply with the A&C Act and more particularly Section 34. If any claim that has been so adjudicated upon cannot be sustained under the A&C Act, the court has the power to set aside that particular claim in the arbitral award.

6. The doctrine of severability is a well-known principle in constitutional law as well as in commercial law including the law of contracts. For instance, in cases where a contract contains obligations which are illegal and legal, a court can apply the doctrine of severability and ensure the enforcement of those obligations which are legal.

7. However, it is respectfully submitted that in partially setting aside an arbitral award, a few key facts are important:

a. The claims that have been adjudicated in the arbitral award must be such that can be separated from each other.

b. If the said claims are so inextricably intertwined that they cannot be separated, then it is not plausible for a court to partially uphold/reject an arbitral award.

c. If the court chooses to apply the doctrine of severability, the court must ensure that upholding/rejecting an award partially does not render the arbitral award unworkable and unenforceable.

8. Advantage of courts applying the doctrine of severability to arbitral awards:

a. When a court is reviewing an arbitral award which, in part, cannot be legally sustained the doctrine of severability allows the court to partially set aside the arbitral award, instead of setting aside the entire award.

b. Seen another way, if a court is empowered to apply the doctrine of severability and partially set aside an arbitral award, it ensures that a court is not compelled to uphold the entire arbitral award, including those claims which are legally unsustainable.

c. By applying the doctrine of severability, a court is presented with an appropriate middle path to pursue a pro-arbitration approach but nonetheless ensure that parts of an arbitral award, which are not consistent with the applicable law are not converted into binding obligations inter se the parties.

II. <u>Partially setting aside an arbitral award is not tantamount to modification of an arbitral award. The judgment of the Supreme Court in *NHAI v. M. Hakeem*, (2021) 9 SCC 1 does not prohibit a court from partially setting aside an arbitral award.</u>

9. Typically, a court reviewing an arbitral award has the power to either modify the terms of the arbitral award or to set aside the award. The following extract from ***Redfern & Hunter on International Arbitration*** (5th edition, 2009) (**pg. 585-586**) clarifies that under the UNCITRAL Model Law, courts are empowered to partially set aside an arbitral award:

> "***The purpose of challenging an award before a national court at the seat, or place, or arbitration is to have***

> ***it modified in some way by the relevant court, or more usually to have that court declare that the award is to be disregarded (ie 'annulled or 'set aside') in whole or in part***. *If an award is set aside or annulled by the relevant court, it will usually be treated as invalid and accordingly unenforceable, not only by the courts of the seat of arbitration but also by national courts elsewhere. This is because, under both the New York Convention and the Model Law, the competent court may refuse to grant recognition and enforcement of an award that has been set aside by a court of the seat of arbitration.*"

10. Prior to the A&C Act, 1996, the Arbitration Act of 1940 was in force. Under the 1940 Act, Section 15 empowered the court to modify an arbitral award. By virtue of this provision, a court could interfere with the merits and findings of an award and alter them as the court deemed fit. This was indeed done by the Supreme Court in ***J.C. Budhiraja's*** case which was a case which arose under the 1940 Act.

11. The 1940 Act in Section 30 provided the "Grounds for setting aside award". Thus, under the 1940 Act, the court had the power to either modify/alter the award or to set aside the award itself (either partially or fully).

12. The A&C Act 1996 does not contain any provision which is *pari materia* to Section 15 of the 1940 Act. Section 34 is the provision which enumerates the grounds on which a court may set aside an award. It does not provide that a court is empowered to modify an award. The only power that the court has under Section 35 is to set aside an award. It is in this context that the judgement of the Supreme Court in ***M. Hakeem's*** (**Ref: Case Compilation, Section I, Sr. No.8**) case needs to be appreciated.

13. In ***M. Hakeem (supra***), the Supreme Court declared that in light of the previous decisions in ***McDermott International Inc v. Burn Standard Co. Ltd.***, **(2006) 11 SCC 181**, ***Kinnari Mullick v. Ghanshyam Das Damani***, **(2018) 11 SCC 328; *Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd.*, (2021) 7 SCC 657**, it was clear that since Section 34 of the A&C Act was modeled on Article 34 of the UNCITRAL Model Law, the principle of arbitration law that had to be applied was that judicial interference was only permissible when specifically provided for.

Thus, under the A&C Act, the court had only the power to either set aside the award or to remand it to the arbitral tribunal for further consideration.

14. Further, the Supreme Court further declared that the power to modify an award was specifically provided for in the 1940 Act. But such a power was not conferred on a court under the 1996 Act. The absence of such a provision was dispositive of the fact that the A&C Act did not authorize a court to modify the terms of an arbitral award.

15. As the Supreme Court declared in ***M. Hakeem (supra***), to modify an award is to vary the terms of the arbitral award itself. Such modification does not result in the award being set aside but results in the merits claim that has been adjudicated being varied or altered by the court. By contrast, setting aside an award indicates that the finding in respect of a particular claim has been declared to be legally unsustainable and hence is unenforceable.

16. When an award is partially set aside, that part of the award is rendered unenforceable. As the High Court of Delhi declared in ***Alcon*** (**Ref: Case Compilation, Section I, Sr. No.4**), the distinction between a court modifying an award and setting aside an award clearly shows that the judgment of the Supreme Court declared in ***M. Hakeem (supra)*** does not apply to the partial setting aside of awards, because that is not the equivalent of modifying an award.

17. It is submitted that Section 34 empowers to a court to partially set aside an arbitral award. If a court does so, it will not be tantamount to modifying an award. Partially setting aside an award under Section 34 will not fall foul of the principles enunciated in ***M. Hakeem (supra)***."

(h) <u>Mr. Rajshekhar Rao, Senior Advocate</u>

B. "<u>The scope for severing/partial setting aside of an arbitral award is limited but does not amount to modification, which is otherwise impermissible.</u>

(1) It is well-settled that the general scope of an inquiry u/s.34 is limited and is in keeping with the principle of minimising judicial intervention in arbitral awards.

(2) On the one hand, it is evident that the term 'arbitral award' refers to the binding decision made collectively on all the issues/claims, including the reasoning and conclusions/findings thereon. At the same time, the very definition of 'arbitral award' under s. 2(1)(c) includes an interim award. Hypothetically, therefore, if the arbitrator were to make individual interim awards on each claim before it, rather than putting them together in a final arbitral award, each of those interim awards could be challenged and set aside individually. It follows, therefore, that the decision of the arbitral tribunal on each claim/counter-claim is *independently* final and binding and the mere putting together of these individual decisions in the form of one final award cannot detract from their nature as such. This is reinforced by the previous jurisprudence recognizing the power of an arbitrator to render 'final partial awards' in relation to some of the claims and defer rendering an award on the others.

(3) Equally however, whether or not the finding and relief on each of these claims can stand on a separate footing is a question of fact, which must be decided on the substance of each case, and not on the *form* in which the claims may have been made. For instance, in a claim for (i) breach of contract; (ii) damages; and (iii) interest, it ought not to matter whether these have been made as three separate claims or one composite claim and it is the manner in which the arbitral tribunal deals with them, which would be material in deciding whether severability is possible.

C. Section 34(4) must be read restrictively and does not envisage fresh consideration of an issue that has already been decided by the arbitral award

(1) S.34(4) requires the Court to determine whether it is appropriate to resume arbitral proceedings for the purpose of eliminating grounds for setting aside. However, this cannot mean that the Court should intervene to allow the tribunal to undertake a fresh consideration of any issues that have already been decided, solely with a view to eliminating unsustainability in the award. Equally, there is no power for the Court to remit part of the award u/s.34(4) *after* having set aside any other part thereof. Such an interpretation would require the Court to pre-judge the sustainability of an award without adjudicating upon it, which is impermissible. It would result in an anomalous

situation where the Court would have to "*adjourn the proceedings ... to give the arbitral tribunal an opportunity to resume arbitral proceedings*", even after having discharged its mandate u/s.34 and there being no 'proceedings' to adjourn *per se*.

(2) This interpretation is also in line with the express provisions of Sections 32(3) and 35 of the Act as well, whereby a tribunal becomes '*functus officio*' after rendering an award and is only allowed to 'resume' proceedings for the limited purposes specified in s.32(3). This is distinguishable from the earlier position under the 1940 Act, where such provisions were absent and s.16 expressly permitted remission to the tribunal from "*time to time*", for the purpose of reconsideration.

(3) Consequently, the power under s.34(4), which is relatable to such action that will "*eliminate the grounds for setting aside the **arbitral award***" cannot be read to be in the nature of a 'partial remand' that permits fresh consideration of specific issues/claims. This is different from the position on the aspect of severability of claims in an award because the concept of severability is expressly envisaged under s.34, whereas remission (which was present under the erstwhile s.16) has been expressly *removed*.

(4) There is a well-recognised distinction between 'findings' and 'reasons' and s.34(4) cannot be used to fill up the absence of a 'finding' in the guise of providing additional reasons or eliminating grounds for setting aside. It can only be utilised to undo curable defects, which if left as it is, would result in setting aside of the award."

(I) <u>Mr. R. Arunadhri Iyer, Advocate</u>

"6.5. It is pertinent to point out that setting aside a part of the award is expressly contemplated under the proviso to Section 34(2)(a)(iv).

6.6. The law as judgment in *M Hakeem* was enunciated despite the provision in Section 34(2)(a)(iv). It is submitted that this demonstrates that setting aside a part of the award does not amount to modification of an award.

6.7. It is submitted that the term "set aside" used in Section 34(1) of the Act ought to be interpreted to include the power to set aside

the whole or a part of the award, not merely in terms of Section 34(2)(a)(iv), but even under other provisions of Section 34 of the Act.

6.8. It is submitted that Section 34 of the Act is substantially identical to Article 34 of the Model law. Thus, the Model law may be relied on to interpret the provision, as was held by the Supreme court in various judgements. Even the judgement in *M Hakeem* relied on the Model law to hold that the Court has no power to modify an award.

6.13. It is significant to note that the Act slightly differs in language under Section 34(2)(b)(ii) from that used in Article 34(2)(b)(ii) of the Model law.

6.14. Whereas the Model law provides that an award may be set aside if the award *or any decision contained therein* is in conflict with public policy, the Act provides that an award may be set aside if the award is in conflict with public policy.

6.15. It is submitted that the distinction between an award (as a whole), and a decision contained therein is already found in the proviso to Section 34(2)(a)(iv) (i.e., Article 34(2)(a)(iii)), where the concept of severability is discussed.

6.16. The reason for using this distinction in Article 34(2)(b)(ii) of the Model law is *ex facie* apparent – it is to clarify the fact that a decision that is contrary to public policy, if it can be severed from the rest of the award, ought to be so severed. However, it is pertinent to point out that the provisions of Article 34(2) are merely pertaining to the procedure for exercising the power found in Article 34(1) of the Model law. The fact that Article 34(2)(b)(ii) is explicit in clarifying that the power can be exercised to set aside the award as a whole or in part does not modify the nature of the power under Article 34(1).

6.17. It is submitted thus, that the fact that the words "or any decision contained therein" were omitted from Section 34(2)(b)(ii) does not change the nature of the power under Section 34(1) to set aside an award, since the said provision is identical to the provision under Article 34(1) of the Model law.

6.18. Thus, it is submitted that the power to set aside an award can be exercised to set aside the whole or a part of the award. This is

the scheme and intent of the law under the Model law, which is incorporated in Section 34 of the Act. Setting aside a part of the award, provided it is severable from the rest of the award, is thus permissible.

7. On when can a part of an award be regarded as severable from another:

7.1. It is submitted that Section 34 of the Act itself clarifies the circumstances in which a part of an award can be regarded as severable from another, similar to Article 34 of the Model law.

7.2. By drawing a distinction between the award, and decisions therein on matters submitted (Section 34(2)(a)(iv) and Article 34(2)(a)(iii)), the scheme of the Act is that parts of an award may be differentiated by virtue of "decisions" rendered therein.

7.3. The judgement of the Supreme Court in *I-Pay* is instructive in understanding the scope of a "decision". The said judgement discusses the distinction between a "finding" and "reasons", holding that a "finding" is a *decision on an issue*, whereas reasons are the link between material on which conclusions are based, and the conclusions themselves.

7.4. It is submitted that the term "decision on [a] matter" in Section 34(2)(a)(iv) of the Act is what the said judgement regards as a "finding", i.e., a decision on an issue.

7.5. An award can thus be regarded as being severable where there are sufficiently distinct "findings" or "decisions" on "matters submitted to arbitration" or "matters not submitted to arbitration". To restate the submission differently, the severability of parts of an award is based on the findings/decisions returned by the award on whatever has been referred (or not referred to the Tribunal).

7.6. The matters submitted to (or not submitted to) arbitration are necessarily derivable from the pleadings filed by the parties before the Tribunal, and the findings thereon are derivable from the decisions on such matters in the award.

7.7. So long as the findings/decisions on a matter is sufficiently distinct from another matter referred to the Tribunal, they will be severable from each other.

7.8. It is pertinent to point out that there is a distinction between a finding on a matter/issue, and the award on a claim/prayer raised. It is only the former on the basis of which an award can be severed, and not the latter.

……

8.23. It is submitted that the drafting history of the provisions and the views of the Working Group make it apparent that the power of remission is to be used to cure procedural defects in an award without setting aside the award. It cannot be exercised once the award is set aside. It also cannot be exercised to cure a defect that is substantial in nature, since that would require remission after the award is set aside. It cannot be exercised to enable re-institution or a re-trial. Further, the Court cannot issue instructions to the Tribunal when remitting the award.

8.24. As earlier set out, the Arbitral Tribunal can take action under Section 34(4) that will eliminate grounds raised under Sections 34(2)(a)(iii), 34(2)(a)(iv), the second part of Section 34(2)(a)(v) or Section or 34(2)(b)(ii) of the Act.

8.25. However, objections under Section 34(2)(a)(iii), Section 34(2)(a)(iv) and Section 34(2)(b)(ii) are not matters of procedure, but rather indicate substantive defects in the Award.

8.26. To enable a Tribunal to eliminate such grounds by exercising power under Section 34(4) would result in the rendering of an entirely different award from what was originally issued, inasmuch as it would result in findings assailed under Section 34(2)(a)(iii) being changed after hearing the party that was unable to present its case, or findings assailed under Section 34(2)(a)(iv) being deleted from the award, or findings assailed under Section 34(2)(b)(ii) being changed to comply with public policy.

8.27. As is apparent from the Model law, this was not the intent of the power of remission. This view is consistent with the law laid down in *I-Pay* as well, which holds that an award lacking findings cannot be remitted to the Tribunal under Section 34(4).”

(j) <u>Mr. Arjun Natarajan and Ms. Kamana Pradhan, Advocate</u>

“**HAKEEM IS NOT AN AUTHORITY ON SEVERABILITY:**

2. The legal position which flows from *Hakeem* is clear i.e., no power of modification of an award by the court exists in the 1996 Act.

Justice R.P. Sethi's *Supreme Court on Words & Phrases* (1950-2021) *(3rd Edition)* defines the word 'modify' at p. 929 as follows:

> "According to the *Oxford Dictionary*, the word 'modify' means, "to limit, restrain, to assuage to make less severe, rigorous or decisive to tone down". It also means "to make partial changes in: to alter without radical transformation".

3. However, *Hakeem* neither deals with severability of parts of an award nor with setting aside of a part of an award.

Justice R.P. Sethi's *Supreme Court on Words & Phrases* (1950-2021) (*3rd Edition*) defines the words 'set aside' at p. 1300 as follows:

> "The ordinary meaning of the words "set aside" is to revoke or quash the effect of which is to make the interim order inoperative or non-existent".

4. Neither Section 34(1) nor the marginal note of Section 34 is qualified by words like 'wholly' or for that purpose by words like 'partly'. Thus, it appears that an application for setting aside an award can either be for setting it aside wholly or be for setting it aside partly, which is reflective of the grundnorm of arbitration as being party autonomy.

> *4.1 SCENARIO 1 – A PARTIAL SETTING ASIDE APPLICATION*
>
> In an application for partially setting aside an award, the court ought to test the award on the anvil of Sections 34(2) and (2A) only to the extent that it has been challenged; to determine whether and to what extent such an application succeeds.
>
> *4.2 SCENARIO 2 – A TOTAL SETTING ASIDE APPLICATION*

In an application for totally setting aside an award, the court ought to test the award on the anvil of Sections 34(2) and (2A) in its entirety; to determine whether and to what extent such an application succeeds."

5. *Hakeem* neither mandates that every application for setting aside has to be for total setting aside or that it has to be for partial setting aside.

6. It also appears that references to Section 34(4) in *Hakeem* are in the context of the court having no power to modify an award and not in the context of severability of parts of an award/setting aside of a part of an award.

7. Thus, it appears that modification of an award is distinct from severability of parts of an award/setting aside of a part of an award. It also appears that modification is in the domain of substitution, whereas severability of parts of an award/setting aside of a part of an award is in the domain of expungement."

(k) Ms. Payal Chawla, Advocate

"**Does the power of setting aside include the power to modify?**

a) In ***Hakeem*** the Supreme Court has held that the power to set aside does not include the power to modify.

b) It is respectfully submitted that such an observation would be in the teeth of ***Ahmedabad St. Xavier's College Society v. State Of Gujarat,*** a Constitution Bench (seven judges) which held that a greater power includes a lesser power. This principle was previously cited by a five judge bench in ***Atma Ram v. State of Punjab***. Copies of these judgement are appended hereto as **Annexure 10 and 11**.

c) Importantly for this Hon'ble Court to hold that the courts do not have the power to modify, this Hon'ble Court will necessarily need to come to a finding that the power to set aside and to modify are two distinct powers and not subordinate to one another.

d) In ***Alcon Builders***, the Delhi High Court has held, that partial setting aside would not amount to modification. In ***Alcon Builders***, the Court while making a distinction between the

power to modify and the power to partially set aside, the Court held that the former requires a positive act.

e) At the same time, it is hard to reconcile the aforesaid with the decision in ***Ssyangyong Engineering & Construction Co. Ltd. v. NHAP*** where the Supreme Court on the one hand set aside the majority award and upheld the minority award, the latter being a positive act. A copy of this judgement is appended hereto as **Annexure 12**.

f) It may not be out of place to mention that a three-judge bench in the matter of ***ONGC v. Western Geco International Limited***, whilst dealing with the issue of modification of an arbitral award had stated-*"What is important in the context of the cast at band is that if on the facts proved before them the arbitrators failed to draw an inference which ought to have been drawn or they have drawn in inference which on the face of it, is untenable resulting in miscarriage of justice, the adjudication even if made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and maybe castaway or modified depending upon whether the offending part is or is not severable from the rest."* A copy of this judgement is appended hereto as **Annexure 13**.

While ***Western Geco*** is considered to be legislatively overruled, it is respectfully submitted that the same would be limited only in the context where the judgement expanded the scope of the court's power in "setting aside" of an arbitral award, particularly with regard to its observations on the Wednesbury principle of reasonableness."

(l) Mr. Amit Gupta, Advocate

"**(b) Partial Setting Aside of Award-specifically provided by legislature:**

i. Sec. 34 (2) (a) (iv): arbitral award deals with a dispute not contemplated by or not falling within terms of submission to arbitration;

ii. Sec. 34 (2) (a) (iv): arbitral award contains decisions on matters beyond scope of the submission to arbitration. (c) Partial Setting Aside of Award on a reasonable interpretation of the provisions and its applicability:

(c) Partial Setting Aside of Award- on a reasonable interpretation of the provisions and its applicability

i. Sec. 34 (2) (b) (i); subject matter of dispute is not capable of settlement by arbitration under law for time being force;

ii. Sec. 34 (2) (b) (ii): arbitral award is in conflict with the public policy of India, i.e., contravention with fundamental policy of Indian law [Explanation I (ii)]

iii. Sec. 34 (2) (b) (ii): arbitral award is in conflict with the public policy of India, i.e., in conflict with the most basic notions of morality or justice [Explanation 1 (iii)]

iv. Sec. 34 (2 A): arbitral award is vitiated by patent illegality on the face of the award.

1.4 Each distinct claim has to be considered separately. As a matter of practice, the parties, the arbitrators and the Courts consider the claim separately. Order XX Rule 5 also requires a Court go give a finding or decision, upon each separate issue, unless the finding upon any one or more of the issue is, sufficient for the decision in the Suit.

(a) J. G. Engineers vs. UOI, (2011) 5 SCC 758, Paras 24 and 25;

(b) *State Trading Corporation of India Ltd. v. Toepfer International Asia Pte Ltd.,* 2014 (144) DRJ 220 (DB) @ paragraphs 7 to 9.

1.5 The judgments of the Delhi High Court relied upon in *Project Director, National Highways Authority of India v. M. Hakeem,* (2021) 9 SCC 1, i.e., (a) *Cybernetics Network Pvt. Ltd. Bisquare Technologies Pot Lid.*, (2012) SCC Online Del 1155 (b) *Nussli Seitzerland Ltd. vs. Organizing Committee, Commonwealth Games, 2010*, (2014) SCC Online Del 4834 and (c) *Puri Construction (P) Lid. vs. Larsen & Toubro Lid*., (2015) SCC Online Del 9126 are limited to the issue of modification of an arbitral award and do not consider the issue of partial setting aside of an award. This would be clear from paras 28 to 30 of M. Hakeem, wherein the judgments have been discussed."

(m) Mr. Sanjit Shenoy, Advocate

"20) Conclusion : -(i) Firstly, while the Supreme Court has rightly observed that it is not possible to modify awards under section 34 of the 1996 Act, the Court has time and again upheld the modification of award under the garb of doing 'complete justice' in accordance with Article 142 of the Constitution. This indicates that the Court is of the opinion that modification is not contrary to the overall procedure but is not permitted under section 34 (2) or (4). Additionally, this clearly reflects an approach of the Court that does incorporate the idea of limited modification. In NHAI, the Supreme Court observed that the present judgment does not bar the exercise of its extraordinary powers under Article 142 of the Constitution in order to achieve complete justice between parties. It is apparent that while the primary objective of arbitration is 'minimum judicial interference', there are questions of practical considerations that co-exists.

(ii) Secondly, from the perspective of comparative analysis of provisions for setting aside and modifying the awards across jurisdictions, it is apparent that various countries have amended their statutes to incorporate modifying power. While adopting the Model Law, the Indian legislature must have also taken ideas from the statutes of other jurisdictions which empower their courts to modify an award. Countries like Australia, which share a similarly worded section for setting aside the award, formulated additional provision that specifically allows for modification, hence reflecting the importance of the same.

(iii) Thirdly, an order that remits the parties back for de novo proceedings before the arbitration tribunal might run contrary to the very foundation of preferring alternative dispute resolution over litigation and defeat the time bound alternate dispute resolution mechanism envisaged under the ACA. Therefore, to allow such a modification, either, the 1996 Act must be amended to incorporate this specific proviso as a new section to the ACA (albeit with limited powers) or a proviso should be added to the existing section 34 with limited modification power as to obviate circumvention of the statute. However, as the present position stands, there is no power vested with the courts under Section 34 to modify an award and as regards setting aside of an award, the same is postulated under S. 34 (2). Section 34 (4) on the other hand envisages only resuming the proceedings before the arbitrator but only upon an

application made by a party under sub section (1) of S. 34 and the court cannot suo motu remit the to the arbitrator for resumptions of the proceedings in the absence of a formal application by the party that has filed the original application under S. 34 (1). Moreover, the award cannot be concurrently set aside and then remitted back to the Arbitrator for resuming the proceedings since that would be contrary to the wordings of 34 (4):- "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 arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

(n) Mr. Zafar Khurshid & Mr. Amit Singh Chauhan, Advocates

"**COURT MAY PARTIALLY SET ASIDE AWARD WHERE AWARD IS SEVERABLE**

7. Various courts have held that the Court can partially set aside an arbitral award, and the same would not amount to modification of the award.

8. Applying the *'Doctrine of Severability',* the issues/claims decided in the arbitral award may be analysed independent of each other, and rather than setting aside the entire award and mandating the parties to start afresh, the court may set aside an award partially based on the facts and circumstances of the case.

9. In *NHAI v Addl. Comm. Nagpur* the Hon'ble Court has observed that *"when the Award deals with several claims that can be said to be separate and distinct, the Court can segregate the Award on items that do not suffer from any infirmity and uphold the Award to that extent. The Court cited and approved the earlier judgment of the Hon'ble Bombay High Court in R.S. Jiwani v Ircon Intl.*

"The judicial discretion vested in the court in terms of the provisions of section 34 of the Arbitration and Conciliation Act, 1996 takes within its ambit power to set aside an award partly or wholly depending on the facts and circumstances of the given case. In our view, the provisions of section 34 read as a whole and in particular section 34(2) do not admit of interpretation which will

divest the court of competent jurisdiction to apply the principle of severability to the award of the Arbitral Tribunal, legality of which is questioned before the court. The Legislature has vested wide discretion in the court to set aside an award wholly or partly, of course, within the strict limitations stated in the said provisions."

10. In *R.S. Jiwani* the Hon'ble Court observed that where the bad part of the award was intermingled and interdependent upon the good part of the award there it is practically not possible to sever the award as the illegality may affect the award as a whole. In such cases, it may not be possible to set aside the award partially. However, there appears to be no bar in law in applying the doctrine of severability to the awards which are severable.

11. Similarly in *Navayuga Engineering v UOI* the Court held that:

[I]f the court finds the award with regard to some claims to be bad, the court can segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. If such an interpretation is not given, it would result in gross injustice and absurd results because the court would have to set aside that portion of the award also which suffers from no infirmity. This certainly cannot be what was contemplated by the Legislature.

12. In *Ravindra Kumar Gupta v UOI* the Hon'ble Uttarakhand High Court has recently reiterated that a court cannot partly set aside an award in absence of manifest and patent error and without a finding as to its severability."

(o) <u>Dr. Shashwat Bajpai, Advocate</u>

"**<u>Purpose and object of S.34(4)</u>**

- Sub-Clause 4 of S. 34 has been a part of the Act since its inception in 1996. This sub-clause has been taken from the UNCITRAL Model Law u/s 34(4) with slight modifications.

- It is submitted that Sub-Clause (4) is a 'CURATIVE ALTERNATIVE' TO SETTING ASIDE the award itself; so that

the parties don't have to initiate fresh arbitration and go back to square one.

- **Some apprehensions have been raised that the outcome of S. 34(4) is *going back to square one or initiation of de novo/ fresh arbitration***–But, it is respectfully submitted that the **object of S. 34(4) is exactly opposite as it is merely a curative alternative to setting aside.** This is the language adopted by various rulings of the Hon'ble Supreme Court as well as the High Courts and also in some of the major decisions of the Singapore court.

- Singapore Courts Judgments in ***AKN andPermasteelisa Pacific Holdings Ltd*** interpreting similar clause observed ***–that the* Purpose is to preserve the award and not set it aside**(as judicially recorded by the Hon'ble Supreme Court in the Judgment of *I- Pay Clearing Services Pvt. Ltd. Vs. ICICI Bank Ltd.,* C.A.@S.LP.(C) No.24278 of 2019). (***Paar 27, Pg 172, CLC***)

- **SECTION 34 (4) IS NOT A REMAND JURISDICTION IT IS CURABLE JURISDICTION** and has been held in number of jurisdictions both in India and outside –**this is also in consonance with the language adopted in the Act.**

- **Cybernetics Network Pvt. Ltd. v. Bisquare Technologies Pvt. Ltd**., 2012 SCC OnLine Del 1155@ Para 51 also observes – *"to eliminate the grounds for setting aside the arbitral award". There is no specific power granted to the Court to itself allow the claims originally made before the Arbitral Tribunal where it finds the Arbitral Tribunal erred in rejecting such claims. If such a power is recognized as falling within the ambit of Section 34(4) of the Act, then the Court will be acting no different from an appellate court which would be contrary to the legislative intent behind Section 34 of the Act. Accordingly, this Court declines to itself decide the claims of CNPL that have been wrongly rejected by the learned Arbitrator.(**Para 51, Pg 86 CLC**)*

- Therefore, it is submitted that the point of view advanced by some of my brother counsels that S.34(4) has no application after S.34(1) or S.34(2), is respectfully incorrect.

NO RE-APPRECIATION OF EVIDENCE

- The bench had raised a pertinent issue –**Can parts of a claim be knocked off?**

- To answer this, I would like to place reliance on the case of **J. Kumar – CRTG JV vs. Delhi Metro Rail Corporation,** O.M.P. (COMM) 39/2020 & IA No.13874/2021, dated 25.04.2022**,** where this precise issue was raised within the claim itself under Section 34(4) (allowed the claim but considered only from grid 1-14 and not grid 14-17, without any reasoning)– though the Arbitral Tribunal awarded the claim but had wrongly quantified it.

- **Para 48 J Kumar judgment dated 25.04.2022,** the court held "*The scope of Section 34(4) of the A&C Act is limited. It does not extend to remanding the matter to Arbitral Tribunal for reviewing a finding returned after appreciation of evidence or for a decision afresh"*

- **Para 49 of J. Kumar Judgment dated 25.04.2022**, "In ***I-Pay Clearing Services (P) Ltd. v. ICICI Bank Ltd.,(2022) 3 SCC 121,*** *the Supreme Court has held that Section 34(4) of the Act can be resorted to record reasons for the finding already given in the award or to fill up the gaps in the reasoning of the award. But recourse to Section 34(4) of the A&C is not available to review findings, which are not based on evidence or where there are no findings on contentious issues.*

This directly sits well with the S.34(2) Explanation (ii) and S.34(2)(a) providing no re-appreciation of evidence or reviewing the merits of the dispute while adjudicating on public policy and patent illegality doctrines.

- In this case even there was a gap of reasoning, it is settled and is *no longer res-integra* that the court is not required to go in 'merits' and 're- appreciation the evidence', therefore consciously it didn't do so.

So even though u/s S.34(4) a curable defect was there, but its elimination would have required re-appreciation of evidence which is impermissible under S.34(2).This further advances the harmonious reading of the two section together – S.34(2) particulars have to be mandatorily followed while exercising power under S.34(4)."

(p) Mr. George Pothan Poothicote, Advocate

"D. UNCITRAL MODEL LAW AND THE NEW YORK CONVENTION

D.1 Cross border enforcement of arbitration awards is under the

New York Convention, which is one of the most successful UNCITRAL Conventions having 172 parties including India as on date.

D.2 It is important to note that the Model Law on Arbitration and the New York Convention are complementary and to be read together. Therefore, an arbitral award passed in a jurisdiction which is signatory to the New York Convention, is done so with the objective to enforce such an award under the New York Convention.

E. POWER OF COURTS IN MODIFYING ARBITRAL AWARDS AND ENFORCEMENT OF ARBITRAL AWARDS

E.1 The New York Convention, like the Indian Arbitration Act, provides grounds where an award "*may*" be refused on certain grounds, and the word used is not "*shall*".

E.2 The ground where the enforcement court may refuse enforcement in the Indian Arbitration Act, as mirrored from the New York Convention reads "*(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*"

E.3 Neither does the Model law nor the New York Convention contemplate modification or partial set aside of awards.

F. CONCLUSION

F.1 Enforcement of arbitral awards are contemplated under the New York Convention. Under this Convention it is the award that is the subject matter of enforcement or non-enforcement. Modifying or partial set aside of an award would result in a judgment of the Court which varies from the arbitral award – which is not a complete acceptance or set aside.

F.2 This would result in a conflict between the arbitral award and the judgment of the court. While arbitral awards are enforced cross-border under the New York Convention, judgments of the courts have a different mechanism of enforcement-like the enforcement of foreign judgments under Section 44 of the CPC.

F.3 Awards that are distinct, separate and unconnected albeit in

the same case, i.e., if awards on jurisdiction, merits and quantum are rendered as separate awards, each can be set aside independently and individually. However, neither does the Model Law nor the New York Convention contemplate a scenario where part of an award is set aside whilst the remaining is upheld.

F.4 Therefore the remedy contemplated under Section 34(4) of the Arbitration Act is an important matter of inquiry, and which requires investigation and discussion and application of mind by the Court to see if on the application of a party, an award can be sent back to the tribunal to cure the defects, rather than set it aside.

F.5 The important factor is that the court must be satisfied that it is appropriate to suspend the setting aside proceedings in order to give the tribunal an opportunity to take such steps as may be required to eliminate the grounds for setting aside. This is plainly a curative provision which enables the court, faced with the fact there has been some defect which could result in the award being set aside, to take a course that might forestall that consequence. Though this is discretionary, just from the use of the word "*may*" there are no limits to the power to remit that is conferred by the provision."

(Q) Mr. Bibin Kurian, Advocate

"**Comparison of Arbitration and Conciliation Act, 1996 (Arbitration Act 1996) and Arbitration and Conciliation Act, 1940 (Arbitration Act 1940)**

3. Under the Arbitration Act 1940, the Act provided for 4 options to the Court when an award is under challenge:

a. Section 15 – On the satisfaction of the specific grounds specified in the section, the Courts were allowed to modify the arbitral award;

b. Section 16 – On the satisfaction of the specific grounds specified in the section, the Courts were allowed to remit the arbitral award to the tribunal remit;

c. Section 17 – if court does not find any ground for remitting the award or for reconsideration or to set aside, then the Court

was supposed make the award part of its judgment and pass decree to that effect; and

d. Section 30 – On the satisfaction of the specific grounds specified in the section, the Courts were allowed to set aside the arbitral award.

4. However, the legislature realized that the Arbitration Act 1940 has become outdated and in order cater to the changing environment of the Arbitration, globally, amended the Arbitration Act in line with the United Nations Commission on International Trade Law (**UNCITRAL**) Model Law on International Commercial Arbitration (1985) and Arbitration and Conciliation Act 1996 was enacted.

5. One of the major changes intended through this amendment was to ensure that the Court's interference with the arbitral award is reduced. In fact, in the catena of cases, this Hon'ble Court and the Hon'ble Supreme Court of India has held that there should be minimum intervention by the Court with respect to any arbitral award. It is submitted that under Section 34(2) of Arbitration Act 1996 the Courts has power to set aside the award and in certain cases, where a party has sought, to allow the arbitral proceeding to resume to eliminate any grounds for setting aside the arbitral award (under Section 34(4). In addition, the arbitral tribunal could rectify any clerical errors under Section 33 of Arbitration Act even after passing of the arbitral award.

6. Thus, unlike Arbitration Act 1940, under Arbitration Act 1996, the Court's have limited role to either set aside or reject the application under Section 34 of the Arbitration Act or to remand the matter back to the Tribunal to rectify the errors which can be ground to set aside the award.

7. It is humbly submitted that without understanding the power and scope of Section 34(4), the Courts, in catena of cases, have decided on its power to set aside or modify the arbitral awards and dwelt on the merits and set aside or modified the award. Due to this very reason the Courts have tried to reduce the scope of its intervention whereas the correct approach would have been that in cases of evidence not considered, or any law being violated, etc., even those errors which are not going to the root of the matter or not, the Court should remit the matter to Arbitral Tribunal for rectifying the error. The Court should not decide whether the same

goes to the root of the matter or not and only consideration should be that the grounds pleaded are prima facie and need to be considered before passing an award. This would have resulted in no grounds of challenging such award surviving for the aggrieved party. This would ultimately lead to finality in the award rather than pushing the parties to challenge the award and the order under Section 34 of the Arbitration Act 1996 under Section 37 of the Arbitration Act 1996 then under SLP before the Supreme Court.

8. It is imperative that the Court should not get into evidence and modify the awards or to set aside the award partially when the same can be remitted to the Arbitrator for rectifying any ground for setting aside or modifying the award.

9. It is further submitted that Section 34(4) does not limit the scope of reference to the Arbitral Tribunal and all grounds of setting aside, if the same can be rectified by the Arbitral Tribunal, can be referred to them instead of Court getting into the merits of the case. And only when either the arbitral tribunal has failed to rectify such an error (after remission or under Section 33), or when the defects are such that the same cannot be eliminated by the Arbitral Tribunal only in such case the Court should set aside the award."

(r) Ms. Aarzoo Aneja, Advocate

I. "***PARTIAL SETTING ASIDE OF THE AWARD VIS-À-VIS APPLICABILITY OF M. HAKEEM JUDGMENT***

1. The answer to the said reference may be answered in the negative for the simple reason that the Hon'ble Court in *M. Hakeem* (supra) did not have the occasion to adjudicate on the vires of the partial setting aside of Arbitral Award. The substantial question of law raised in *M. Hakeem* was merely with regard to the permissibility of the modification of award in light of the powers of setting-aside the award under Section 34 of the A&C Act and not regarding the permissibility of partially setting aside the award amounting to modification thereof. In other words, it must be noticed at the very outset that the Hon'ble Supreme Court in that case was not concerned with the application of principle of severability of award. The Court was primarily concerned with the ambit and scope of section 34 in its entirety. The contention of severability neither came up for consideration, was not argued, and nor has been dealt with by the Supreme Court in the entire

judgment as the Court was not called upon to decide such an issue. Thus, the judgment of M. Hakeem (supra) cannot be considered as an authority/ decision on 'power of the court under S 34 of the Arbitration Act to partially set aside an award.'

2. The facts of the case in *M. Hakeem* clearly establishes the same that the challenge to the Impugned Award therein was with regard to a consolidated award which could not be severed or separated, hence the question of partially setting aside the award did not occur. The facts of the case were that notifications were issued under the provisions of the National Highways Act and Awards were passed thereunder. In the Arbitral Award made by the District Collector in all the cases, no infirmity was found in the aforesaid award, as a result of which, same amount of compensation was given to all the claimants. In Petitions filed before the District and Sessions Judge under Section 34 of the A&C Act, these amounts were enhanced and the award of the Collector was therefore modified by the District Court in exercise of jurisdiction under Section 34 A&C Act. In the appeal filed to the Division Bench, the aforesaid modification was upheld, with there being a remand order to fix compensation. Hence, the Appeal was filed before the Hon'ble Supreme Court challenging the said modification. It is therefore clear that the Award was in the nature of being inseparable and therefore, there was no room for discussion about the issue of partially setting aside of the Award.

3. The same is clearly discernible from the findings of the Hon'ble Court in *M. Hakeem* whereby the Court refused to interfere with the findings of the District Collector who modified the Award since it was impossible to segregate the same and reach a different conclusion. The said findings are extracted hereinbelow:

> "*60.. Given the fact that in several similar cases, the NHAI has allowed similarly situated persons to receive compensation at a much higher rate than awarded, and given the law laid down in Nagpur Improvement Trust (supra), we decline to exercise our jurisdiction under Article 136 in favour of the appellants on the facts of these cases. Also, given the fact that most of the awards in these cases were made 7-10 years ago, it would not, at this distance in time, be fair to send back these cases for a de novo start before the very arbitrator or some other arbitrator not consensually appointed, but appointed by the Central Government. The*

appeals are, therefore, dismissed on facts with no order as to costs."

4. It is noteworthy to mention the Judgment of the Hon'ble Supreme Court in *J.G. Engineers Private Limited* v. *Union of India and Anr*., 2011 SCC OnLine SC 704has categorically held that the Courts under Section 34 has the power to **partly set aside** the Award with respect to certain claims which are separate and distinguishable, and the Court can segregate the items, that does not suffer from infirmity and uphold the award to that extent.

5. The Court in *M. Hakeem*, purposely did not discuss or distinguish the Judgment in *J.G. Engineers* (supra) since it was not concerned with the issue of partial setting aside of the Award. The issue of partly setting aside of the award.

6. This position has also been upheld by the following judgments:

i. Navayuga Engineering Company Ltd. Vs. Union of India, ARB. A No. 38 of 2020. (Division Bench, Kerala High Court)

ii. National Highway Authority of India and Anr. Vs. the Additional Commissioner and Ors., Arbitration Appeal No. 3 of 2022. (Division Bench, Bombay High Court, Nagpur Bench)

iii. Union of India and Anr. Vs. Alcon Builders and Engineer Private Limited, OMP 146 of 2008. (Single Bench, Delhi High Court)

7. It would not be out of place to mention that in any event, the Court in *M. Hakeem* (supra) could not have reversed the findings made by its Coordinate Bench in *J.G. Engineers* (supra) since it is impermissible in law for a coordinate bench to pronounce a judgment contrary to declaration of law made by a previous coordinate bench. The subsequent Coordinate Bench (in M Hakeem) could have only referred the issue to a larger bench, which was not done.

8. Thus, the law declared in J.G. Engineers continues to be the law of the land and is a binding precedent.

II. <u>DOCTRINE OF SEGREGATION VIS-À-VIS APPLICATION ON A&C ACT AND ITS EXTENT THEREOF</u>

12. The answer to the said reference may be answered in the affirmative in light of the findings made by the Hon'ble Supreme Court in *J.G. Industries* (supra) and Division Bench Judgment of the Bombay High Court in *R.S. Jiwani* v. *Ircon International Ltd., Mumbai*, 2009 SCC OnLine Bom 2021.

13. It is submitted that merely because the words "modify" or "vary" is not indicated in Section 34 of the A&C Act, it will not take away the jurisdiction of the Court to interfere with the Award of an Arbitrator partially. If such a power is not vested with the Court, it will only lead to multiplicity of proceedings, which destroys the entire substratum and purpose of the introduction of the A&C Act. A reasonable interpretation of Section 34 read with Section 31(6) of the A&C Act leads to an irresistible conclusion that the Courts may partially set aside the Award under any of the grounds mentioned in Section 34 itself and remit the limited matter of claims back to the Arbitral Tribunal for afresh consideration without disturbing the findings made in certain claims by the Arbitrator which are upheld by the Courts under Section 34.

Such a purposive interpretation would meet the ends of the objective of the Act, i.e., speedy disposal of cases, minimum cost-bearing by the parties and party autonomy."

(s) **Mr. Varun K. Chopra, Advocate**

"2. Power of court to partially set-aside an arbitral award:

m. It is submitted that an award can be partially set aside under section 34(2)(a)(iv), whereby the statute allows the Courts to partially set aside an arbitral award by applying the doctrine of severability. Further, it is submitted that if a part of an award is against the 'fundamental policy of Indian law' as provided under Section 34(2)(b)(ii) *explanation 1*(ii), and the claims of the award are separate and distinct, then applying the doctrine of severability the Court may partially set aside the part of the award against 'fundamental policy of Indian law' as the proviso to section 34(2)(a)(iv) has to be read *ejusdem generis* to the main section."

n. It is submitted that it would not be out of place to mention that several high courts including Hon'ble Delhi High Court, Hon'ble Bombay High Court, and Hon'ble Kerala High Court have considered the question whether a court can partially set

> aside an arbitral award while exercising powers under ACA 1996, and there is a common view that has been adopted by the High Courts pan India as mentioned hereinabove in the previous para.
>
> o. Further, it is submitted that in a recently, in 2023, this Hon'ble High Court in ***Union of India v. Alcon Builders & Engineer (P) Ltd.,*** 2023 SCC OnLine Del 160 has held where the claims in an award are distinct and severable then the Court is empowered to partially set aside individual or several such claims, and that this partial setting aside would not amount to modification of the arbitral award.
>
> p. Therefore, it is submitted that there is an absolute duty on the court under section 34(2)(a)(iv), and matter falling within that category, to apply the doctrine of severability to separate and partially set aside matters not referred to arbitration and decision thereupon by the arbitral tribunal from those that have been referred to arbitration."

8. In order to holistically evaluate the questions that stand posited, it would be profitable to briefly step back and recall the seminal developments and deliberations which preceded the adoption of the **United Nations Commission on International Trade Laws**[5] and the Model Law which came to be drawn pursuant thereto. Undoubtedly, the Act that India framed owes its genesis to the Model Law, which acted as the basis for our nation revamping the law of arbitration. However, since we are essentially concerned with Section 34 and the interpretation of its various clauses, we propose to focus our attention on the discussions which preceded and centered around its formation and ultimate adoption. As would be evident from a reading of the **Report of the Working Group on International Contract Practices**

[5]UNCITRAL

(Fourth Session) [Vienna, 4-15 October 1982][6], the core issue which formed the subject matter of consideration was the modes or type of action which may be adopted for challenging an award. Dealing with the aforesaid question, the Working Group observed as follows: -

> "13. The Working Group decided to commence its work by considering the four questions prepared by the Secretariat which had not been discussed at the third session of the Working Group.
>
> Means of recourse
>
> Setting aside or annulment of award (and similar procedures)
>
> > Question 6-6: Should the model law provide for only one type of action of "attacking" an award, e.g. setting aside (leaving aside here recourse against exequatur, but see question 6-8)
>
> 14. There was general agreement that the model law should streamline the various types of recourse against an arbitral award and should provide for only one type of action of "attacking" an award. However, it was observed that the acceptability of this approach may depend on the decision as to which arbitral awards were international, and therefore subject to this law, and that the position on this question may not be final.
>
> > Question 6-7: If so, on what grounds should such an action be successful? For example, would it be acceptable to restrict the grounds to those listed in article V, paras. (1)(a-d) and(2)(b) of the 1958 New York Convention, with a possible restriction of the "public policy" ground to "international public policy"?
>
> 15. There was general agreement that a restrictive approach in listing the grounds for the setting aside of awards should be adopted. Some doubt was expressed as to whether the reasons for setting aside needed to be restricted to those which are mentioned in the 1958 New York Convention. However, the prevailing view

[6] Fourth Working Group Report

was that the grounds for setting aside should be restricted to those listed in article V, paras. (1)(a-d) and (2)(b) of that Convention.

16. Under one view the "public policy" ground for refusal of recognition or enforcement (article V, paragraph (2)(b)) should be further restricted and qualified as "international public policy". In this connection it was noted that the case law and doctrine of many countries showed a clearly detectable trend to apply a different standard of public policy in cases of international commercial arbitration from that applied in cases of domestic arbitration.

17. Under another view the introduction of a concept of "international public order" was unnecessary and could give rise to difficulties in interpretation. It was noted that there might be a conflict between the grounds for setting aside of an award for violation of "international public policy" under the model law and the grounds for refusing execution of a foreign award for violation of "public policy" under the 1958 New York Convention.

18. The Working Group requested the Secretariat to prepare draft provisions for the attacking of an award reflecting two alternative approaches. One alternative should use the concept of "international public policy" while the other should retain the traditional concept of public policy, leaving it to the courts to interpret this concept adequately.

19. In this connection the Working Group recalled its position in respect of questions 6-3, 6-4 and 6-5 as expressed in paragraph 109 of the Report on the work of its third session (A/CN.9/216) in which it said that the model law should not set forth rules on remedies against decisions granting or refusing enforcement of awards. In view of the discussion at this session which favoured the listing of grounds for attacking awards the Working Group decided to reconsider at a later stage its position adopted at its third session in respect of questions 6-3, 6-4 and 6-5.

> Question 6-8: Assuming that an action to set aside may be brought only on the same grounds as an appeal against the order of enforcement of the same award, should the recourse system be streamlined, e.g. by allowing only the action to set aside and regard it as implying an appeal against the exequatur, or by

> requiring in enforcement proceedings that the party against whom enforcement is sought would be given an opportunity to raise objections and, if he does so, to transfer the case to setting aside proceedings?
>
> 20. The Working Group expressed different views regarding the extent to which different means of recourse against arbitral awards could be streamlined. Under one view a maximum streamlining in respect of procedure and grounds for attacking awards was desirable. Under another view only the substantive grounds could be unified but not the various procedural aspects of the different means of recourse. The task would be complicated by the fact that in some countries there is no special exequatur procedure and an award is enforceable once it is issued.
>
> 21. The Working Group decided that the model law should not have detailed procedural rules on exequatur and setting aside but should place emphasis on the grounds for attacking awards. The Working Group requested the Secretariat to prepare draft provisions along these lines.
>
> Question 6-9: Which rules of procedure concerning an action to set aside the award should the model law lay down, including any time-limits for bringing such action?"

9. The Working Group clearly appears to have suggested that the Model Law should rather than attempting to formulate detailed procedural rules with respect to setting aside, concentrate on formulating the grounds for "attacking" the award. The Working Group, accordingly, and as would be evident from the **Note by the Secretariat: Model Law on International Commercial Arbitration** proceeded to frame Draft Articles 40 and 41 as follows: -

"RECOURSE AGAINST ARBITRAL AWARD

Article 40

No recourse against an arbitral award made under this Law [,whether or not rendered in the territory of this State,][22]may be made to a court except an action for setting aside in accordance with the provisions of article 41.

Article 41

(1) An action for setting aside [an arbitral award referred to in article 40][23] may be brought [before the Court specified in article V][24] within four months from the date on which the party bringing that action has received the award in accordance with article XXII (4) .[25]

(2) An arbitral award may be set aside only on one of the grounds on which recognition or enforcement may be refused under article 37, paragraph (1) (a), (b), (c), (d)[26] or (2)[27] [or on which an arbitrator may be challenged under article IX (2)].[28]

(3) The court may, where appropriate,[29][[29]The main cast envisaged here (and possibly to be expressed in the provision itself) is where the ground for setting aside affected only a part of the decision]set aside only a part of the award, provided that this part can be separated from the other parts of the award.

(4) If the court sets aside the award, [it may order that the arbitration proceedings continue for re-trial of the case] [a party may within three months request reinstitution of the arbitration proceedings], unless such measure is incompatible with a ground on which the award is set aside.[30]

(5) Any decision by the court on an action for setting aside is subject to appeal within three months.[31]"

10. It becomes pertinent to note that draft Article 41 in terms of Clause (3) thereof envisaged an award being set aside in part. This specific recognition of a power to set aside in part finds explicit mention in subsequent drafts also, till it appears to have been done away with in the Model Law as would become apparent from the discussion that follows. However, the Court refrains from observing

anything further at this stage and reserves its comments on this aspect for the latter parts of this decision.

11. In the Notes drawn by the Secretariat dated 25 January 1983 [A/CN.9/WG.11/WP.42] draft Articles 37 to 41 were suggested to read as under:-

> "RECOGNITION AND ENFORCEMENT OF AWARD
> *(continued)*
>
> Article 37
>
> (1) Recognition and enforcement of an arbitral award made in the territory of this State may be refused, at the request of the party against whom it is invoked, only if that party furnishes proof that:
>
> (a) A party to the arbitration agreement referred to in article II was, under the law applicable to him, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator(s) or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award [deals with] [decides on] a dispute or matter [not submitted to arbitration] [outside the scope of the arbitration agreement or not referred to the arbitral tribunal]; however, if any decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (d) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the mandatory provisions of this Law, or the agreement

by the parties, unless in conflict with any mandatory provision of this Law, or, failing such agreement, the non-mandatory provisions of this Law [, provided that, if the parties have agreed on the application of the law of another State, the provisions of that law are relevant]; or

(e) The award [has not yet become binding on the parties] [is still open to appeal before a higher instance arbitral tribunal] or has been set aside [or suspended] by a court of this State [or, if the award was made under the law of another country, by a competent authority of that country].

Article 38

(1) Subject to any multilateral or bilateral agreement entered into by this State, recognition and enforcement of an arbitral award made outside the territory of this State may be refused, at the request of the party against whom it is invoked, only if that party furnishes proof that:

(a) A party to the arbitration agreement referred to in article II was, under the law applicable to him, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator(s) or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award [deals with] [decides on] a dispute or matter [not submitted to arbitration] [outside the scope of the arbitration agreement to not referred to the arbitral tribunal]; however, if any decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place [, provided that, if the parties have agreed on the application of the law of another State, the provisions of that law are relevant]; or

(e) The award [has not yet become binding on the parties] [is still open to appeal or other ordinary recourse] or has been set aside [for one of the reasons set forth in sub-paragraphs (a) to (d) or in paragraph (2) of this article], or suspended, by a competent authority of the country in which [, or under the law of which,] that award was made.

(2) Recognition and enforcement may also be refused if the court [from which recognition and enforcement is sought] finds that:

(a) The subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(b) The recognition or enforcement of the award would be contrary to the [international] public policy of this State.

Article 39

If an application for the setting aside or suspension of an award has been made to a competent authority referred to in article 37, paragraph (1) (*e*) or 38, paragraph (1) (*e*), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

RECOURSE AGAINST ARBITRAL AWARD

Article 40

No recourse against an arbitral award made under this Law [,whether or not rendered in the territory of this State,] may be made to a court except an action for setting aside in accordance with the provisions of article 41.

Article 41

(1) An action for setting aside [an arbitral award referred to in article 40] may be brought [before the Court specified in article V] within four months from the date on which the party bringing that action has received the award in accordance with article XXII (4) .

(2) An arbitral award may be set aside only on one of the grounds on which recognition or enforcement may be refused under article 37, paragraph (1) (a), (b), (c), (d) or (2) [or on which an arbitrator may be challenged under article IX (2)].

(3) The court may, where appropriate,[29][29]The main cast envisaged here (and possibly to be expressed in the provision itself) is where the ground for setting aside affected only a part of the decision]set aside only a part of the award, provided that this part can be separated from the other parts of the award.

(4) If the court sets aside the award, [it may order that the arbitration proceedings continue for re-trial of the case] [a party may within three months request reinstitution of the arbitration proceedings], unless such measure is incompatible with a ground on which the award is set aside.

(5) Any decision by the court on an action for setting aside is subject to appeal within three months."

12. Of significance is Footnote 29, where while dealing with the power proposed to be conferred on a court to set aside an award in part and the usage of the word "*appropriate*" therein, it was observed that the said expression is in aid of the provision itself being recognised as envisaging a situation where the ground for setting aside affects only a part of the decision. Footnote 29 reads thus:-

> "The main cast envisaged here (and possibly to be expressed in the provision itself) is where the ground for setting aside affected only a part of the decision."

13. Over the course of deliberation and more particularly in the Fifth Session of the Working Group, Articles 40 and 41 again came up for consideration when the following discussions ensued:-

> "Recourse against arbitral award
>
> Article 40
>
> 178. The text of article 40 as considered by the Working Group was as follows:
>
> Article 40
>
> > No recourse against an arbitral award made under this Law [whether or not rendered in the territory of this State,) may be made to a court except an action for setting aside in accordance with the provisions of article 41.
>
> 179. The Working Group expressed its support for the policy underlying that article. It was noted, however, that that rule of exclusion could be finally assessed only after having considered article 41. It was also noted that the reference to "an action for setting aside" was too restrictive if article 41 would include other remedies such as remission to the arbitral tribunal, as envisaged in its paragraph (4), or correction or interpretation of an award by the court. In such case it would be more appropriate to delete the words "an action for setting aside" and merely retain the general reference "in accordance with the provisions of article 41"
>
> 180. The Working Group was divided on whether the words placed between square brackets should be retained. Under one view, that text provided a useful clarification (as suggested in footnote 24 of WP.42). Under another view, that text should not be retained for either of the following reasons: (a) the words "made under this Law" were sufficiently clear so as to make any clarification superfluous, (b) the text between square brackets created uncertainty, by allowing the possible misinterpretation that article

40 adopted in State A would also apply to an award made in State B under the model law adopted there and, even if correctly interpreted, touched upon the difficult issue of court competence (for setting aside awards made abroad but under the model law of State A), which was a matter probably outside the scope of the model law.

Article 41

181. The text of article 41 as considered by the Working Group was as follows:

Article 41

> (1) An action for setting aside (an arbitral award referred to in article 40] may be brought (before the Court specified in article V] within four months from the date on which the party bringing that action has received the award in accordance with article XXII (4).
>
> (2) An arbitral award may be set aside only on one of the grounds on which recognition or enforcement may be refused under article 37, paragraph (1) (a), (b), (c), (d) or (2) (or on which an arbitrator may be challenged under article IX (2)].
>
> (3) The 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.
>
> (4) If the court sets aside the award, [it may order that the arbitration proceedings continue for re-trial of the case] (a party may within three months request re-institution of the arbitration proceedings), unless such measure is incompatible with a ground on which the award is set aside.
>
> (5) Any decision by the court on an action for setting aside is subject to appeal within three months.

Structure and order of provisions

182. It was suggested to place that article (and art. 40) before the articles on recognition and enforcement of awards and, then, to specify in paragraph (2) the reasons for setting aside instead of referring to article 37. A further suggestion was to reverse the order of paragraphs (1) and (2). Yet another suggestion was to combine the provisions on setting aside with the articles on recognition and enforcement of domestic awards and, thereby, to streamline the

system established in the model law. The Working Group was agreed that those suggestions could be considered at a later stage.

Paragraph (1)

183. As regards the words between the first square brackets, the Working Group was agreed that they could either be deleted, in view of the close proximity of that provision with article 40, or replaced by the same words as used in article 40 specifying which awards were covered. As regards the words between the second square brackets, the Working Group agreed with their contents but felt that a reference to article 41 in article V was sufficient.

184. As regards the time period stated in paragraph (1), various suggestions were made for shortening or for extending that period. After deliberation, a time-period of three months was accepted. It was noted that the provision might be expanded so as to accommodate cases of appeal to another arbitral tribunal (as suggested in footnote 27 of WP.42).

185. The Working Group decided to retain paragraph (1), subject to the above modifications.

Paragraph (2)

186. Divergent views were expressed as to the grounds for setting aside an award. Under one view, the list of reasons set forth in paragraph (2) was too restrictive since it did not cover some important grounds recognized in some legal systems, sometimes even forming part of the public policy of a State. It was suggested, therefore, to add to the list some more grounds as, e.g., mentioned in footnote 29 of WP.42 (in particular, under (c) and (d)). An alternative suggestion was to replace the list by a general formula such as "in cases of procedural injustice" and to rely on the common sense of the judge.

187. The prevailing view, however, was to limit the reasons for setting aside to those grounds on which under article 38 recognition and enforcement may be refused. That solution would facilitate international commercial arbitration by enhancing predictability and expeditiousness and would go a long way towards establishing a harmonized system of limited recourse against awards and their enforcement. It was stated in support that the reasons set forth in article V of the New York Convention provided sufficient safeguards, and that some of the grounds

suggested as additions to the list were likely to fall under the public policy reason.

188. As regards the reason set forth in subparagraph (d) of article V (1), there was vide support for providing for a certain qualification (as suggested in footnote 28 of WP.42), by adopting a general rule of "estoppel" or implied waiver and, possibly, by excluding minor defects which had no influence on the award. Subject to such possible addition, which would also apply to articles 37 and 38, the Working Group adopted paragraph (2).

Paragraph (3)

189. The Working Group adopted that paragraph.

Paragraph (4)

190. Divergent views were expressed as to the appropriateness of retaining a rule along the lines of paragraph (4). Under one view, the provision should be deleted since it dealt in an insufficient manner with procedural questions which were answered in a way not easily reconciled with the different concepts of the various legal systems. It was also pointed out that setting aside should be regarded as a remedy separate from remission to the arbitral tribunal and that the wording between the second square brackets and the following proviso lacked clarity.

191. However, there was more support for retaining a provision along the lines of paragraph (4), subject to various modifications. The main reasons for retention were that the provision made it clear that the arbitration agreement had not necessarily lapsed and that it opened the way for remission to an arbitral tribunal. While some support was expressed for leaving the decision on retrial of the case solely to the court and its discretion, the prevailing view was to leave that matter to the parties, possibly subject to some control or authorization by the court.

192. Various suggestions were made for clarifying, in a revised draft, in particular, the following issues: (a) to whom would a party have to address its request for "re-institution", (b) “re-institution” should not necessarily mean that the proceedings would be conducted by the previous arbitrators; (c) remission or retrial might relate to the whole award or only to part of it, including the instruction to correct a certain procedural defect, (d) the proviso at the end of the paragraph should be more detailed and, for example, should mention the reasons of non-existence of a valid arbitration

agreement and non-feasibility of remission to the previous arbitral tribunal.

193. The Working Group, after deliberation, requested the Secretariat to prepare a revised draft on the basis of the views expressed during the discussion."

14. It becomes relevant to note that the power to set aside the award in part and which stood comprised in draft Article 41(3) was duly adopted. In the Sixth Session, draft Articles 40 and 41 came to be renumbered as Articles 29 and 30. It would be pertinent to notice the relevant parts of the report of the said session and which are reproduced hereinbelow:-

"Article XXIX

No recourse against an arbitral award made under this Law may be made to a court except as provided in article XXX.

147. The Working Group noted that article XXIX was closely linked with article XXX in that it expressed the exclusive nature of the recourse available under article XXX. It was, therefore, suggested to incorporate the provision of article XXIX into article XXX.

148. The Working Group noted that both articles applied to arbitral awards "made under this Law" and that this scope of application was different from the one used in articles XXV and XXVII where the territorial approach had been adopted ("awards made in the territory of this State"). It was thought that this disparity could lead to conflicts and undesirable results.

149. The Working Group was agreed to reconsider the matter at its next session in the light of a general study by the Secretariat on the scope of application of the various provisions of the model law, including the question of the choice of a procedural law of a country other than the place of arbitration and some suggestions as to possible rules on conflict of laws.

Article XXX

150. The text of article XXX as considered by the Working Group was as follows:

Article XXX

(1) An award made under this Law may be set aside, whether in whole or in part, only on grounds on which recognition and enforcement may be refused under article XXVII (1) (a), (b), (c), (d) or (2) /or on which an arbitrator may be challenged under article IX (2)/.

(2) An application action for setting aside may not be made brought after four months have elapsed from the date on which the party making that application bringing that action had received the award in accordance with article XXII (4). However, where the arbitration agreement provides for appeal to another arbitral tribunal, this period commences on the date of the receipt of the decision of that arbitral tribunal.

(3) The Court, when asked to set aside an award, may also order, where appropriate and if so requested by a party, that the arbitral proceedings be continued. Depending upon the reason for setting aside procedural defect found by the Court, this order may specify the matters to be considered by the arbitral tribunal and may contain other instructions concerning the composition of the arbitral tribunal or the conduct of the proceedings.

Paragraph (1)

151. A suggestion was made to widen the supervisory power of the court under article XXX by adding to the list of grounds "manifest injustice". However, this suggestion was not adopted since it was considered as too vague and too broad and since most cases of such injustice would fall under the grounds listed in paragraphs (1) (b) and (2) of article XXVII referred to in article XXX.

152. The Working Group adopted the grounds as listed in paragraph (1) of article XXX which corresponded to the reasons for refusal of recognition and enforcement under the 1958 New York Convention. It was noted that the ground placed between square brackets was not needed if the Working Group would adopt the second alternative in article X (3).

Paragraph (2)

153. The Working Group was agreed that the time-period within which an application for setting aside may be made should be three months. The Working Group was also agreed that the wording between square brackets at the end of the first sentence was not needed and that the second sentence could be deleted, too.

Paragraph (3)

154. Divergent views were expressed as to whether paragraph (3) should be retained. Under one view, the draft provision was useful in that it provided some guidance on procedural questions which were relevant in the case of remission. Under another view, the provision should be deleted since remission was not known in all legal systems and, in particular, the idea of orders or instructions to an arbitral tribunal was not acceptable. Under yet another view, the option of remission should be retained, without the giving of orders or instructions as envisaged in the second sentence; it was stated in support that this device would allow to cure a procedural defect without having to vacate the award.

155. The Working Group, after deliberation, adopted this latter view and requested the Secretariat to revise the provision accordingly.

Relationship between article XXVII and XXX

156. The Working Group recalled the concern expressed in the context of article XXVII that this article, even if consolidated with article XXVIII, would for domestic awards establish a procedure which would duplicate the examination of the very reasons set forth in article XXX for the setting aside of awards made under the law of this State. While some support was expressed for maintaining this double procedure in view of the different purposes of article XXVII and article XXX, the prevailing view was that it should be avoided, not only for the sake of economy and efficiency but also in order to prevent conflicting decisions.

157. In this respect, a suggestion was made to delete the provisions of article XXVII, with the result that the only control of domestic awards (if made under this Law) was exercised upon an application for setting aside if made within the time-period provided therefor in article XXX. However, this suggestion was adopted since it was not justified to deprive a party from raising objections if "domestic" enforcement was sought after expiration of this time-

> limit while the same objections could still be raised against enforcement in any other State.
>
> 158. The Working Group was, thus, agreed that the double procedure should be avoided during the time-period for setting aside and requested the Secretariat to prepare a draft provision to that effect. One possible technique was to refer a party against whom enforcement was sought within three months after receipt of the award to the procedure of setting aside. It was further suggested that the decision in that procedure would be binding on the enforcement judge or court and that a provision along the lines of paragraph (3) of article XXVIII might be appropriate also in this "domestic" context.

15. Even up to this stage, the power to set aside an award in whole or in part was retained in Article 30(1). It is also pertinent to take note of the draft provisions comprised in Article 30(3) and which was a precursor to Section 34(4) and spoke of procedural defects that may be discovered by a court in the course of setting aside proceedings. While dealing with Article 30(3), the Working Group took note of a school of thought which was in favour of a power of remission being retained. It was in this Session itself that a proposal was also mooted for draft Articles 29 and 30 being merged.

16. The said revised and combined provision was thereafter taken up for consideration in the Seventh Session of the Working Group and where it came to be numbered as draft Article 34. It is this re-drafted Article 34 that stands replicated as the setting aside provision which ultimately came to be adopted in the Model Law. The relevant extracts from the report of the Working Group drawn upon conclusion of its Seventh Session is reproduced hereinbelow:-

"**CHAPTER VII. RECOURSE AGAINST AWARD**

Article 34

126. The text of article 34 as considered by the Working Group was as follows:

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award made [in the territory of this State] [under this Law] may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the Court specified in article6 only if

(a) the party making the application furnishes proof that:

(i) the parties to the arbitration agreement referred to in article 7 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, falling any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of the arbitrator(s) or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the [mandatory provisions of this Law and the] agreement of the parties or, falling such agreement, was not in accordance with this Law; or

(b) the Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award or any decision contained therein is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award in accordance with article 31 (4) [or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal).

(4) The Court, instead of setting aside the award, [may order, where appropriate, that the arbitral proceedings be continued] [may authorize the continuation of arbitral proceedings where this would permit an omission or other procedural defect to be cured without having to set aside the award].

127. The Working Group adopted that article, subject to the addition, at the end of paragraph (1), of the words "or by a request to refuse recognition or enforcement in accordance with article 36", 10/ and subject to the replacement of the (2) (a) (iv), by the words "provisions of this Law from which the parties cannot derogate and the", and subject to the deletion, in paragraph (3), of the words "in accordance with article 31 (4)", and subject to the revision of paragraph (4) as follows: "The Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside".

128. While there was some support for the suggestion to place article 34 after the provisions on recognition and enforcement, the Working Group decided to retain the existing order of those articles.

129. It was noted that article 34 regulated the recourse against

an arbitral award without defining the term "award" or specifying what types of awards would be covered. In order to achieve the necessary clarification, the Working Group decided to include in the model law a general definition of the term "award" or, at least, to specify what types of awards would be subject to setting aside under article 34. A suggestion for later consideration was to allow recourse against any award deciding on the substance of the dispute. 11/

130. It was observed that paragraph (1), by presenting the application for setting aside as exclusive recourse against awards, appeared to disregard the right of a party under article 36 to raise objections against the recognition or enforcement of an award. Although that right was exercised in reply to an initiative by the other party, the Working Group was agreed that, for the sake of clarity, paragraph (1) should make reference to that other type of recourse. 12/

131. As regards the words "[in the territory of this State][under this Law]", the Working Group was agreed that it was premature to decide on the specific scope of application of article 34 before having discussed the territorial scope of application of the model law in general. 13/

132. As regards paragraph (2) (a) (i), there was considerable support for substituting the words "a party to the arbitration agreement referred to in article 7 lacked the capacity to conclude the agreement" for the words "the parties to the arbitration agreement referred to in article 7 were, under the law applicable to them, under some incapacity" since the latter wording WAS seen as containing an incomplete and inappropriate conflict of laws rule. The prevailing view, however, was to retain the current wording which was identical to the one in article V (1) (a) of the 1958 New York Convention.

133. There was some support for deleting the reference, in paragraph (2)(a)(i) to the law applicable to the validity of the arbitration agreement and, thus, to state as reason for refusal merely that "the arbitration agreement is not valid". It was pointed out, in support of that view, that the reference did not set forth a complete system of conflicts rules and had given rise to some difficulties. The prevailing view, however, was to retain the current wording as an acceptable and satisfactory provision

which was identical to the one adopted in the 1958 New York Convention.

134. As regards paragraph (2) (a) (iii), the Working Group was agreed that the drafting of that provision, in particular its second part, could be improved. It was suggested, for example, to replace the words "only that part of the award which contains decisions on matters not submitted to arbitration may be set aside" by the words "that part of the award which contains decisions on matters submitted to arbitration need not be set aside".

135. As regards paragraph (2) (a) (iv), the Working Group adopted the policy underlying the words "mandatory provisions of this Law and the arbitration agreement" since a mandatory provision of this Law, by definition, would prevail over any procedural agreement by the parties which was in conflict with such provision. However, it was agreed to redraft that portion of the provision so as to avoid the expression "mandatory" which was not understood in all legal systems as meaning "from which the parties cannot derogate".

136. As regards paragraph (2) (b) (i), it was noted that that provision made the law of the forum determine the arbitrability of the subject-matter of the dispute. It was suggested that such a rule, while appropriate in the context of recognition and enforcement (art. 36 (1) (b) (i)), was not appropriate in setting aside proceedings since here the effect of a finding of non-arbitrability was not limited to the State of the forum but extended to all other States by virtue of article 36 (1) (a) (v). Such global effect should obtain only from a finding that the subject-matter of the dispute was not capable of settlement by arbitration under the law applicable to that issue which was not necessarily the law of the State of the setting aside proceedings. It was, therefore, suggested to delete the provision of paragraph (2) (b) (i). The result of that deletion, which received considerable support, would be to limit the court control under article 34 to those cases where non-arbitrability of a certain subject-matter formed part of the public policy of that State (para. (2) (b) (ii)) or where the Court regarded arbitrability as an element of the validity of an arbitration agreement (para. (2) (a) (i)), although some proponents of that suggestion sought the

more far-reaching result of excluding non-arbitrability as a reason for setting aside. Another suggestion was to delete, in paragraph (2) (b) (i), merely the reference to "the law of this State" and, thus, to leave open the question as to which was the law applicable to arbitrability.

137. The Working Group in discussing those suggestions, was agreed that the issues raised were of great practical importance and, in view of their complex nature, required further study. The Working Group after deliberation, decided to retain, for the time being, the provision of paragraph (2) (b) () in its current form so as to invite the Commission to reconsider the matter and to decide, in the light of comments by Governments and organizations, on whether the present wording was appropriate or whether the provision should be modified or deleted.

138. As regards paragraph (3), the Working Group reaffirmed its decision to delete the words "in accordance with article 31 (4)". As regards the words "or, if request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal", there was considerable support for deleting those words since they might open the door for dilatory tactics by a party and because an unbreakable time-limit for applications for setting aside was desirable for the sake of certainty and expediency. The prevailing view, however, was to retain those words since they presented the reasonable consequence of article 33 which allowed a party to request a correction, interpretation or an additional award. It was also pointed out that the periods of contained in article 33 enabled the arbitral tribunal to minimize the risk of dilatory tactics and provided a basis for calculating the possible extension of the time-limit prescribed in paragraph (3) of article 34.

139. As regards paragraph (4), the Working Group adopted the policy underlying that provision since remission, though not known in all legal systems, could be a useful device for curing procedural defects without having to set aside the award. It was noted that the wording "Instead of setting aside the award" was not felicitous since it could be understood as upholding the validity of the award for the time during which the arbitral tribunal dealt with the case remitted to it. It was also noted that it was misleading to speak of a "continuation of the arbitral

> proceedings" since these were terminated by the final award and, apart from that, regard should be had to the fact that the arbitral tribunal may have to repeat an earlier phase of the proceedings. The Working Group was agreed that the wording set forth above (para. 127) would meet those concerns."

17. Significantly, however, the specific reference to a partial setting aside which otherwise formed part of the previous versions of draft Articles 40 and 41 and stood incorporated in the report of the Working Group prepared during the Sixth Session inexplicably ceased to remain a part of the Article which came to be adopted. While a partial setting aside or severance was retained in Article 34(2)(a)(iii) [and which is similar to Section 34(2)(a)(iv) of the Act], the partial setting aside reference which formed part of the principal body of the draft Article ceased to find place. Draft Article 34 as mooted by the Working Group for adoption also incorporated a provision akin to Section 34(4) as it stands today and envisaged the same to be an enabling power inhering in the court to frame a direction permitting an AT to continue proceedings so as to take care of omissions or other procedural defects and enabling a court to suspend the setting aside proceedings in the meanwhile. The Working Group in Para 139 of its report significantly noted that though a provision for remission may not be accepted in various legal systems, it would constitute a useful device for curing procedural defects without the Court being compelled or constrained to set aside the award.

18. Our attention was also drawn to the Travaux Préparatoires relating to the UNCITRAL Model Law and which records the views

expressed by representatives of member nations. While dealing with the power to sever offending parts of an award, the Travaux Préparatoires prepared for the 318th meeting dated 11 June 1985 records the views expressed by different countries as follows:-

> *"Article 34(2) (b) (ii)*
>
> 34. Mr. SEKHON (India) said that his delegation would prefer to see subparagraph (b) (ii) deleted. The expression "public policy" was much too vague and had very little to do with the law of arbitration. If the subparagraph were retained, the Commission should consider deleting the phrase "or any decision contained therein", which was superfluous as the whole necessarily included all of its parts, and a decision was part of an award.
>
> 35. Mr. LOEFMARCK (Sweden) said that his delegation would prefer the subparagraph to be deleted but would not insist upon it.
>
> 36. Mrs. VILUS (Yugoslavia) said that she agreed with the comments of the representative of India. The subparagraph could be interpreted to mean that an award could be set aside because "a decision contained therein", i.e. a part of that award, conflicted with certain principles of the law of the forum which were irrelevant to the merits of the case. The subparagraph was not, moreover, compatible with a restrictive interpretation of the notion of public policy.
>
> 37. Mr. SAMI (Iraq) said that his delegation also felt that the phrase "in conflict with the public policy of this State" was very ambiguous. He would prefer a wording such as "in conflict with the legal order of this State". If the wording was not changed, he would prefer the subparagraph to be deleted.
>
> 38. The CHAIRMAN said that "public policy" was a translation of the French term "*order public*" and meant the fundamental principles of law.
>
> 39. Mr OLUKOLU (Nigeria) also felt that subparagraph *(b)* (ii) should be deleted. The term "public policy" was too vague to

provide the guidance that the countries applying it should be able to expect from the Model Law.

40. Mr. JARVIN (Observer for the International Chamber of Commerce) thought that the idea of public policy was perhaps vague. It should, however, be further developed in the Model Law and a distinction made between international and national public policy. The Model Law was intended to apply to international trade.

41. Sir Michael MUSTILL (United Kingdom) pointed out that the term "public policy" was used again in article 36 (1)*(b)*(ii). In his delegation's view, the question was linked with the general problem of whether there should be a general provision encompassing all cases of serious procedural injustice. It was important to know, therefore, whether a case of serious procedural injustice would be regarded as contrary to public policy. If the term would allow the court to intervene in such cases, his delegation would regret the deletion of the subparagraph. If the subparagraph was not concerned with such cases, he would not object to its deletion.

42. The CHAIRMAN said that during the drafting of the 1972 European Convention on State Immunity, subsequently ratified by both the United Kingdom and Austria, there had been a long discussion on "*ordre public*". Ultimately, the French text of the Convention had used simply "*ordre public*", while the English text had had to specify a violation of a fundamental rule of procedure in the form of "no adequate opportunity fairly to present his case". That language had been used to make it clear that the notion was not limited to substantive law.

43. Mr. ROEHRICH (France) said that he felt the same concern as the United Kingdom representative. He had said earlier that his delegation would have no objection to the deletion of subparagraph (b) (ii). However, since a discussion had arisen on an addition to the provision in order to meet the anxiety of the common law States, an approach must be found which would cover the notion expressed in the 1972 European Convention on State Immunity. A formula was needed that would be acceptable to all States, irrespective of their legal systems. His delegation favoured retaining the subparagraph, provided it could be reworded to deal with those anxieties.

44. Mr. GOH (Singapore) was in favour of deleting the subparagraph. He felt that its retention would allow the court to intervene in matters which the parties had agreed to submit to arbitration.

45. The CHAIRMAN thought that subparagraph (*b*) (ii) was the best place for an improved explanation of the idea. The problem raised by the United Kingdom delegation could be solved by using different wording, because the intention was to refer to deviations from the fundamental principles of the law "of this State", both substantive and procedural. There was a public policy clause in all 38 conventions of The Hague Conference. He urged the Commission not to delete the subparagraph simply because the notion of "public policy" was strange, but rather to find a more comprehensive formula which would meet the fears of the United Kingdom and other delegations.

46. Mr. BONELL (Italy) said that the purpose of the subparagraph was to make it clear that, in addition to the reasons set out in the preceding subparagraphs, there was a more general limitation beyond which an award could not go. He pointed out that there was no other possibility of supervising the content of the award. If subparagraph *(b)* (ii) was deleted, there were two possibilities either the mater would be left entirely open and the recognition of any kind of award would be allowed, or the possibility would be hinted at that set only general but less than general principles were at stake, which would be an undesirable result. The aim way was to provide for a minimum of court control and supervision. If a clearer form of wants could be suggested, his delegation would welcome it. He noted that the 1958 New York Convention used the same concept (article V para 2 *(b))*. That Convention had worked satisfactorily so far.

47. Mr BOGGIANO (Observer for Argentina) felt that it would be inconsistent to retain subparagraph (*b*) (i) and to reject *(b)* (ii). His delegation considered that "*ordre public*" constituted a body of fundamental principles which included also due process of law. The subparagraph implied a guarantee of protection against serious procedural injustice in the arbitration proceedings.

48. Mr. HOELLERING (United States of America) was in favour of retaining the subparagraph as it stood. To delete it would be a radical departure from the New York Convention. It was a concept frequently used in the United Nations, and its retention would

enhance the acceptability of the Model Law. He was certain that the concern of the United Kingdom could be met by means of drafting changes.

49. Mr. TORNARITIS (Cyprus) thought that the subparagraph should not be deleted simply on account of its use of the term "public policy". If a more appropriate term could be found, his delegation would have no objection to the subparagraph. He noted that the words "*ordre public*" had been used in the English test of the Fourth Protocol to the European Convention on the Protection of Human Rights.

50. Mr. MTANGO (United Republic of Tanzania) said it was inaccurate to say that the concept of public policy was unknown in some common law States. It was in familiar use in contract law, for example. He had heard the concept defined as "binding rules of the legal system". He was in favour of retaining the subparagraph, with the deletion of the phrase "or any decision contained therein" if the Commission so decided.

51. Mr. GRAHAM (Observer for Canada) sympathized with the Indian position but favoured retaining the reservation contained in the subparagraph. In Canada, the common law and the civil law systems were both present, and problems such as that under discussion had had to be faced. He associated himself with the United States position on the subparagraph. The concept of public policy (*ordre public*) was included in many international conventions, and deleting it from the Model Law would be tantamount to refusing to tolerate the civil law concept. It might be possible to include a further subparagraph in paragraph (2) to accommodate the suggestion of respect for procedural regularity. He felt, however, that it would be better to expand the notion in paragraph (2) *(b) (*ii*)*along the lines of article 20 (2)(a) of the European Convention on State Immunity.

52 Mr. de HOYOS GUTIERREZ (Cuba) favoured maintaining subparagraph *(b)* (ii).

53. Mr. MATHANJUKI (Kenya) also favoured retaining the subparagraph. His delegation appreciated the need to provide for a rule of general character which would cover serious misjustice to the detriment of one of the parties to the arbitration. His delegation would not insist on the term "public policy" but would accept any

form of words that reflected the seriousness with which procedural injustice was regarded in the Model Law.

54. Mrs. DASCALOPOULOU-LIVADA (Observer for Greece) said that the notion of public policy was fundamental to her country's legal system. Her delegation was therefore in favour of retaining the subparagraph.

55. Mr. JOKO-SMART (Sierra Leone) said that, before the debate, his delegation had been in favour of retaining the subparagraph because of its understanding of the meaning of "public policy". There now seemed to be some confusion as to whether "*ordre public*" was properly rendered by the term "public policy", and unless that term was clarified, his delegation would be in favour of deleting the subparagraph.

56. The CHAIRMAN said that the Commission seemed disposed to retain the reference in article 34 (2) (*b*) (ii) to public policy without amplification in the text, but with a reference in the report to what the term meant in other conventions in which it was used, namely fundamental principles of law, without differentiating between substantive and procedural law. On the other hand, several speakers had supported the deletion of the phrase "or any decision contained therein". He took it there was agreement to delete it.

57. *It was so agreed."*

19. The Travaux Préparatoires prepared for the 319th meeting records the views expressed by representatives of member nations insofar as draft Article 34(4) is concerned and the relevant parts thereof are extracted hereinbelow:-

"**International commercial arbitration (continued)**
(A/CN.9/246, annex; A/CN.9/263 and Add.1-2; A/CN.9/264; A/CN.9/XVIII/CRP.1 and 3-6)

Article 34. Application for setting aside as exclusive recourse against arbitral award (continued)

Article 34 (4) (continued)

1. Mr. SAWADA (Japan) said that the paragraph was an unknown quantity. That was not a reason for its deletion, but it would help his delegation to make up its mind about the provision if the secretariat could explain how it would work.

2. Mr. HERRMANN (International Trade Law Branch) said that the aim of paragraph (4) was to give the court the option of not setting aside the arbitral award when there was a possibility of curing the defect in the arbitral proceedings. The question would be considered by the court referred to in article 6. The court would not, however, be able to invite the arbitrators to cure the defect in the case of some of the reasons for setting aside listed in article 34 (2), for example incapacity of a party or invalidity of the arbitration agreement. In some legal systems, once the arbitrators had made their award their mandate could not be revived, but paragraph (4) would empower the court to do that.

3. Sir Michael MUSTILL (United Kingdom) said that his delegation was strongly in favour of the principle expressed in paragraph (4). In the United Kingdom, remission had proved a very valuable remedy by avoiding the choice between completely quashing the award and allowing no relief at all. It was very rare in practice in the United Kingdom for an award to be set aside; when a court had to intervene, the less drastic remedy of remission was usually granted. His delegation supported the written suggestion of the International Bar Association, reproduced in A/CN.9/263 (p. 48, para. 18), that the paragraph should be formulated along the lines of the version given in paragraph 126 of A/CN.9/246.

4. Lord WILBERFORCE (Observer for the Chartered Institute of Arbitrators) said that from the viewpoint of arbitrators paragraph (4) was very valuable, and he was perturbed at the prospect of its deletion. The objections raised to the paragraph were not serious and concerned only the obscurity of the language and the novelty of the provision. The remission system already operated well in many countries and offered a better means of dealing with procedural defects or mistakes by the arbitrators than the alternative, which was the complete setting aside of the award.

5. Mr. SEKHON (India) said that his delegation was in favour of paragraph (4). The fact that such a provision was not found in some legal systems was not a reason for excluding it if it was meritorious. The aim, after all, was harmonization of law. He

suggested that the words "an opportunity to resume the arbitral proceedings" should be replaced by the words "an opportunity to reconsider the arbitral proceedings".

6. Mr. STALEV (Observer for Bulgaria) proposed, as a compromise, that the closing portion of the paragraph should read “an opportunity to eliminate such grounds for setting aside as are remediable without reopening of the arbitral proceedings”. That would cover cases when, for example, the arbitrators had not given reasons for their award or had not all signed the award. The present text of the paragraph implied that the arbitrators would have the power to vacate the contested award, for otherwise a new award would not be possible; until the court set the contested award aside, if it did, the parties and the arbitrators would be bound by it. The arbitrators' power to vacate should therefore be stated explicitly, a point to some extent covered by the useful suggestion made by the German Democratic Republic (A/CN.9/SR.318, para. 77).

7. Mr. BROCHES (Observer for the International Council for Commercial Arbitration) said that the Council was strongly in favour of paragraph (4), which would benefit both arbitrators and businessmen. He thought that the Bulgarian proposal would make the provision more generally acceptable.

8. Mr. JOKO-SMART (Sierra Leone) said that if the purpose of the paragraph was to empower the court to remit an award to the arbitrators, it would be better to delete the words "and so requested by a party", which cast doubt on whether the court had that power. The hands of the court should not be tied by the wishes of the parties.

9. Mr. GRIFFITH (Australia) said that paragraph (4) was a sensible and useful provision in its existing form. He endorsed the view of the Observer for the International Council for Commercial Arbitration that it would benefit arbitrators and businessmen. His delegation opposed the Bulgarian proposal.

10. Mr. ENAYAT (Observer for the Islamic Republic of Iran) said that his delegation was in favour of the provision, which would save the parties time and money in cases in which the court found there was a defect in the arbitral proceedings. The arbitrators' review of their award should, however, be for the purpose of curing defects in the award itself and should not result in the validation of an award in the making of which mandatory procedural rules had not been observed.

11. Mr. GRAHAM (Observer for Canada) endorsed the comments made by the representative of Australia.

12. Mr. HOLTZMANN (United States of America) said that his delegation could accept the paragraph as submitted by the Working Group on International Contract Practices even though the version suggested by the International Bar Association seemed marginally better. It opposed the Bulgarian proposal but liked the idea put forward by the representative of Sierra Leone.

13. Mr. JARVIN (Observer for the International Chamber of Commerce) said that he was in favour of the principle contained in paragraph (4) but thought the provision should be amended to provide that the court had the power to suspend the setting- aside proceedings of its own motion and not only at the request of a party.

14. Mr. GOH (Singapore), Mr. LAVINA (Philippines) and Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for Commercial Arbitration) spoke in favour of the paragraph.

15. Mr. SZURSKI (Observer for Poland) said that his delegation supported the idea of including the paragraph in the Model Law but thought it would rarely need to be used in practice. It would be improved by various drafting changes, including the replacement of the words "grounds for setting aside" by "possible grounds for setting aside" or "grounds for setting aside indicated by the court". The remission procedure might of course cause problems for the arbitrators if they were located in another country, and it would increase the costs of the arbitral proceedings.

16. Mr. MTANGO (United Republic of Tanzania) said that he was not opposed to the inclusion of the paragraph in the Model Law. He wished to point out, however, that if the court had the power to order a resumption of the arbitral proceedings, the potential costs to the parties would be much higher. The parties should therefore have a say in any decision on remission.

17. Mr. SAWADA (Japan) said that his delegation felt strongly that the court should have the power to remit only at the request of a party.

18. Mr. MOELLER (Observer for Finland) said that even if the words "and so requested by a party" were deleted, the provision would still be understood in his country to mean that remission could only be ordered if requested by a party. The Commission

might make the intention of the paragraph clearer by using a formula such as "the court, at the request of a party or of its own motion".

19. The CHAIRMAN said that in his opinion the words "when asked to set aside an award" covered that point.

20. Mr. VOLKEN (Observer for Switzerland), Mr. SCHUMACHER (Federal Republic of Germany) and Mr. OLUKOLU (Nigeria) expressed their agreement with the Japanese contention that the court should have power to remit only at the request of a party.

21. The CHAIRMAN said that it seemed to be the general view that the paragraph should be included in the Model Law and that the court should have the power to suspend the setting-aside proceedings only when so requested by a party. There appeared to be little support for the Bulgarian proposal. He suggested, therefore, that the substance of paragraph (4) should not be changed and that the various drafting suggestions which had been made should be submitted to the drafting committee."

20. The **United Nations Commission on International Trade Law**[7] Year Book [Volume XVI: 1985] contains an instructive discussion on the scope of Article 34. The relevant parts of the said Year Book are extracted hereinbelow:-

"CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. *Application for setting aside as exclusive recourse against arbitral award*

(1) Recourse to a court against an arbitral award made [in the territory of this State] [under this Law] may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the Court specified in article 6 only if:

(*a*) the party making the application furnishes proof that:

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(i) the parties to the arbitration agreement referred to in article 7 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of the arbitrator(s) or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(*b*) the Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award or any decision contained therein is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article33, from the date on which that request had been disposed of the arbitral tribunal.

(4) The Court, when asked to set aside an award, may where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

References

A/CN.9/232, paras. 14-22

A/CN.9/233, paras, 178-195

A/CN.9/245, paras. 146-155

A/CN.9/246, paras. 126-139

Commentary

Sole action for attacking award paragraph (1)

1. Existing national laws provide a variety of actions or remedies available to a party for attacking the award. Often equating arbitral awards with local court decisions, they set varied and sometimes extremely long periods of time and set forth varied and sometimes long lists of grounds on which the award may be attacked. Article 34 is designed to ameliorate this situation by providing only one means of recourse (paragraph (1)), available during a fairly short period of time (para-graph (3)) and for a rather limited number of reasons (paragraph (2)). It does not, beyond that, regulate the procedure, neither the important question whether a decision by the Court of articles 6 may be appealed before another court nor any question as to the conduct of the setting aside proceedings itself.

2. The application for setting aide constitutes the exclusive recourse to a court against the award in the sense that it is the only means for actively attacking the award, i.e. initiating proceedings for judicial review. A party retains, of course, the right to defend himself against the award by requesting refusal of recognition or enforcement in proceedings initiated by the other party (articles 33 and 36). Obviously, article 34 (1) does not exclude the right of a party to request any correction or interpretation of the award or the making of an additional award under article 33, since such request would be directed to the arbitral tribunal and not to a court, the situation is different in the case of a remission to the arbitral tribunal under article 34 (4), which is envisaged as a possible response by a court to an application for setting aside the award. Finally, article 34 (1) would not exclude recourse to a second arbitral tribunal, where such appeal within the arbitration system is envisaged (as, e.g., in certain commodity trades).

3 Article 34 provides recourse against an “arbitral award” without specifying which kinds of decision would be subject to such recourse. The Working Group was agreed that it was desirable for

the Model Law to define the term "award" and noted that such definition had important implications for a number of provisions of the Model Law, especially articles 34 and 16. After commencing consideration of a proposed definition, the Working Group decided, for lack of time, not to include a definition in the Model Law to be adopted by it and to invite the Commission to consider the matter.

4. Another matter to be considered by the Commission is the question of the territorial scope of application, the pending nature of which is clear from the alternative wordings placed between square brackets in paragraph (1). It is submitted that the territorial scope of article 34 should be the same as the one of the Model Law in general, whichever may be the criterion adopted by the Commission.

Reasons for setting aside the award, paragraph (2)

5. Paragraph (2) lists the various grounds on which an award may be set aside. This listing is exhaustive, as expressed by the word "only" and reinforced by the character of the Model Law as *lex specialis*.

6. Paragraph (2) sets forth essentially the same reasons as those on which recognition or enforcement may be refused under article 36 (1) (or article V of the 1958 New York Convention, on which it is closely modelled). It even uses, with few exceptions, the same wording, for the sake of harmony in the interpretation.

7. The list of reasons presented in paragraph (2) is based on two different policy considerations, which, however. converge in their result. First, after an extensive selection process, which included a considerable number of other grounds suggested for inclusion in the list, the reasons set forth in paragraph (2), and only these, were regarded as appropriate in the context of setting aside of awards in international commercial arbitration.

8. Second, conformity with article 36 (1) is regarded as desirable in view of the policy of the Model Law to reduce the impact of the place of arbitration. It recognizes the fact that both provisions with their different purposes (in one can reasons for setting aside and in the other case grounds for refusing recognition or enforcement) form part of the alternative defence system which provides a party with the option of attacking the award or making the grounds when

recognition or enforcement is sought. It also recognizes the fact that these provisions do not operate in isolation. The effect of traditional concepts and rules familiar and peculiar to the legal system ruling at the place of arbitration is not limited to the State where the Arbitration takes place but extends to many other States by virtue of article 36(1)(a)(v) (or article V (1) (e) of the 1958 New York Convention) in that an award which has been set aside for whatever reason recognized by the competent court or applicable procedural law, would not Ne recognized and enforced abroad.

9. Drawing the consequences from this undesirable situation, article IX of the 1961 Geneva Convention cuts off this international effect in respect of all awards which have been set aside for reasons other than those listed in article V of the 1958 New York Convention. The Model Law merely takes this philosophy one step further by going beyond the angle of recognition and enforcement to the source and aligning the very reasons for setting aside with those for refusing recognition or enforcement. This step has the salutary effect of avoiding "Split" or "relative" validity of international awards, i.e. awards which are void in the country of origin but valid and enforceable abroad."

10. Since the grounds listed in paragraph (2) are essentially those of article V of the 1958 New York Convention, they are familiar and require no detailed explanation; however, the fact that they are used for purposes of setting aside under the Model Law leads to some differences. For example, the application of subparagraphs (*a*)(i) and (iv), possibly also (iii), may be limited by virtue of an implied waiver or submission, as mentioned in the commentary to article 4 (para. 6) and to article 16 (paras, 8-9).

11. Subparagraph (*a*)(iv) expresses the priority of the mandatory provisions of the Model Law over any agreement of the parties, which is different from article 36 (1) (*a*) (iv), at least according to the predominant interpretation of the corresponding provision in the 1958 New York Convention (article V (1) (*d*). The fact that the composition of the arbitral tribunal and the arbitral procedure are, thus, to be judged by the mandatory provisions of the Model Law entails, for example, that this subparagraph (e) (iv) covers to a large extent also the grounds of subparagraph (e) (ii), copied from the 1958 New York Convention, which comprise cases of violations of articles 19 (3) and 24 (3),(4)

12. Yet another difference is less obvious since it follows merely from the different effect of setting aside as compared to refusing recognition or enforcement. Under subparagraph (b) (i), an award would be set aside if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration "under the law of this State". This reason is certainly appropriate for refusing recognition or enforcement in a given State, which often regards it as part of its public policy and may reduce its impact by protecting only its *ordre public international*, i.e., its public policy concerning international cases. However, this same reason used for setting aside gains a different dimension by virtue of the global effect of setting aside (article 36 (1) (a) (v), or article V (1) (e) of the 1958 New York Convention). As was suggested in the Working Group, to quote now from the report of the seventh session (A/CN.9/246, paras 136-137),

> "….such global effect should obtain only from a finding that the subject-matter of the dispute was not capable of settlement by arbitration under the law applicable to that issue which was not necessarily the law of the State of the setting aside proceedings. It was, therefore, suggested to delete the provision of paragraph (2) (b) (1). The result of that deletion, which received considerable support, would be to limit the court control under article 34 to those cases where non-arbitrability of a certain subject-matter formed part of the public policy of that State (para. (2) (b) (ii)) or where the Court regarded arbitrability as an element of the validity of an arbitration agreement (para.(2) (a) (i)), although some proponents of that suggestion sought the more far-reaching result of excluding non-arbitrability as a reason for setting aside. Another suggestion was to delete, in paragraph (2) (b) (1), merely the reference to "the law of this State" and, thus, to leave open the question as to which was the law applicable to arbitrability. The Working Group, in discussing those suggestions, was agreed that the issues raised were of great practical importance and, in view of their complex nature, required further study. The Working Group, after deliberation, decided to retain, for the time being, the provision of paragraph (2) (b) (1) in its current form so as to invite the Commission to reconsider the matter and to decide, in the light of comments by Governments and organizations. On whether the present wording was appropriate of whether the provision should be modified or deleted."

Remission to arbitral tribunal, paragraph (4)

13. Paragraph (4) envisages a procedure which is similar to the "remission" known in most common law jurisdictions, though in various forms. Although the procedure is not known in all legal systems, it should prove useful in that it enables the arbitral tribunal to cure a certain defect and, thereby, save the award from being set aside by the Court.

14. Unlike in some common law jurisdictions, the procedure is not conceived as a separate remedy but placed in the framework of setting aside proceedings. The Court, where appropriate and so requested by a party, would invite the arbitral tribunal, whose continuing mandate is thereby confirmed, to take appropriate measures for eliminating a certain remediable defect which constitutes a ground for setting aside under paragraph (2). Only if such "remission" turns out to be futile at the end of the period of time determined by the Court, during which recognition and enforcement may be suspended under article 36 (2), would the Court resume the setting aside proceedings and set aside the award."

21. It was on the basis of the aforesaid deliberations that the UNCITRAL Model Law came to adopt and incorporate Article 34. The said Article as appearing in the Model Law came to be adopted by member nations who proceeded to frame and promulgate independent statutes accordingly. Some of the salient statutes which came to be framed are briefly noticed hereinafter.

22. For instance, in the **Arbitration Act, 2001**[8] as promulgated by the Republic of Singapore, the setting aside provision reads thus:-

"**Remedies**

34.— (1) The parties may agree on the powers exercisable by the arbitral tribunal as regards remedies.

[8] The 2001 Act

(2) Unless otherwise agreed by the parties, the arbitral tribunal may award any remedy or relief that could have been ordered by the Court if the dispute had been the subject of civil proceedings in that Court."

23. Similarly, the **Commercial Arbitration Act, 2017**[9] as adopted by Australia makes the following provisions in relation to the setting aside of an award:-

"**34**. Application for setting aside as exclusive recourse against arbitral award

(Model Law art 34)

(1) Recourse to the court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3) or by an appeal under section 34A.

Note: The Model Law does not provide for appeals as under s 34A.

(2) An arbitral award may be set aside by the court only if—

(a) the party making the application furnishes proof that—

(i) a party to the arbitration agreement referred to in section 7was under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication in it, under the law of the Territory; or

(ii) the party making the application was not given proper notice of the appointment of an arbitral tribunal or of the arbitral proceedings or was otherwise unable to present the party's case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters

[9] The 2017 Act

beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Territory; or

(ii) the award is in conflict with the public policy of the Territory.

(3) An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the award or, if a request had been made under section 33,from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside of proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."

24. In New Zealand, the **Arbitration Act, 1996**[10]makes the following provisions for setting aside of an Arbitral Award:-

"Chapter 7

Recourse against award

[10] The 1996 NZ Act

34 Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3).

(2) An arbitral award may be set aside by the High Court only if—

(a) the party making the application furnishes proof that—

(i)a party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication on that question, under the law of New Zealand; or

(ii)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 that party's case; or

(iii)the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv)the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b)the High Court finds that—

(i)the subject matter of the dispute is not capable of settlement by arbitration under the law of New Zealand; or

(ii)the award is in conflict with the public policy of New Zealand.

(3) An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal. This paragraph does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

(4) The High Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(5) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application.

(6) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an award is in conflict with the public policy of New Zealand if—

(a)the making of the award was induced or affected by fraud or corruption; or

(b)a breach of the rules of natural justice occurred—

(i)during the arbitral proceedings; or

(ii)in connection with the making of the award."

25. The **Arbitration Act, 2000**[11] of Canada in Section 45 makes the following provisions in relation to the setting aside of an award:-

"**Setting aside award**

45(1) On a party's application, the court may set aside an award on any of the following grounds:

[11] The 2000 Act

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid or has ceased to exist;

(c) the award deals with a matter in dispute that the arbitration agreement does not cover or contains a decision on a matter in dispute that is beyond the scope of the agreement;

(d) the composition of the arbitral tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with the matter, was not in accordance with this Act;

(e) the subject-matter of the arbitration is not capable of being the subject of arbitration under Alberta law

(f) the applicant was treated manifestly unfairly and unequally, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator;

(g) the procedures followed in the arbitration did not comply with this Act or the arbitration agreement;

(h) an arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias;

(i) the award was obtained by fraud.

(2) If subsection (1)(c) applies and it is reasonable to separate the decisions on matters covered by the arbitration agreement from the impugned ones, the court shall set aside the impugned decisions and allow the others to stand.

(3) The court shall not set aside an award on grounds referred to in subsection (1)(c) if the applicant has agreed to the inclusion of the matter in dispute, waived the right to object to its inclusion or agreed that the arbitral tribunal has power to decide what matters in dispute have been referred to it.

(4) The court shall not set aside an award on grounds referred to in subsection (1)(h) if the applicant had an opportunity to challenge the arbitrator on those grounds under section 13 before the award was made and did not do so or if those grounds were the subject of an unsuccessful challenge.

(5) The court shall not set aside an award on a ground to which the applicant is deemed under section 4 to have waived the right to object.

(6) If the ground alleged for setting aside the award could have been raised as an objection to the arbitral tribunal's jurisdiction to conduct the arbitration, the court may set the award aside on that ground if it considers the applicant's failure to make an objection in accordance with section 17 justified.

(7) When the court sets aside an award, it may remove an arbitrator or the arbitral tribunal and may give directions about the conduct of the arbitration.

(8) Instead of setting aside an award, the court may remit it to the arbitral tribunal and give directions about the conduct of the arbitration."

26. The South African statute being the **Arbitration Act, 1965**[12], incorporates Section 33 in relation to the setting aside of an award and reads thus:-

"**Setting aside of award.**

33. (1) Where –

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained, the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

(2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the ground of corruption, such application shall be made within six weeks after the discovery of the corruption

[12] The 1965 Act

and in any case not later than three years after the date on which the award was so published.

(3) The court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

(4) If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court."

27. In Germany too, an identical provision exists for the purposes of considering challenges in respect of an Arbitral Award. The **Arbitration Act,1996**[13] as prevalent in the United Kingdom while spelling out the grounds on which an award may be assailed makes the following significant provisions in Section 68:-

"**68Challenging the award: serious irregularity**.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

[13] The 1996 UK Act

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(4) The leave of the court is required for any appeal from a decision of the court under this section."

28. As would be evident from Section 68(3), the said provision empowers the court to either remit the award in whole or in part as well as to adopt an identical procedure while setting aside the award or declaring it to be of no effect. The English statute also enables

parties to appeal on a point of law. This is evident from Section 69 which reads thus:-

> "**69 Appeal on point of law.**
>
> (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.
>
> An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.
>
> (2) An appeal shall not be brought under this section except—
>
> (a) with the agreement of all the other parties to the proceedings, or
>
> (b) with the leave of the court.
>
> The right to appeal is also subject to the restrictions in section 70(2) and (3).
>
> (3) Leave to appeal shall be given only if the court is satisfied—
>
> (a) that the determination of the question will substantially affect the rights of one or more of the parties,
>
> (b) that the question is one which the tribunal was asked to determine,
>
> (c) that, on the basis of the findings of fact in the award—
>
> (i) the decision of the tribunal on the question is obviously wrong, or
>
> (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
>
> (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

(7) On an appeal under this section the court may by order—

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d) set aside the award in whole or in part.

The court shall 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 tribunal for reconsideration.

(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.

But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."

29. The effect of the ultimate order that may be passed by the court on an appeal against the award is set forth in Section 71 which reads as under:-

"**71 Challenge or appeal: effect of order of court.**

> (1) The following provisions have effect where the court makes an order undersection 67, 68 or 69 with respect to an award.
>
> (2) Where the award is varied, the variation has effect as part of the tribunal's award
>
> (3) 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.
>
> (4) 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."

30. Turning then to developments closer to home, we find that the Supreme Court while rendering its decision in *M. Hakeem* had principally borne in consideration the provisions which stood embodied in the erstwhile **Arbitration Act**, **1940**[14] and which included Sections 15 and 16 which enabled a court to vary or modify an award. It, however, found that significantly while promulgating the Act, no parallel provisions came to be adopted. It was in the aforesaid backdrop that the Supreme Court in *M. Hakeem* observed as follows:-

> "**25.** As a matter of fact, the point raised in the appeals stands concluded in *McDermott International Inc.* v. *Burn Standard Co. Ltd.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181], where this Court held : (SCC p. 208, paras 51-52)

[14] The 1940 Act

> "*51*. After the 1996 Act came into force, under Section 16 of the Act the party questioning the jurisdiction of the arbitrator has an obligation to raise the said question before the arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his authority. It was required to be raised during arbitration proceedings or soon after initiation thereof. The jurisdictional question is required to be determined as a preliminary ground. A decision taken thereupon by the arbitrator would be the subject-matter of challenge under Section 34 of the Act. In the event the arbitrator opined that he had no jurisdiction in relation thereto an appeal there against was provided for under Section 37 of the Act.
>
> *52*. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

26. This statement of the law was followed in *Kinnari Mullick* v. *Ghanshyam Das Damani* [*Kinnari Mullick* v. *Ghanshyam Das Damani*, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106] at p. 334 (see para 15).

27. Also, in *Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.* [*Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.*, (2019) 20 SCC 1] , this Court held : (SCC p. 15, paras 36-37)

> "*36.* At this juncture it must be noted that the legislative intention 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. This provision cannot be brushed aside and the High Court [*Crompton Greaves Ltd.* v. *Dyna Technologies (P) Ltd.*,

2007 SCC OnLine Mad 427] could not have proceeded further to determine the issue on merits.

37. In case of absence of reasoning the utility has been provided under Section 34(4) of the Arbitration Act to cure such defects. When there is complete perversity in the reasoning then only it can be challenged under the provisions of Section 34 of the Arbitration Act. The power vested under Section 34(4) of the Arbitration Act to cure defects can be utilised in cases where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34 of the Arbitration Act. However, in this case such remand to the Tribunal would not be beneficial as this case has taken more than 25 years for its adjudication. It is in this state of affairs that we lament that the purpose of arbitration as an effective and expeditious forum itself stands effaced."

28. Some of the judgments of the High Courts are also instructive. A learned Single Judge of the Delhi High Court in *Cybernetics Network (P) Ltd.* v. *Bisquare Technologies (P) Ltd.* [*Cybernetics Network (P) Ltd.* v. *Bisquare Technologies (P) Ltd.*, 2012 SCC OnLine Del 1155] , held : (SCC OnLine Del paras 47-51)

"*47.* The next question that arises is whether the above claims as mentioned in para 44 that have been erroneously rejected by the learned arbitrator can be allowed by this Court in exercise of its powers under Section 34(4) of the Act?

48. Under Section 34(4) of the Act, the Court while deciding a challenge to an arbitral award, can either 'adjourn the proceedings for a period of time determined by it 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'. This necessarily envisages the Court having to remit the matter to the Arbitral Tribunal. This is subject to the Court finding it appropriate to do so and a party requesting it to do so.

49. In *Union of India* v. *Arctic India* [*Union of India* v. *Arctic India*, 2007 SCC OnLine Bom 409 : (2007)

4 Arb LR 524] , a learned Single Judge of the Bombay High Court opined that the Court can modify the award even if there is no express provision in the Act permitting it. The Court followed the decision of the Supreme Court in *Krishna Bhagya Jala Nigam Ltd.* v. *Harischandra Reddy* [*Krishna Bhagya Jala Nigam Ltd.* v. *Harischandra Reddy*, (2007) 2 SCC 720] . A similar view has been taken by a learned Single Judge of this Court in *Union of India* v. *Modern Laminators Ltd.* [*Union of India* v. *Modern Laminators Ltd.*, 2008 SCC OnLine Del 956 : (2008) 3 Arb LR 489] There the question was whether in light of the arbitrator having failed to decide the counterclaim of the respondent in that case the Court could itself decide the counterclaim. After discussing the case law, the Court concluded that it could modify the award but only to a limited extent. It held (Arb LR p. 496) : (*Modern Laminators Ltd. case* [*Union of India* v. *Modern Laminators Ltd.*, 2008 SCC OnLine Del 956 : (2008) 3 Arb LR 489] , SCC OnLine Del para 22)

'*22*. … Such modification of award will be a species of "setting aside" only and would be "setting aside to a limited extent". However, if the courts were to find that they cannot within the confines of interference permissible or on the material before the arbitrator are unable to modify and if the same would include further fact finding or adjudication of intricate questions of law, the parties ought to be left to the forum of their choice i.e. to be relegated under Section 34(4) of the Act to further arbitration or other civil remedies.'

50. However, none of the above decisions categorically hold that where certain claims have been erroneously rejected by the arbitrator, the Court can in exercise of its powers under Section 34(4) of the Act itself decide those claims. The Allahabad High Court has in *U.P. State Handloom Corpn. Ltd.* v. *Asha Lata Talwar* [*U.P. State Handloom Corpn. Ltd.* v. *Asha Lata Talwar*, 2009 SCC OnLine All 624 : (2009) 4 All LJ 397] , held that while exercising the powers to set aside an award under Section 34 of the Act the Court does not have the jurisdiction to grant the original relief which was prayed for before the arbitrator. The Allahabad High Court referred to the

decision of the Supreme Court in *McDermott International Inc.* v. *Burn Standard Co. Ltd.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] , where it was observed (SCC p. 208):

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51. The view of the Allahabad High Court in *U.P. State Handloom Corpn. Ltd.* v. *Asha Lata Talwar* [*U.P. State Handloom Corpn. Ltd.* v. *Asha Lata Talwar*, 2009 SCC OnLine All 624 : (2009) 4 All LJ 397] appears to be consistent with the scheme of the Act, and in particular Section 34 thereof which is a departure from the scheme of Section 16 of the 1940 Act which perhaps gave the Court a wider amplitude of powers. Under Section 34(2) of the Act, the Court is empowered to set aside an arbitral award on the grounds specified therein. The remand to the arbitrator under Section 34(4) is to a limited extent of requiring the Arbitral Tribunal 'to eliminate the grounds for setting aside the arbitral award'. There is no specific power granted to the court to itself allow the claims originally made before the Arbitral Tribunal where it finds the Arbitral Tribunal erred in rejecting such claims. If such a power is recognised as falling within the ambit of Section 34(4) of the Act, then the court will be acting no different from an appellate court which would be contrary to the legislative intent behind Section 34 of the Act. Accordingly, this Court declines to itself decide the claims of CNPL that have been wrongly rejected by the learned arbitrator."

29. The Delhi High Court in *Nussli Switzerland Ltd.* v. *Organizing Committee, Commonwealth Games, 2010* [*Nussli Switzerland Ltd.* v. *Organizing Committee, Commonwealth Games, 2010*, 2014 SCC OnLine Del 4834] , held : (SCC OnLine Del para 34)

"*34*. A party like the Organising Committee which has its claims rejected, except a part, but which subsumes into the larger amount awarded in favour of the opposite party, even if succeeds in the objections to the award would at best have the award set aside for the reason the Arbitration and Conciliation Act, 1996 as distinct from the power of the court under the Arbitration Act, 1940, does not empower the court to modify an award. If a claim which has been rejected by an Arbitral Tribunal is found to be faulty, the

court seized of the objections under Section 34 of the Arbitration and Conciliation Act, 1996 has to set aside the award and leave the matter at that. It would be open to the party concerned to commence fresh proceedings (including arbitration) and for this view one may for purposes of convenience refer to sub-section (4) of Section 43 of the Arbitration and Conciliation Act, 1996. It reads:

'**43. *Limitations***.—(1)-(3) * * *

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.' "

30. An instructive judgment of the Delhi High Court in *Puri Construction (P) Ltd.* v. *Larsen & Toubro Ltd.* [*Puri Construction (P) Ltd.* v. *Larsen & Toubro Ltd.*, 2015 SCC OnLine Del 9126] deals with the authorities of the Madras and Calcutta High Courts on the one hand and the other High Courts dealing with this problem as follows : (SCC OnLine Del paras 115-16 & 118)

"*115*. In these circumstances, this Court holds that the reliefs granted by the Tribunal cannot be sustained and are hereby set aside. The question that follows is whether this Court, exercising jurisdiction under Section 37 read with Section 34 of the Act, can modify, vary or remit the award. At the outset, it is noticed that there are divergent views on this issue. Here, the Court notices a somewhat divergent approach of various High Courts. The case law is discussed in the following part of the judgment.

Authorities in Favour of the Power to Modify, Vary or Remit the award

116. A learned Single Judge of this Court in *Bhasin Associates* v. *N.B.C.C.* [*Bhasin Associates* v. *N.B.C.C.*, 2005 SCC OnLine Del 689 : ILR (2005) 2 Del 88] held that '*the power to set aside an award when exercised by the court would leave a vacuum if the said power was not understood to include the power to remand the matter back to the arbitrator*'. This view was subsequently adopted in Single Bench decisions in *Union of India* v. *Modern*

Laminators Ltd. [*Union of India* v. *Modern Laminators Ltd.*, 2008 SCC OnLine Del 956 : (2008) 3 Arb LR 489] (in the context of modification of the award), *IFFCO-Tokio General Insurance Co. Ltd.* v. *Indo-Rama Synthetics Ltd.* [*IFFCO-Tokio General Insurance Co. Ltd.* v. *Indo-Rama Synthetics Ltd.*, 2015 SCC OnLine Del 6669] (decided on 20-1-2015) and *Canara Bank* v. *BSNL* [*Canara Bank* v. *BSNL*, 2015 SCC OnLine Del 8379] (decided on 26-3-2015). In *Modern Laminators* [*Union of India* v. *Modern Laminators Ltd.*, 2008 SCC OnLine Del 956 : (2008) 3 Arb LR 489] , the Court relied upon the Supreme Court's decision in *Numaligarh Refinery Ltd.* v. *Daelim Industrial Co. Ltd.* [*Numaligarh Refinery Ltd.* v. *Daelim Industrial Co. Ltd.*, (2007) 8 SCC 466] , noting that the Court therein had modified the award in terms of its findings; and the decision in *Krishna Bhagya Jala Nigam Ltd.* v. *G. Harischandra Reddy* [*Krishna Bhagya Jala Nigam Ltd.* v. *Harischandra Reddy*, (2007) 2 SCC 720] , where the interest rate awarded by the arbitrator was modified. The learned Single Judge in *Canara Bank* relied upon a decision of a Single Judge of the Madras High Court in *Gayatri Balaswamy* v. *ISG Novasoft Technologies Ltd.* [*Gayatri Balaswamy* v. *ISG Novasoft Technologies Ltd.*, 2014 SCC OnLine Mad 6568 : (2015) 1 Mad LJ 5] The Court in *Gayatri Balaswamy* [*Gayatri Balaswamy* v. *ISG Novasoft Technologies Ltd.*, 2014 SCC OnLine Mad 6568 : (2015) 1 Mad LJ 5] examined the issue in significant [sic] and held as follows : (*Gayatri Balaswamy case* [*Gayatri Balaswamy* v. *ISG Novasoft Technologies Ltd.*, 2014 SCC OnLine Mad 6568 : (2015) 1 Mad LJ 5] , SCC OnLine Mad para 52)

'*52*. Therefore, in my considered view, the expression "recourse to a court against an arbitral award" appearing in Section 34(1) cannot be construed to mean only a right to seek the setting aside of an award. Recourse against an arbitral award could be either for setting aside or for modifying or for enhancing or for varying or for revising an award. The expression "application for setting aside such an award" appearing in Sections 34(2) and (3) merely prescribes the form, in which, a person can seek recourse against an arbitral award. The form, in which an application has to be made, cannot curtail the substantial right conferred

by the statute. In other words, *the right to have recourse to a court, is a substantial right and that right is not liable to be curtailed, by the form in which the right has to be enforced or exercised*. Hence, in my considered view, the power under Section 34(1) includes, within its ambit, the power to modify, vary or revise.'

The same view had been adopted earlier by Single Bench decisions of the Bombay High Court in *Axios Navigation Co. Ltd.* v. *Indian Oil Corpn. Ltd.* [*Axios Navigation Co. Ltd.* v. *Indian Oil Corpn. Ltd.*, 2012 SCC OnLine Bom 4 : (2012) 114 (1) Bom LR 392] and *Angerlehner Structurals & Civil Engg. Co.* v. *Municipal Corpn. of Greater Mumbai* [*Angerlehner Structurals & Civil Engg. Co.* v. *Municipal Corpn. of Greater Mumbai*, 2012 SCC OnLine Bom 1454 : (2013) 7 Bom CR 83] and a Division Bench of the Calcutta High Court in *W.B. Electronics Industries Development Corpn. Ltd.* v. *Snehasis Bhowmick* [*W.B. Electronics Industries Development Corpn. Ltd.* v. *Snehasis Bhowmick*, 2012 SCC OnLine Cal 10262] .

Authorities holding there is no power to Modify, Vary or Remit the award

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118. This Court is inclined to follow the decisions in *Central Warehousing Corpn.* [*Central Warehousing Corpn.* v. *A.S.A. Transport*, 2007 SCC OnLine Mad 972] , *DDA* [*DDA* v. *Bhardwaj Bros.*, 2014 SCC OnLine Del 1581] , *State Trading Corpn. of India Ltd.* [*State Trading Corpn. of India Ltd.* v. *Toepfer International Asia PTE Ltd.*, 2014 SCC OnLine Del 3426], *Bharti Cellular Ltd.* [*Bharti Cellular Ltd.* v. *Deptt. of Telecommunications*, 2012 SCC OnLine Del 4846], *Cybernetics Network (P) Ltd.* [*Cybernetics Network (P) Ltd.* v. *Bisquare Technologies (P) Ltd.*, 2012 SCC OnLine Del 1155] and *Asha Talwar* [*U.P. State Handloom Corpn. Ltd.* v. *Asha Lata Talwar*, 2009 SCC OnLine All 624 : (2009) 4 All LJ 397] . The guiding principle on this issue was laid down by the Supreme Court in *McDermott International Inc.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181], where the Court held :

(*McDermott International Inc. case* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] , SCC p. 208, para 52)

'*52*. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.'

Although the Madras High Court in *Gayatri Balaswamy* [*Gayatri Balaswamy* v. *ISG Novasoft Technologies Ltd.*, 2014 SCC OnLine Mad 6568 : (2015) 1 Mad LJ 5] appropriately noted that these observations in *McDermott International Inc.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] were not in the context of the specific issue being dealt herewith, this Court is of the opinion that it is determinative of the Court's approach in an enquiry under Section 34 of the Act. Indeed, a court, while modifying or varying the award would be doing nothing else but "*correct[ing] the errors of the arbitrators*". This is expressly against the *diktat ofMcDermottInternational Inc.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] Further, if the power to remit the matter to the arbitrator is read into Section 34, it would render inexplicable the deliberate omission by Parliament of a provision analogous to Section 16 of the Arbitration Act, 1940 in the present Act. Section 16 of the 1940 Act specifically armed courts with the power to remit the matter to arbitration. Noticeably, the scope of remission under the present Act is confined to that prescribed in sub-section (4) of Section 34. Besides the Division Bench rulings of this Court in *DDA* [*DDA* v. *Bhardwaj Bros.*, 2014 SCC OnLine Del 1581] , *State Trading Corpn. of India Ltd.* [*State Trading*

Corpn. of India Ltd. v. *Toepfer International Asia PTE Ltd.*, 2014 SCC OnLine Del 3426] , this was also noted by a Full Bench of the Bombay High Court in *R.S. Jiwani* v. *Ircon International Ltd.* [*R.S. Jiwani* v. *Ircon International Ltd.*, 2009 SCC OnLine Bom 2021 : (2010) 1 Bom CR 529] , where the Court held : (*R.S. Jiwani case* [*R.S. Jiwani* v. *Ircon International Ltd.*, 2009 SCC OnLine Bom 2021 : (2010) 1 Bom CR 529] , SCC OnLine Bom paras 28 & 35)

'*28*. … An award can only be set aside under the provisions of Section 34 as there is no other provision except Section 33 which permits the Arbitral Tribunal to correct or interpret the award or pass additional award, that too, on limited grounds stated in Section 33. …

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35. … It is also true that there are no pari materia provisions like Sections 15 and 16 of the Act of 1940 in the 1996 Act but still the provisions of Section 34 read together, sufficiently indicate vesting of vast powers in the court to set aside an award and even to adjourn a matter and such acts and deeds by the Arbitral Tribunal at the instance of the party which would help in removing the grounds of attack for setting aside the arbitral award.'

On the other hand, the Calcutta High Court in *Snehasis Bhowmick* [*W.B. Electronics Industries Development Corpn. Ltd.* v. *Snehasis Bhowmick*, 2012 SCC OnLine Cal 10262] did not analyse this distinction, or the specific observations of the Supreme Court in *McDermott International Inc.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] quoted above. Further, the decisions in *Numaligarh Refinery* [*Numaligarh Refinery Ltd.* v. *Daelim Industrial Co. Ltd.*, (2007) 8 SCC 466] and *Harischandra Reddy* [*Krishna Bhagya Jala Nigam Ltd.* v. *Harischandra Reddy*, (2007) 2 SCC 720] did not discuss the Court's power to modify, vary or remit the award under Section 34 of the Act. Therefore, in light of the *dictum* in *McDermott International Inc.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] and the difference in provisions of the 1940 Act and the present Act, this Court holds that the power to

> modify, vary or remit the award does not exist under Section 34 of the Act."
>
> (emphasis in original)
>
> **31.** Thus, there can be no doubt that given the law laid down by this Court, Section 34 of the Arbitration Act, 1996 cannot be held to include within it a power to modify an award. The sheet anchor of the argument of the respondents is the judgment of the learned Single Judge in *Gayatri Balaswamy* [*Gayatri Balaswamy* v. *ISG Novasoft Technologies Ltd.*, 2014 SCC OnLine Mad 6568 : (2015) 1 Mad LJ 5] . This matter arose out of a claim for damages by an employee on account of sexual harassment at the workplace. The learned Single Judge referred to the power to modify or correct an award under Section 15 of the Arbitration Act, 1940 in para 29 of the judgment. Thereafter, a number of judgments of this Court were referred to in which awards were modified by this Court, presumably under the powers of this Court under Article 142 of the Constitution of India. In para 34, the learned Single Judge referred to para 52 in *McDermott case* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] and then concluded that since the observations made in the said para were not given in answer to a pointed question as to whether the court had the power under Section 34 to modify or vary an award, this judgment cannot be said to have settled the answer to the question raised finally."

31. It must, however, be borne in mind that *M. Hakeem* was essentially concerned with the validity of the District and Sessions Judge enhancing the amount of compensation as awarded by the Collector in its award while entertaining a petition under Section 34 of the Act. It was in that backdrop that the Supreme Court observed that the only option available to the Section 34 court would have been to set aside the award if it be found to suffer from any of the infirmities prescribed in Section 34 and that while considering a challenge to an award, no power existed in a court to modify or vary the terms of the award.

32. As a preface to the discussion which follows, it must therefore be recognised that the question which falls for consideration would be whether *M. Hakeem* while proscribing a modification of an award by a Section 34 court should be read as an authority for the proposition that there can be no partial setting aside. While dealing with this aspect we would have to also bear in mind whether a conscious decision by the Legislature to desist from adopting provisions akin to Sections 15 and 16 of the Arbitration Act, 1940 should be read as being representative of an intent to deprive courts from exercising a power to set aside an award partially.

33. We may at this juncture itself also notice a recent decision rendered by the Supreme Court in **M/s Larsen Air Conditioning and Refrigration Company v. Union of India & Ors**[15] in which *N. Hakeem* came to be reiterated as would be evident from the following passages: -

> " **15**. The limited and extremely circumscribed jurisdiction of the court under Section 34 of the Act, permits the court to interfere with an award, sans the grounds of patent illegality, i.e., that "illegality must go to the root of the matter and cannot be of a trivial nature"; and that the 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" [ref: Associate Builders (supra)]. The other ground would be denial of natural justice. In appeal, Section 37 of the Act grants narrower scope to the appellate court to review the findings in an award, if it has been upheld, or substantially upheld under Section 34. It is important to notice that

the old Act contained a provision which enabled the court to modify an award. However, that power has been consciously omitted by Parliament, while enacting the Act of 1996. This means that the Parliamentary intent was to exclude power to modify an award, in any manner, to the court. This position has been iterated decisively by this court in *M. Hakeem*:

> "42. It can therefore be said that this question has now been settled finally by at least 3 decisions [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , [Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106] , [Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the "limited remedy" under Section 34 is coterminous with the "limited right", namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996."

16. In view of the foregoing discussion, the impugned judgment warrants interference and is hereby set aside to the extent of modification of rate of interest for past, pendente lite and future interest. The 18% per annum rate of interest, as awarded by the arbitrator on 21.01.1999 (in Claim No. 9) is reinstated. The respondent-state is hereby directed to accordingly pay the dues within 8 weeks from the date of this judgment."

34. While attempting to answer the issues flagged above, we must at the outset, acknowledge the shift in legislative policy which underlies the Act and which mandates intervention by courts to be minimal. This flows from the recognition of the theory that once parties have agreed to the resolution of their disputes by an alternative adjudicatory forum, courts must as a matter of first principle refrain from interfering with the process or the decision except on the limited grounds that the statute recognises. Courts are thus obliged to bear in mind the principle of minimalist intervention insofar as awards are concerned. This also flows from the legislative command of the resolution of disputes by way of arbitration being accorded a finality as opposed to endless challenges that may otherwise be resorted to under the normal justice dispensation system of nations. For after all, if arbitration is to be truly accorded the status of an effective alternative resolution mechanism and consequently insulated from myriad challenges that may otherwise be available under ordinary law, the aforesaid self-imposed restraints would always have to be borne in the forefront. It is these objectives which enjoin courts to desist from adopting an "interventionist" position and stepping into the fray only where patent illegalities are found to exist or where the arbitration is shown to suffer from fundamental and manifest errors.

35. The aforesaid aspect was succinctly explained by Shakdher J. while speaking as a Judge of the Madras High Court in **Interbulk Trading SA v. Adam and Coal Resources Private Limited**[16]**:-**

> "Preface:
>
> **RAJIV SHAKDHER, J.**:— Let me preface this judgment with two aspects, which crossed my mind during the course of arguments advanced before me.
>
> **2.** First, is there a perfect answer to every legal issue, which comes before the Court.
>
> **3.** Second, will the Court try and reduce the rigours of obligations reflected in a commercial contract, executed between two entities, having equal bargaining power.
>
> **4.** In so far as the first aspect is concerned, I would be the first one to confess, that there is no perfect answer to every legal problem, which is why, in an adversarial system, one party goes back, feeling dissatisfied.
>
> **5.** A quietus is put to litigation, only because of a hierarchical system that the Courts maintain. As Judges we are trained to be interventionist. We attempt to set right, in a manner of speech, that slightly crooked picture hanging on the wall, till we reach, what according to us, is a just solution.
>
> **6.** Whether such an approach is right or wrong, is often governed, both by the jurisdiction that a Judge sits in and the personal disposition as well as predilection of a person exercising that jurisdiction. Some jurisdictions have more width and amplitude than others. Restraints are often self-imposed.
>
> **7.** Arbitration is one such jurisdiction, where the temptation for a judge to straighten that proverbial crooked picture is, immense. Repeatedly, the interventionist in the Judge comes to fore, however, in my view and experience the rule, which should play out, is that, once, parties have made their bed, they should be made to sleep on it. Any other approach is a recipe for docket clogging

[16] 2016 SCC OnLine Mad 10306

> and is often seen to give succour to critics, and perhaps, rightly, that the alternate dispute resolution system is a failing proposition.
>
> **8.** Having said so, the exception to this approach should be : that obvious case of fraud, compromised integrity of arbitrators and plainly erroneous awards, which go against the stated position of law and, hence, border on perversity and/or, those awards, which go against public policy."

36. However, and at the same time while courts are enjoined to follow the minimalist intervention route, it would clearly be a travesty of justice if they were to fail to intervene where circumstances warrant and demand corrective measures being adopted. It is these compulsions which have led to courts evolving the serious irregularity or the patent illegality grounds to interfere with an award. Section 34 is a clear and unequivocal embodiment of the Legislature's intent to balance these competing facets of arbitration.

37. That takes us to the heart of the issue that arises, namely, the partial annulment of an award. Undisputedly, Section 34(2)(a)(iii) speaks of a part of an award being exorcised from the rest. The Court also finds no justification to lend too much credence on Article 34 of the Model Law ultimately failing to allude to a partial setting aside power even though that was provisioned for in explicit terms in draft Articles 29, 30, 40 and 41. This since neither the Working Group Reports nor the contemporaneous material that we have noticed hereinbefore seem to suggest a conscious deletion of that power. The considerable material, on the aspects surrounding partial setting aside that we have had an occasion to review, does not evidence any deliberation or discussion which may have predicated or actuated its

deletion. The said material is also not indicative of any principled decision that may have been taken by member nations for deletion of the partial setting aside power. Its absence from Article 34 which came to be ultimately adopted stands lost in a mist of conjecture. The Court, however, is of the opinion that no useful purpose would be served in speculating on this aspect any further since one would still have to consider whether the power to set aside an award in part stands lost by virtue of Section 34 as it presently stands. The Court has in any case found that the deletion of references to partial setting aside does not appear to have been premised on any principled decision to deprive courts of such a power.

38. In our considered opinion, therefore, the answer to the question which stands posed would have to be rendered on an interpretation of the phrase "setting aside" as ultimately adopted and forming part of Section 34. As was noticed hereinbefore, Section 34(2)(a)(iii) does speak of an award being set aside in part. We find that the key to understanding the intent underlying the placement of the Proviso in sub-clause (iv) of Section 34(2)(a) is in the nature of the grounds for setting aside which are spoken of in clause (a). As would be manifest from a reading of the five sub-clauses which are positioned in Section 34(2)(a), those constitute grounds which would strike at the very heart of the arbitral proceedings. The grounds for setting aside which are set forth in clause (a) strike at the very foundation of validity of arbitration proceedings. Sub-Clauses (i) to (v) thus principally

constitute grounds which would render the arbitration proceedings void ab initio. Although the Section 34(2)(a)(iv) ground for setting aside also falls in the same genre of a fundamental invalidity, the Legislature has sought to temper the potential fallout of the award being set aside in toto on that score. The Proviso to sub-clause (iv) seeks to address a comprehensibly conceivable situation where while some parts of the award may have dealt with non-arbitrable issues or disputes falling outside the scope of the reference, its other components or parts constitute an adjudication which could have been validly undertaken by the AT. The Proviso thus seeks to address such a situation and redeems as well as rescues the valid parts of an award. This saves the parties from the spectre of commencing arbitral proceedings all over and from scratch in respect of all issues including those which could have validly formed part of the arbitration.

39. The grounds for setting aside encapsulated in Section 34(2)(b) on the other hand relate to the merits of the challenge that may be raised in respect of an award and really do not deal with fundamental invalidity. However, the mere fact that the Proviso found in sub-clause (iv) of Section 34(2)(a) is not replicated or reiterated in clause (b) of that provision would not lead one to conclude that partial setting aside is considered alien when a court is considering a challenging to an award on a ground referable to that clause. In fact, the Proviso itself provides a befitting answer to any interpretation to the contrary. The Proviso placed in Section 34(2)(a)(iv) is not only an acknowledgment

of partial setting aside not being a concept foreign to the setting aside power but also of parts of the award being legitimately viewed as separate and distinct. The Proviso itself envisages parts of an award being severable, capable of segregation and being carved out. The Proviso is, in fact, the clearest manifestation of both an award being set aside in part as well as an award comprising of distinct components and parts.

40. Undoubtedly, an award may comprise a decision rendered on multiple claims. Each claim though arising out of a composite contract or transaction may be founded on distinct facts and flowing from separate identifiable obligations. Just as claims may come to be preferred resting on a particular contractual right and corresponding obligation, the decision which an AT may render on a particular claim could also be based on a construction of a particular covenant and thus stand independently without drawing sustenance on a decision rendered in the context of another. If such claims be separate, complete and self-contained in themselves, any decision rendered thereon would hypothetically be able to stand and survive irrespective of an invalidity which may taint a decision on others. As long as a claim is not subordinate, in the sense of being entwined or interdependent upon another, a decision rendered on the same by the AT would constitute an award in itself. While awards as conventionally drawn, arranged and prepared may represent an amalgam of decisions rendered by the AT on each claim, every part

thereof is, in fact, a manifestation of the decision rendered by it on each claim that may be laid before it. The award rendered on each such claim rules on the entitlement of the claimant and the right asserted in that regard. One could, therefore, validly, subject of course to the facts of a particular case, be entitled to view and acknowledge them as binding decisions rendered by the AT on separate and distinct claims.

41. The Court notes in this regard that Mr. Mukhopadhaya**,** Mr. Rajshekhar Rao, learned senior counsels as well as Mr. Ashim Sood had urged that while an award as ultimately rendered may contain findings on numerous claims, the decision rendered in respect of each such claim is entitled to be viewed as an award in itself. This, according to learned counsels, clearly flows from the power of the AT to not just render a final award but also and in the course of arbitral proceedings render interim awards in respect of various claims. It was rightly pointed out by learned counsels that each such decision on a claim could stand independently and be final and binding in itself. Those findings or decisions in relation to various claims that stand placed before the AT may each constitute an award itself and the operative directions framed representing the disposition of all such claims. As was rightly contended by Mr. Mukhopadhaya**,** the declaration with respect to entitlement and the award of a money claim consequent thereto would be liable to be viewed as independent Arbitral Awards. Mr. Sood had chosen to describe such a disposition

of claims as being an *"agglomeration"* of awards. The Court accords its emphatic and wholehearted acceptance to the aforenoted submissions and comes to the conclusion that an award is thus liable to be viewed and understood accordingly. It thus comes to conclude that each such decision rendered by an AT could be validly viewed as the decision rendered on a particular claim and thus constituting an independent award in itself.

42. Once an award is understood as comprising of separate components, each standing separately and independent of the other, there appears to be no hurdle in the way of courts adopting the doctrine of severability and invoking a power to set aside an award partly. The power so wielded would continue to remain one confined to "setting aside" as the provision bids one to do and would thus constitute a valid exercise of jurisdiction under Section 34 of the Act. That takes us to the question whether the adoption of such a course would be contrary to what the Supreme Court had forbidden in *M. Hakeem*.

43. The Supreme Court in *M. Hakeem*, as would be evident from the passages of that decision extracted hereinabove, has enunciated the setting aside power as being equivalent to a power to annul or setting at knot an Arbitral Award. It has essentially held that bearing in mind the plain language of Section 34 coupled with the Act having desisted from adopting powers of modification or remission that existed in the erstwhile 1940 Act, a court while considering a challenge under

Section 34 would not have the power to modify. The expression "modify" would clearly mean a variation or modulation of the ultimate relief that may be accorded by an AT. However, when a Section 34 Court were to consider exercising a power to partially set aside, it would clearly not amount to a modification or variation of the award. It would be confined to an offending 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 must be borne in mind.

44. We note that such a recourse was accorded a judicial imprimatur in **J.G. Engineers (P) Ltd. v. Union of India**[17] by the Supreme Court where it observed:-

> ***"Re: Question (ii)***
>
> **24.** The arbitrator had considered and dealt with Claims 1, 2, 3, 4 and 5, 6, 7 and 8, 9 and 11 separately and distinctly. The High Court found that the award in regard to Items 1, 3, 5 and 11 was liable to be set aside. The High Court did not find any error in regard to the award on Claims 2, 4, 6, 7, 8 and 9, but nevertheless chose to set aside the award in regard to these six items, only on the ground that in the event Counterclaims 1 to 4 were to be allowed by the arbitrator on reconsideration, the respondents would have been entitled to adjust the amounts awarded in regard to Claims 2, 4, 6, 7, 8 and 9 towards the amounts that may be awarded in respect of Counterclaims 1 to 4; and that as the award on Counterclaims 1 to 4 was set aside by it and remanded for fresh decision, the award in regard to Claims 2, 4, 6, 7, 8 and 9 was also liable to be set aside.
>
> **25.** It is now well settled that if an award deals with and decides several claims separately and distinctly, even if the court finds

[17] (2011) 5 SCC 758

> 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. As the award on Items 2, 4, 6, 7, 8 and 9 was upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to Claims 2, 4, 6, 7, 8 and 9 of the appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to Claims 2, 4, 6, 7, 8 and 9."

45. *J.G. Engineers* thus clearly affirms a power vesting in the Court to segregate different parts of the award and which may relate to independent and identifiable claims and thus upholding those parts which do not suffer from any legal infirmity or fall foul of the grounds of challenge set out in Section 34(2).

46. One of the earliest judgments rendered by this High Court in which the power to set aside an award in part was recognised is **State Trading Corporation of India Ltd. v. Toepfer International Asia Pte Ltd.**[18] The learned Judge in *State Trading Corporation* observed thus:

> "**7**. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an arbitral award is in no sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand, the decision under review may either be invalidated in whole or in part or be left to stand if the plea for

[18] 2014 SCC OnLine Del 3426

> annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process."

47. The Telangana High Court in **Saptarishi Hotels Pvt. Ltd. and Anr. v. National Institute of Tourism & Hospitality Management (NITHM)**[19] had upon noticing *J.G. Engineers* held in paragraph 33 as follows:-

> **"33.** In *J.G. ENGINEERS PVT. LTD.* v. *UNION OF INDIA*, the Supreme Court observed that it is now well settled that if an Award deals with and decides several claims separately and distinctly and if such Award is found to be bad in regard to some items, the Court would be entitled to segregate the Award on the items which did not suffer from any infirmity so that it could be upheld to that extent. The Award in that case was sustained in part and set aside in relation to rest of it. In effect, the Supreme Court modified the Award."

48. However in paragraph 35, the said High Court has observed as under:-

> **"35.** The aforestated case law makes it clear that the Court exercising power under Section 34 of the Act of 1996 is not restrained from interfering with the arbitral Award even by way of modification. It can modify the Award, by sustaining it in relation to parts thereof and setting it aside in relation to others, as

[19] 2019 SCC OnLine TS 1765

> long as such parts are severable. Therefore, the very foundational premise, which formed the basis for the decisions in **DIRK INDIA PRIVATE LIMITED** and **NUSSLI SWITZERLAND LTD.**, stands shaken. Once it is accepted that the Court exercising power under Section 34 can modify the Award, if warranted, as per the provisions thereof and in the light of the case law cited supra, the party whose claim was rejected during the arbitral proceedings, as reflected in the final Award, cannot be left remediless (See *SUNIL VASUDEVA* v. *SUNDAR GUPTA*) during the pendency of the petition filed by such party under Section 34. It may be necessary for such party to seek interim measures of protection, as contemplated under Section 9. As rightly pointed out by the Gujarat High Court in **GAIL (INDIA) LTD.**, there is no distinction drawn, as per the language of Section 9, between a party who has succeeded in the arbitral proceedings as opposed to a party who has lost and both are equally entitled to invoke the provisions of Section 9, even after passing of the final arbitral Award but before execution thereof. In this context, it may be noted that even if the final Award is a 'nil' Award as in the case on hand, once it is accepted that there is a possibility of the nature of the Award being changed by exercise of jurisdiction by the Court under Section 34, it cannot be ruled out that a 'nil' Award may transform into an Award favouring one or the other party. Be it noted that in the case on hand, both parties have filed petitions under Section 34 and they are pending consideration. That being so, until the disposal of these pending petitions under Section 34, the appellants cannot be non-suited on the ground that the Award in question is a 'nil' Award, disentitling them from invoking the provisions of Section 9."

The only caveat that we propose to record insofar as the aforenoted observations are concerned is that where parts of an award are found to be unsustainable and severable, there setting aside would clearly not amount to a modification, an expression which the learned Judges have chosen to employ in *Saptarishi Hotels.*

49. In **Navayuga Engineering Company Ltd. vs. Union of India**[20], the Kerala High Court drawing sustenance from *J.G. Engineers* had observed as follows:-

> "**14.** As in the aforesaid decision, in the case on hand also, the award has dealt with and decided several claims separately and distinctly. Therefore, if the court finds the award with regard to some claims to be bad, the court can segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. If such an interpretation is not given, it would result in gross injustice and absurd results because the court would have to set aside that portion of the award also which suffers from no infirmity. This certainly cannot be what was contemplated by the Legislature. No reference has been made to *J.G. Engineers Pvt. Ltd.* (supra) in *Hakeem's case* nor has it been distinguished or overruled. The decision in *J.G. Engineers Pvt. Ltd.* is apparently not under Article 142 of the Constitution also. That being the position, we find that the doctrine of severability can be applied to proceedings under Section 34 also because as held in *R.S. Jiwani* (supra), if a person can challenge an award in part, certainly the court can also set aside an award in part. That being the position, we negative the argument advanced on behalf of the appellant that the impugned order is liable to be set aside on the said preliminary ground alone."

50. The Court notes that the most comprehensive review of the issue was undertaken by the Full Bench of the Bombay High Court in **R.S. Jiwani v. Ircon International Ltd**.[21] The Full Bench of the Bombay High Court in *R.S. Jiwani* made the following pertinent observations: -

> **"16.** In terms of section 34(1) recourse to a Court against an arbitral award has been limited by the Legislature which can be made only by one mode that is, by filing an application for setting aside an arbitral award in accordance with provisions of sub-

[20] 2021 SCC OnLine Ker 5197
[21] 2009 SCC OnLine Bom 2021

section (2) and sub-section (3) of the Act. Sub-section (3) primarily prescribes the limitation within which an application for setting aside an award can be made that the Court would entertain such an application only within 3 months from the date on which the party making application received the award and would entertain it after the prescribed limitation of three months only if sufficient cause is shown within a period of 30 days and not thereafter. The ambit and the scope of power setting aside an arbitral award are entirely controlled by section 34(2). An arbitral award may be set aside by the Court only if the grounds stated in sub-section (2) are satisfied and application to that effect are placed before the Court. The expression 'May' sufficiently indicates that larger discretion is vested in the Court which has to be exercised in accordance with the settled canons of judicial discretion and the context would require that the expression 'may' should be read as 'may' alone and does not admit or invite any other meaning or interpretation. The other expression which is of significance is 'only if. The word 'only if empowers the Court to set aside an award only if conditions of sub-clauses (a) and (b) of sub-section (2) are satisfied. In other words, it is for the grounds stated in the said provisions alone that the award can be set aside and not otherwise. Further an obligation is cast upon the applicants to furnish proof thereof. The word "proof again has some definite value in law and it cannot be equated to the word 'ground' or 'alleged facts'. Thus, the provisions of sub-section (2) of section 34 contemplate a higher degree of deliberation than a mere statement of fact when an award is challenged. It is expected that the documents produced in evidence before the arbitral tribunal would be the proof in support of an objection raised by an applicant. The applicant should be able to demonstrate from the record that his objection is supported by evidence and is not a mere objection for the sake of objecting. The word "proof need be understood in the sense in which it is defined in the Evidence Act because proof depends upon the admissibility of evidence. A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This is the definition given for the word "proved" in the Evidence Act. What is required is production of such materials on which the Court can reasonably act to reach the supposition that a fact exists. 'Proof of the fact depends upon the degree of probability of its having existed. The standard required for reaching

the supposition is that of a prudent man acting in any important matter concerning him. *M. Narsinga Rao* v. *State of A.P.*, (2001) 1 SCC 691.

17. The argument raised before us is that sub-clauses (i) to (iii) and (v) of clause (a) of sub-section (2) of section 34 are the grounds where it is mandatory for the Court to set aside the whole award and there is no other choice before the Court. It is only in the class of cases falling under section 34(2)(a)(iv) that with the aid of the proviso to that sub-section, the Court can apply principle of severability. In that case, if the matter submitted to the arbitration can be separated from the one not submitted then the Court may set aside that part of the award alone which is not submitted to arbitration. This argument is founded on the Division Bench judgment of this Court in the case of *Mrs. Pushpa P. Mulchandani* v. *Admiral Radhakrishin Tahiliani*, 2008(7) LJ Soft, 161, and which was relied upon by the respondents for inviting the decision against the Appellant. Thus, we have to examine the provision of section 34 of the 1996 Act to find whether it permit of any other interpretation than the one put forward by the respondents. Sub-clauses (i), (ii), (iii) and (v) of clause (a) of sub-section (2) of section 34 deal with certain situations which may require the Court to set aside an award of the arbitral tribunal. These may be the cases where the party was under incapacity, the agreement is not valid under the law in force, where proper notice was not given to the party or otherwise enable to present his case, and the composition of arbitral tribunal or procedure was not in accordance with the agreement between the parties and lastly the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. Explanation to section 34(2) which is in the nature of a declaration further explains that when an award is in conflict with the public policy of India when the award was induced or affected by (i) fraud or (ii) by corruption; or (iii) was in violation of section 75 or 81 of the Act. It is difficult for this Court to hold that under all these categories it would be inevitable for the Court to set aside the entire award. It may not be very true that even under these categories, it would be absolutely essential for the Court to set aside an award. It is true that where a party was under incapacity or was not served with the notice at all and the arbitration agreement itself was not valid that an award may have to be set aside in its entirety. But even within these clauses, there is possibility of a situation where it may not be

necessary for the Court to set aside the entire award. Let us take an example that where a party is given a notice has participated in the proceedings before the arbitral tribunal but was unable to lead evidence or present himself or submit his counter claim. Would it be fair for the Court to set aside an award of the arbitral tribunal in its entirety in this situation? A party who participated in the arbitral proceeding even led evidence and cross-examined the witnesses of the claimants in relation to the claims but for any reason was not able to place his evidence on record in relation to the counter claims or he was not granted sufficient opportunity to present his case or for some reason was unable to present his case before the arbitral tribunal, would it not be just, fair, equitable and in line with the object of the Act of 1996 to consider setting aside award only regarding counter claim. Is such a party which has succeeded in the claims made by it, which are otherwise lawful and not hit by any of the stated circumstances, should be awarded his reliefs while either rejecting or even altering the award with regard to the counter claim filed by the aggrieved party before the Arbitrator. Situation may be different where arbitration agreement is not valid. In other words, where claim is unlawful the Supreme Court in the case of *Karnail Singh* v. *State of Haryana*, 1995 Supp (3) SCC 376 held that not valid would mean unlawful and equated it to void.

> "8. 'Void' dictionarily means, ineffectual, nugatory; having no legal force or binding effect, unable in law to support the purpose for which it was intended; nugatory and ineffectual so that nothing can cure it; not valid. In Words and Phrases (American), Vol. 44, published by West Publishing Co., at page 319 it is stated thus:
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> > "A 'void' thing is nothing; it has no legal effect whatsoever; and no rights whatever can be obtained under it or grow out of it. In law it is the same thing as if the void thing had never existed."
>
> What was declared void was election. That is the process which led to choosing or selecting appellant as a member was invalid. The legal effect of declaration granted by the Tribunal was that the election of the appellant became non-existent resulting automatically in nullifying the earlier declaration. The declaration did not operate from the date it was granted but it related back to the date when election was held. The legislative provision being clear and the Tribunal being vested only with power of declaring election to be void the entire controversy about

voidable and void was unnecessary. The appellant could not therefore, claim any pension under section 7A of the 1975 Act."

18. In the event the arbitration agreement between the parties is not valid means where it is unlawful or void, the whole award will have to be set aside as the very root of the matter suffers from a defect of law and is not valid under the law for the time being in force. Severability is an established concept. It is largely applicable to various branches of civil jurisprudence. Where it is possible to sever the bad part from the good part, the good part of the contract can always be enforced and partial relief can be granted. Doctrine of severability has been applied to law of Contract since time immemorial of course, it could be said that substantial severability and not textual divisibility is the principle controlling this concept. In the case of *Shin Satellite Public Co. Ltd.* v. *Jain Studios Ltd.*, (2006) 2 SCC 628 where the Supreme Court was dealing with an agreement between the parties for availing broadcasting services in favour of the petitioner therein by the respondent. Because of the dispute between the parties, arbitration clause was invoked to which defence was taken by the respondent that the claim of the petitioner was not maintainable inasmuch as clause 20 of the agreement was against the public policy and was not enforceable. The Supreme Court in the light of para 430 of Halsbury Law of England, 4th Edition, Volume 9, page 297 finally held as under:-

"**430.***Severance of illegal and void provisions*— A contract will rarely be totally illegal or void and certain parts of it may be entirely lawful in themselves. The question therefore arises whether the illegal or void parts may be separated or 'severed' from the contract and the rest of the contract enforced without them. Nearly all the cases arise in the context of restrain of trade, but the following principles are applicable to contracts in general.

First, as a general rule, severance is probably not possible where the objectionable parts of the contract involve illegality and not mere void promises. In one type of case, however, the Courts have adopted what amounts almost to a principle of severance by holding that if a statute allows works to be done up to a financial limit without a licence but requires a licence above that limit, then, where works are done under a contract which does not specify an amount but which in the event exceeds the financial limit

permitted without licence, the cost of the works up to that limit is recoverable.

Secondly, where severance is allowed, it must be possible simply to strike out the offending parts but the Court will not rewrite or rearrange the contract.

Thirdly, even if the promises can be struck out as aforementioned, the Court will not do this if to do so would alter entirely the scope and intention of the agreement.

Fourthly, the contract, shorn of the offending parts, must retain the characteristics of a valid contract, so that if severance will remove the whole or main consideration given by one party the contract becomes unenforceable. Otherwise, the offending promise simply drops out and the other parts of the contract are enforceable.

Reference may be made to Chitty on Contracts (29th Edn. Vol. 1) pp. 1048-49:

> **"16-188.***Introductory.*— Where all the terms of a contract are illegal or against public policy or where the whole contract is prohibited by statute, clearly no action can be brought by the guilty party on the contract; but sometimes, although parts of a contract are unenforceable for such reasons, other parts, were they to stand alone, would be unobjectionable. The question then arises whether the unobjectionable may be enforced and the objectionable disregarded or 'severed'. The same question arises in relation to bonds where the condition is partly against the law.
>
> **16- 189.***Partial statutory invalidity.*— It was laid down in some of the older cases that there is a distinction between a deed or condition which is void in part at common law. This distinction must now be understood to apply only to cases where the provisions shall be wholly void. Unless that is so, then provided the good part is separable from and not dependent on the bad, that part only will be void which contravenes the provisions of the statute. The general rule is that 'where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality by created by statute or by the common law, you may reject the bad part and retain

the good'. Thus, a covenant in a lease that the tenant should pay 'all parliamentary taxes', only included such as he might lawfully pay, and a separate covenant to pay the landlord's property tax, which it was illegal for a tenant to contract to pay, although void, did not affect the validity of the instrument. In some situations where there is a statutory requirement to obtain a licence for work above a stipulated financial limit but up to that limit no licence is required, the Courts will enforce a contract up to that limit. There is some doubt whether this applies to a lump sum contract 'for a single and indivisible work'. Even in this situation if the cost element can be divided into its legal and illegal components, the Courts will enforce the former but not the latter."

(Emphasis supplied)

15. It is no doubt true that a Court of law will read the agreement as it is and cannot rewrite nor create a new one. It is also true that the contract must be read as a whole and it is not open to dissect it by taking out a part treating it to be contrary to law and by ordering enforcement of the rest if otherwise it is not permissible. But it is well settled that if the contract is in several parts, some of which are legal and enforceable and some are unenforceable, lawful parts can be enforced provided they are severable.

16. xxxxxxxxx

17. In several cases, Courts have held that partial invalidity in contract will not *ipso facto* make the whole contract void or unenforceable. Wherever a contract contains legal as well as illegal parts and objectionable parts can be severed, effect has been given to legal and valid parts striking out the offending parts."

19. Similar situations also had arisen under section 23 of the Contract Act where a contract was partly lawful and partly unlawful. The contract where the unlawful parts were severable from lawful parts had been held to be enforceable.

[Referred *Canbank Financial Services* v. *Custodian*, (2004) 8 SCC 355.]

20. The cases would be different where it is not possible or permissible to sever the award. In other words, where the bad part of the award was intermingled and interdependent upon the good parts of the award there it is practically not possible to sever the award as the illegality may affect the award as a whole. In such cases, it may not be possible to set aside the award partially. However, there appears to be no bar in law in applying the doctrine of severability to the awards which are severable. In the case of *Messrs. Basant Lal Banarsi Lal* v. *Bansi Lal Dagdulal*, AIR 1961 SC 823, though the Supreme Court was dealing with an application for setting aside an award passed by the Bombay City Civil Court, contending that forward contract in groundnuts were illegal as making of such contracts was prohibited by Oil Seeds (Forward Contract Prohibition) Order, 1943 and hence arbitration clause contained in the forward contracts in groundnuts between the parties was null and void, where it was found as a matter of fact that it was not possible to segregate the dispute under the various contracts as there was direct link between them. The Supreme Court held as under:

> "It would follow that the arbitration clause contained in that contract was of no effect. It has therefore to be held that the award made under that arbitration clause is a nullity and has been rightly set aside. The award, it will have been noticed, was however in respect of disputes under several contracts one of which we have found to be void. But as the award was one and is not severable in respect of the different disputes covered by it, some of which may have been legally and validly referred, the whole award was rightly set aside."

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24. Now a further question that falls for consideration of this Court is as to whether there is anything contained in 1996 Act which prohibits in law the Court from adopting the approach applicable under the 1940 Act or prohibits applicability of principle of severability to the awards under 1996 Act. We are unable to see any prohibition much less an absolute bar in the provisions of section 34 of 1996 Act to that effect. There could be instances falling under section 34(2)(a), sub-sections (iii) and (v) where the principle of severability can safely be applied. These provisions do not specifically or impliedly convey legislative intent which

prohibits the Courts from applying this principle to the awards under the 1996 Act. Again for example, an Arbitral Tribunal might have adopted a procedure at a particular stage of proceeding which may be held to be violative of principles of natural justice or impermissible in law or the procedure was not in accordance with the agreement between the parties but the parties waived such an objection and participate in the arbitration proceedings without protest, in that event it will be difficult for the Court to hold that the good part of the award cannot be segregated from the bad part.

25. Section 4 of the 1996 Act has been enacted by the Legislature to control the conduct of the parties during the arbitral proceedings. The purpose appears to be that unnecessary technical objections with regard to the continuation or otherwise of the arbitration proceedings and challenge to an award on that ground at a subsequent stage should be discouraged. This itself is indicative of the legislative intent not to unnecessarily prolong the litigation on such believable objection which may be waived. The language of section 34(2) does not use any specific language which debars the Court from exercising its discretion otherwise vested in it by virtue of its very creation to set aside the award wholly or partially as the case may be.

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30. If the principles of severability can be applied to a contract on one hand and even to a statute on the other hand, we fail to see any reason why it cannot be applied to a judgment or an award containing resolution of the disputes of the parties providing them such relief as they may be entitled to in the facts of the case. It will be more so, when there is no statutory prohibition to apply principle of severability. We are unable to contribute to the view that the power vested in the Court under section 34(1) and (2) should be construed rigidly and restrictedly so that the Court would have no power to set aside an award partially. The word “set aside” cannot be construed as to ‘only to set aside an award wholly’, as it will neither be permissible nor proper for the Court to add these words to the language of section which had vested discretion in the Court. Absence of a specific language further supported by the fact that the very purpose and object of the Act is expeditious disposal of the arbitration cases by not delaying the proceedings before the Court would support our view otherwise the object of Arbitration Act would stand defeated and frustrated.

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33. It must be understood that the scope of judicial intervention under section 34 is very limited and cannot be equated to the powers of a civil appellate Court. The award can be set aside on the grounds stated in these provisions and that is what is emphasized by the use of expression 'only'. The Supreme Court in the case of Mc Dermott International Inc. v. Burnt Standard Co. Ltd., (2006) 11 SCC 181 has discussed in some elaboration the cases where the Court can interfere with the awards and/or set aside the award. Mere appreciation of evidence or an error simpliciter in appreciation of fact or law may not essentially fall within the class of cases which may be covered within the ambit and scope of section 34 of the Act. We will shortly proceed to discuss this aspect of law but only insofar as it is relevant for answering the question posed before the larger Bench.

34. Number of cases have been relied upon and referred by the learned counsel appearing for the respective parties. One set of cases have taken the view that partial setting aside of the award is permissible and the Court can exercise its discretion while granting partial relief to the parties. On the other hand, the rival contention is that an award can partially be set aside only if a case falls under proviso to section 34(2)(iv) and the Court is bound to set aside the entire award in other cases and leave the parties to such remedy as may be available to them in law. The judgments of this Court as well as the other Courts which take the former view are *Mt. Amir Begum* v. *Syed Badruddin Husain*, AIR 1914 PC 105; *Mattapalli Chelamayya* v. *Mattapalli Venkataratnam*, (1972) 3 SCC 799; *The Upper Ganges Valley Electricity Supply Co. Ltd.* v. *The U.P. Electricity Board*, (1973) 1 SCC 254; *State of Orissa* v. *Niranjan Swain*, (1989) 4 SCC 269; *Union of India* v. *Jain Associates*(1994) 4 SCC 665; *J.C Budhraja*v. *Orissa Mining Corpn. Ltd.*, 2008(3) Mh.L.J. (SC) 33 : (2008) 2 SCC 444; *Poonam International Co. Pvt. Ltd*. v. *ONGC*, 1998(1) Arb. LR 28; *Union of India* v. *M L. Dalmiya*, AIR 1977 Cal 266; *Metro Electric Co.* v. *DDA*, AIR 1976 Del 195; *Umraosingh and Co., Lucknow* v. *State of Madhya Pradesh*, AIR 1976 MP 126; *Anandilal Poddar* v. *Keshavdeo Poddar*, AIR (36) 1949 Cal. 549; *S.B. Garware* v. *D.V. Garware*, AIR 1939 Bom. 296; *Dagdusa Tilakchand* v. *Bhukan Govind Shet*, 1884 Indian Law Reports Vol. IX 82; *Mehta Teja Singh and Co.* v. *UOL*AIR 1977 Del. 231, *Union of India* v. *Artie India, Arb. Petn. No. 355/2004 (SJ); and Sanyukt Nirmata* v. *IIT*. 1986 (2) Arb

LR 33 (Del); *while Rakomder Lrosjam Ljamma* v. *IPO*, (1998) 7 SCC 129; *ITDC* v. *T.P. Sharma*, (2002) 3 RAJ 360 (Del); *Mc Dermott International* v. *Burns Standard Co. Ltd.*, (2006) 11 SCC 181 cases including the Division Bench judgment of this Court take the later view. We have given detailed reasoning as to why the view taken by the Division Bench of this Court in the case of *Ms. Pushpa Mulchandani* (supra) may not be a correct view of law. It will be appropriate to discuss the reasoning given by the Division Bench while taking that view in some detail. In the case of Ms. *Pushpa Mulchandani* (supra), the Court was concerned with a case where the disputes and differences had been referred to the Arbitrator and the Arbitrator had made his award holding that the testator willed the goodwill of his trading concerns to the Trust and other ancillary matters like tenancy and conversion of a partnership concern into a limited company and its winding up of the business. Aggrieved from the award of the Arbitral Tribunal, a petition was filed under section 34 of the 1996 Act on different grounds. The grounds raised were rejected by the learned Single Judge who declined to interfere with the award. This judgment of the learned Single Judge was challenged before the Division Bench on two grounds; (a) the award had been vitiated on account of non-compliance of provision of sub-section (3) of section 24 of the Act due to non-supply of copies of the valuation report on which the award was based and (b) the award had been passed after termination of mandate of the arbitrator. The Division Bench discussed various aspects of the case and it finally allowed the appeal, set aside the award as well as the judgment of the learned Single Judge. In the present case, we are not concerned with the merits of this case as such. The only relevance of the order of the Division Bench for answering the present reference is whether the Division Bench has taken a correct view that the only option with the Court was to set aside the whole award and not part thereof. The relevant part of the judgment of the Division Bench we have already reproduced above. The Division Bench while taking that view recorded reasons that it is not permissible for the Court to modify the award even if it finds that only part of the award is affected by illegality, the Court has to still set aside the entire award unless a party had applied under the provisions of section 34(4) of the Act. While taking this view, the Division Bench entirely relied upon para 52 of the judgment of the Supreme Court in the case of *McDermott International* (supra). It must be noticed at the very outset that the Supreme Court in that case was not

concerned with the application of principle of severability of award. The Court was primarily concerned with the ambit and scope of section 34(2) in its entirety. The contention of severability neither came up for consideration nor has been dealt with by the Supreme Court in the entire judgment as the Court was not called upon to decide such an issue. In *stricto sensu* the proviso to section 34(2)(iv) may not literally apply to the entire provision of section 34(2) but can certainly be taken as a yardstick for rest of the provision insofar as exercise of judicial discretion of the Court is concerned. The Supreme Court while considering the provisions of section 34(2) discussed in some detail as to which of the cases would fall under those heads and defined the supervisory role of the Courts under that provision. Discussion on this topic, in fact, starts at paragraph 45 and goes upto paragraph 66 of the judgment. The Supreme Court in that case has defined in particular principle which may be attracted in relation to setting aside of an award. Paragraph 52 relied upon by the Division Bench. Paras 59, 60 and 65 which can be usefully referred to at this stage which read as under:

> 59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the Court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.
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> 60. What would constitute public policy is a matter dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the Court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. [See *State of Rajasthan* v. *Basant Nahata*, (2005) 12 SCC 77].
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> 65. We may consider the submissions of the learned counsel for the parties on the basis of the broad principles which may be attracted in the instant case i.e. (i) whether the award is contrary to the terms of the contract and,

> therefore, no arbitrable dispute arose between the parties; (ii) whether the award is in any way violative of the public policy; (iii) whether the award is contrary to the substantive law in India viz. Sections 55 and 73 of the Indian Contract Act; (iv) whether the reasons are vitiated by perversity in evidence in contract; (v) whether adjudication of a claim has been made in respect whereof there was no dispute or difference; or (vi) whether the award is vitiated by internal contradictions."

Thus, the above observations and dictum held in paragraph 52 has to be construed in the context in which it has been referred to and decided. If a issue is not raised before the Court, no arguments are addressed on that issue and no reasons on an issue is recorded by the Court, such a judgment cannot be treated as a precedent applicable to a subsequent case on the correct application of the principle of *ratio decidendi*. order for a judgment to apply as a precedent, the relevant laws and earlier judgments should be brought to the notice of the Court and they should be correctly applied. Mere observations in a previous judgment may not be binding on a subsequent Bench if they are not applicable to the facts and controversies in a subsequent case as per settled principle of "*ratio decidendi".* The rule of precedent, thus, places an obligation upon the Bench considering such judgments that the Court should discuss the facts and the law of both the cases and then come to a conclusion as to whether the principle enunciated in the previous judgment is actually applicable on facts and in law of the subsequent case. In the case of *Commissioner of Customs (Fort)* v. *Toyota Kirloskar Motor (P) Ltd.*, (2007) 5 SCC 371, the Supreme Court stated the law relating to precedents and held that a decision, as is well known, is an authority for what it decides and not what can logically be deduced therefrom. The ratio of a decision must be culled out from the facts involved in a given case and need not be an authority in generality without reference to the reasons, discussions and facts of the case.

35. The Supreme Court was primarily stating the principles which have been kept in mind by the Courts while interfering with the award of the Arbitral Tribunal that it was to outline the supervisory role of the Courts within the ambit and scope of section 34. It is true that the Court like a Court of appeal cannot correct the errors of arbitrator. It can set aside the award wholly or partially in its discretion depending on the facts of a given case and can even

> invoke its power under section 34(4). It is not expected of a party to make a separate application under section 34(4) as the provisions open with the language "on receipt of application under sub-section (1), the Court may……." which obviously means that application would be one for setting aside the arbitral award to be made under section 34(1) on the grounds of reasons stated in section 34(2) and has to be filed within the period of limitation as stated as reply under section 34(3). The Court may if it deems appropriate can pass orders as required under section 34(4). In other words, the provisions of section 34(4) have to be read with section 34(1) and 34(2) to enlarge the jurisdiction of the Court in order to do justice between the parties and to ensure that the proceedings before the Arbitral Tribunal or before the award are not prolonged for unnecessarily. In our humble view, the Division Bench appears to have placed entire reliance on para 52 by reading the same out of the context and findings which have been recorded by the Supreme Court in subsequent paragraphs. It is also true that there are no pari materia provisions like sections 15 and 16 of the Act of 1940 in the 1996 Act but still the provisions of section 34 read together, sufficiently indicate vesting of vast powers in the Court to set aside an award and even to adjourn a matter and such acts and deeds by the Arbitral Tribunal at the instance of the party which would help in removing the grounds of attack for setting aside the arbitral award. We see no reason as to why these powers vested in the Court should be construed so strictly which it would practically frustrate the very object of the Act. Thus, in our view, the principle of law stated by the Division Bench is not in line with the legislative intent which seeks to achieve the object of the Act and also not in line with accepted norms of interpretation of statute.

51. As would be evident from the aforesaid extracts of the decision in *R.S. Jiwani*, the Bombay High Court had adopted the principles of severability when employed in the context of contracts. It is those principles of severance which were held to be also available to be invoked in the context of a challenge under Section 34. In *R.S. Jiwani* the Bombay High Court also took into consideration the serious prejudice that may be caused in case a power to partially sever was

not countenanced to exist in Section 34. The said observations are of significance since a declaration to the contrary may result in the court setting aside an award in its entirety and thus relegating and compelling parties to commence proceedings afresh even though the offending parts of the award may clearly be severable. That clearly does not appear to be the intent of Section 34.

52. *R.S. Jiwani* was noticed by a learned Judge of this Court in **Union of India vs. Alcon Builders & Engineer (P) Ltd.**[22], where the following observations came to be rendered:-

> *"On partial setting aside of an award*
>
> **18.** In the course of hearing the parties, a preliminary query was raised as to whether, in exercise of its jurisdiction under Section 34 of the A&C Act, this Court can partly set aside an arbitral award. Learned counsel for the parties answered the query in the affirmative, to say that in any case, the challenge was only to the arbitrator's decision on two aspects; and the parties have accepted and acted upon the rest of the award. That being said however, this Court finds it necessary to refer to the decision of the Supreme Court in *NHAI* v. *M. Hakeem* [*NHAI* v. *M. Hakeem*, (2021) 9 SCC 1] , in which case it was held that the court's power under Section 34 of the A&C Act does not include the power to "modify" an award. The question then arises whether partial setting aside of an award would amount to "modification" thereof. It would be beneficial at this point to extract para 42 of *M. Hakeem case* [*NHAI* v. *M. Hakeem*, (2021) 9 SCC 1] which reads as under : (SCC p. 28, para 42)
>
> > "*42*. It can therefore be said that this question has now been settled finally by at least 3 decisions *McDermott International Inc.* v. *Burn Standard Co. Ltd.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] , *Kinnari Mullick* v. *Ghanshyam Das Damani* [*Kinnari Mullick* v. *Ghanshyam Das Damani*,

[22] 2023 SCC OnLine Del 160

(2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106] , *Dakshin Haryana Bijli Vitran Nigam Ltd.* v. *Navigant Technologies (P) Ltd.* [*Dakshin Haryana Bijli Vitran Nigam Ltd.* v. *Navigant Technologies (P) Ltd.*, (2021) 7 SCC 657 : (2021) 4 SCC (Civ) 157] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in *Redfern and Hunter on International Arbitration*, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the 'limited remedy' under Section 34 is coterminous with the 'limited right', namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996."

19. Upon a closer reading of *M. Hakeem case* [*NHAI* v. *M. Hakeem*, (2021) 9 SCC 1] however, it transpires that the said case concerned a claim for payment of compensation for land acquisition and the District Court, in exercise of its powers under Section 34 of the A&C Act, had increased the quantum of compensation awarded by the competent authority. *M. Hakeem case* [*NHAI* v. *M. Hakeem*, (2021) 9 SCC 1] therefore, was not a case where some of several claims made before the Arbitral Tribunal were set aside.

20. In order to better appreciate and apply *M. Hakeem case* [*NHAI* v. *M. Hakeem*, (2021) 9 SCC 1] , and to understand the correct meaning of what amounts to "modification" of an arbitral award, it is necessary to refer to the following decisions:

21. In *J.G. Engineers (P) Ltd.* v. *Union of India* [*J.G. Engineers (P) Ltd.* v. *Union of India*, (2011) 5 SCC 758 : (2011) 3 SCC (Civ) 128] which involved multiple claims dealt with and decided by the arbitrator, this is what the Supreme Court had to say : (SCC p. 775, para 25)

"*25.* It is now well settled 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*…."

22. Then again, in R.S. Jiwani v. Ircon International Ltd. [R.S. Jiwani v. Ircon International Ltd., 2009 SCC OnLine Bom 2021] a Full Bench of the Bombay High Court has dealt with the concept of severability of the decisions on various claims/counterclaims comprised in an award and has held as follows….

23. The judgment in R.S. Jiwani case [R.S. Jiwani v. Ircon International Ltd., 2009 SCC OnLine Bom 2021] has been relied upon recently in a judgment of the Bombay High Court in NHAI v. Commr. [NHAI v. Commr., 2022 SCC OnLine Bom 1688]

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28. Upon a combined and meaningful reading of the provisions of the A&C Act and the aforesaid judicial precedents, in the opinion of this Court, the following position emerges:

29. A court exercising power under Section 34 of the A&C Act cannot "modify" an arbitral award;

30. The arbitrator's decision on each claim and counterclaim, taken individually, is final. "Modification" means to substitute the court's own decision for the decision made by the arbitrator on any given claim or counterclaim; which the court cannot do.

31. If objections are filed under Section 34, impugning the arbitrator's decision only on some of the claims or counterclaims, it is not necessary for the court to set aside the entire arbitral award viz. the decision on all claims and counterclaims. This follows from the limited ambit of the court's powers under Section 34. Besides, the decision on a Section 34 petition cannot go beyond the scope of the challenge itself.

32. When the arbitrator's decisions on multiple claims and counterclaims are severable and not interdependent, the court is empowered under Section 34 to set aside or uphold the arbitrator's decisions on individual and severable claims or counterclaims; without having to set aside the entire arbitral award. That would not amount to modification of the arbitral award.

33. The above is also in line with the overarching principle that the scope of interference by the court under the A&C Act in arbitral

> proceedings and arbitral awards, is to be minimal. The statute does not command the court to go for the overkill. To adapt a phrase famously used by Justice Felix Frankfurter, while exercising power under Section 34, it is not necessary to burn the house to roast the pig."

53. As was rightly propounded in *Alcon Builders*, the injunct of modification as enunciated in *M. Hakeem* would only apply where the Court were to consider rendering its own decision or substituting its own view over that of the Arbitrator on a particular claim. The learned Judge also rightly noticed a situation where a decision only on some parts of an award or counter claims may be laid before a Court. It was in that backdrop significantly observed that it would be wholly unnecessary for a court to set aside the award in its entirety even though the challenge itself may stand confined to certain parts thereof. In *Alcon* too the learned Judge propounded the principles of severability and claims not being inter-dependent so as to enable the Court to consider partially setting aside the award. The views thus expressed in the aforesaid decision clearly commends acceptance and a power of partial setting aside being recognized to inhere in courts. We have already found that Section 34(2)(a)(iv) cannot be construed as being indicative of the legislative intent for a partial setting aside power being available to be invoked only in cases that may fall within the ambit of that clause. In light of the foregoing discussion, we are of the firm opinion that the expression "setting aside" as employed in Section 34 would include the power to annul a part of an award provided it is severable and does not impact or eclipse other components thereof.

54. Viewed in light of the aforesaid, learned counsels appear to be correct in their submission that *M. Hakeem* does not really deal with the question of a partial setting aside of an award. In fact, they appear to be correct in their submission that a partial setting aside may not amount to a variation or modification at all.

55. Of equal significance are the observations appearing in the decision of the Ad-Hoc Committee of the International Centre for Settlement of Investment Disputes[23] which was cited by Dr. George. The Court refers to **Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais**[24] where the Committee observed thus:-

> "**80**. The finding that there is a ground for annulment of the Award under Article 52 of the Washington Convention immediately raises the question of the consequences of that finding. According to Article 52(3) in fine, the "Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)."
>
> In concrete terms, the question is whether, applying the principle of favor validitatis or "partial annulment of legal acts," only a part of the contested award should be annulled, or whether it should be annuled in its entirety.
>
> Generally speaking, partial annulment would seem appropriate if the part of the Award affected by the excess of powers is identifiable and detachable from the rest, and if so, the remaining part of the Award has an independent basis.

[23] ICSID

[24] ICSID Case No. ARB/81/2

> **81**. Such is clearly not the case here. Indeed, the Award rejected Klöckner's claim for payment by a single decision. (pp. 136-137) What the Tribunal terms "this company's responsibility for shortcomings in delivering the factory and in its technical and commercial management" and in the alleged duty of "full disclosure" seem, insofar as one can understand in the Award, to be linked both to the delivery obligation and doubtless above all to the management obligation. It is because of the breach of this "contractual duty of full disclosure" that the Award concludes (p. 109) that Klöckner "is not entitled to the contract price" and that it has already been "paid enough." Since in the Tribunal's view the Award forms a whole, and since the Tribunal, in rejecting the counter-claim, as it were made parallel decisions based on the alleged illegality of Klöckner's lack of frankness, the Award's annulment should also extend to the part relating to the counter-claim.
> That being the case, one does not see how, at least in the Award's operative parts, one can dissociate matters relating solely to a breach of the alleged "duty of full disclosure," and to decide on only *a* partial annulment. This conclusion is moreover confirmed and reinforced, as will be seen below, by the response to some of the other complaints of the Applicant for Annulment."

56. Dr. George had also drawn our attention to a judgment handed down by the Swiss Federal Tribunal in **X._____ v. Z._____ Inc.**[25] where although on facts a partial setting aside was refused, the Court made the following pertinent observations:-

> "Appellant,
>
> X._____,
>
> Represented by Mr Philippe Bärtsch and Mrs Anne-Carole Cremades,
>
> v.
>
> Respondent,
>
> Z._____ Inc.,
>
> Represented by Mr Jean-Philippe Rochat,

[25] 4A_360/2011

> **6.** According to the Appellant the award under appeal must be annulled entirely.
>
> **6.1**. Case law and legal writing recognize the possibility of partial annulment, irrespective of the fact that an appeal against an international arbitral award may only seek its annulment (see Art. 77 (2) LTF ruling out the applicability of Art. 107 (2) LTF) when the issue appealed is independent of the others (judgement 4P.129/2002 of Novembre 2002 at 10; judgement 4P.114/2001 of December 19, 2001 at 1c; Sébastien BESSON, Le recours contre la sentence arbitrale internationale selon la nouvelle LTF (aspects procéduraux), in Bulletin de I'Association suisse de I'arbitrage [ASA], 2007, p. 2 ff, nr. 49; Jean- François POUDRET, Les recours au Tribunal fédéral suisse en matière d'arbitrage international (Commentaire de I'art. 77 LTF), in Bulletin ASA 2007 p. 669 ff, 685 ch. 4.9; KAUFMANN- KOHLER/RIGOZZI, op. cit., p. 484 footnote 565).
>
> **6.2**. In this case the procedural requirement enabling the Court to depart from a full annulment of the award is not met. Indeed, items 1 and 2 of the award refer to global amounts, without any distinction between the various heads of claim involved. These amounts are moreover in various currencies (US dollars and euros) and furthermore result from setoff between the claims of both Parties.
>
> Consequently the award must be annulled entirely. However it goes without saying that notwithstanding the annulment it is only the claims in respect of which the appeal has been granted which will need to be decided again in the new award."

57. We also note that while the Model Law ultimately failed to specifically or explicitly speak of partial setting aside, Section 34 has been understood and interpreted as clearly embodying such a power notwithstanding the same having not been unambiguously spelt out. **Redfern and Hunter (6th Edition)** in their seminal treatise on **International Arbitration** have explained that power in the following terms:-

"**D. Effects of Challenge**

10.89 The effects of a successful challenge differ depending upon the grounds of the challenge, the relevant law, and the decision of the court that dealt with it. This decision in itself may take several forms. The court may decide to confirm the award, refer the award back to the arbitral tribunal for reconsideration, vary the award, or set the award aside, in whole or in part.

10.90 When an award is set aside, it is unenforceable in the country in which it was made, and it will usually be unenforceable elsewhere. In this situation, the party who won the arbitration, but lost the challenge, is in an unenviable position. If, for example, the award has been set aside completely on the basis that the arbitration agreement was null and void, a further resort to arbitration (on the basis of the void agreement) would be out of the question. Resort to litigation might be considered, but there could be problems of time limit, to say nothing of more substantive difficulties.

10.91 If the award has been set aside for procedural defects (for example lack of due process), the party who won the arbitration, but lost the challenge, will have to resubmit the dispute to arbitration and the process will start over again. This is a daunting prospect for even the most resilient claimant.

10.92 A successful party does not wish to be deprived of victory because of a procedural failure on the part of the arbitral tribunal. As the practice of international arbitration becomes increasingly litigious, a party who expects to be on the losing side may seek, during the course of the proceedings, to lay the basis for a claim that the hearing was not conducted fairly. This point should be kept well in mind by parties to an arbitration (usually the claimants) who consider that the arbitral tribunal is being too generous to their opponents in allowing extensions of time and giving them a full opportunity to state their case. Arbitrators are well advised to obtain a clear statement on the record upon conclusion of the last oral hearing that the parties are satisfied with the conduct of the hearing, in order to protect the eventual award. If a party then declares a concern, there is

still time for the tribunal to address it before issuing the final award."

58. A similar instructive enunciation on the scope of partial annulment is found in **International Commercial Arbitration** authored by **Gary B Born.** The relevant parts dealing with the aforesaid subject are extracted hereinbelow**:-**

"[7] **Partial Annulment of Award Under Article 34**

It is clear that partial annulment of arbitral awards is permitted, and in some cases required, by the UNCITRAL Model Law. Article 34 (2)(a)(iii) of the Model Law provides for partial annulment of an award where only part(s) of the award exceeded the jurisdiction of the tribunal: "if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside." As discussed below, courts have applied this provision to annul only parts of awards where other parts of those awards were within the tribunal's authority.

Although other subsections of Article 34(2) lack Article 34(2)(a)(iii)'s express reference to partial annulment (in cases of excess of authority), the same possibility exists under other ground for annulment. Thus if one part of a tribunal's award violates the annulment forum's public policy, or rested on a procedurally-unfair process, then that portion of the award may be annulled without—requiring (or warranting) annulment of separable parts of the award that are unaffected by the relevant public policy or procedural objections. This parallels the treatment of partial recognition under the New York Convention and Article 36 of the Model Law."

59. The Court also acknowledges and records it appreciation for the herculean task which was undertaken by Mr. Arunadhri Iyer, learned counsel, who had placed a detailed note setting out the 451 occasions

when this Court while exercising powers either under Section 34 or Section 37 had set aside awards in part. These were decisions rendered right from 1996 to 2023. The aforesaid precedents which have been detailed in the table placed by Mr. Iyer along with his Note of 18 July 2023 does reinforce the conclusion of partial setting aside as propounded hereinabove.

60. While closing the chapter on the power of a Court to set aside an award in part, the Court deems it apposite to deal with a decision rendered by a Division Bench of our Court in **MBL Infrastructures Ltd. v. Telecommunication Consultants of India**[26]**.** In *MBL* the Division Bench had while considering an appeal preferred under Section 37 of the Act made the following pertinent observations: -

> "**11.1** It is to be noted here that vide impugned judgement dated 10.02.2021, the learned Single Judge has made modifications/corrections in the impugned Award dated 10.01.2020 as under:

1. No.	Claim/Counter-claim MBL/TCIL	Majority Tribunal Award	Amount (Rs.) modified by learned Single Judge
(i)	Against **Claim No. 1**	Rs. 5,14,48,210/-	Rs. 4,14,66,495/-
(ii)	Against **Claim No. 4** (No change)	Rs. 8,00,000/-	Rs. 8,00,000/-
(iii)	Against **Claim No. 7**	Rs. 72,71,257/-	Rs. 2,89,575/-
	Total	Rs.	Rs. 4,25,56,070/-

[26] 2022 SCC OnLine Del 4613

		5,95,19,467/-	
Less:	**Counter Claim No. 2** of the Respondent (No change)	Rs. 3,82,653/-	Rs. 3,82,653/-
	Net	**Rs. 5,91,36,814/-**	**Rs. 4,21,73,417/-**

****

16. It is to be noted that in the present case, the arbitral Award dated 20.01.2020, passed by the Majority Arbitrators, was modified/set aside/corrected. Section 34(2)(a)(iv) deals with separation of the claims and it gives power to the Civil Court to set aside only part of the arbitral Award but the overriding condition is that the said part of the Award, which can be set aside, should have dealt with a dispute, which is beyond the terms of submission to arbitration or the decision made was beyond the scope of submission to arbitration.

16.1 In the present case, where parts of Claim Nos.1 and 7 of the MBL have been set aside, the learned Single Judge has neither pointed out nor exercised his powers under Section 34(2)(a)(iv) of the Act. There is no other power available with the learned Single Judge to set aside a part of the award. The award can only be set aside as a whole. Moreover, the learned Single Judge has no power to modify the award as the same is beyond the scope of Section 34 of the Act.

16.3 The law in this regard is very clear. It is not in doubt that under the Arbitration Act, 1940, the Court had power to modify or correct an Award as provided under Section 15 of the Arbitration Act, 1940. Under Section 16 of the Arbitration Act, 1940, the Court had power to remit the Award back to the arbitrators. These two powers have been expressly taken away after promulgation of the Arbitration and Conciliation Act, 1996.

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17. It is again to be noted here that sub-Section (4) of Section 34 of the Act gives power to the Court to adjourn the proceedings, giving an opportunity to the Arbitral Tribunal to resume its proceedings or to take any other action to eliminate the grounds

> for setting aside the arbitral Award. The said power is to be exercised on the specific request by a party. No such request was made, so there was no occasion even to remit the matter to the Arbitral Tribunal.
>
> *********
>
> **17.3** In the present case, the learned Single Judge has taken upon himself the responsibility of correcting the errors committed by the Arbitrators and has partly set-aside the Award, which is not permissible. The only course open to the learned Single Judge was to quash the Award and leave the parties free to take appropriate action, if he had found that there were numerous errors in the approach of the Majority Arbitrators."

61. All that we deem necessary to observe is the observation made by the Division Bench in paragraph 16.1 that a Section 34 court has no power to set aside an award in part except where the provisions of Section 34(2)(a)(iv) is liable to be appreciated and understood in the context of the facts which obtained in *MBL***.** As is evident from paragraph 11.1, the Section 34 court had not only proceeded to set aside the award rendered by the AT, it had also proceeded to modify and accord relief to the claimant. The adoption of such a course of action is what had been clearly frowned upon by *M. Hakeem*. It was therefore in those circumstances that the Division Bench of our Court was constrained to observe that the Section 34 court had no power to modify the award and made certain observations in paragraph 16.1. The aforesaid view is further fortified from the observations made in paragraph 16.3 and 17.3 where the Division Bench noticed the absence of a power to modify or correct an award existing under the Act as opposed to Sections 15 and 16 which formed part of the 1940

Act. The Court in *MBL* in light of the relief which came to be granted and which evidently not only moulded the relief granted by the AT but proceeded to accord positive relief on a re-appreciation of the case of parties was constrained to hold that the only option available to the learned Single was to quash the award and leave parties free to take appropriate action. This Court therefore, finds that *MBL* also does not detract from the partial setting aside power which this Court has recognised to exist in Section 34.

62. The body of precedent that has evolved around the question that stands raised as well as the authoritative texts that we have had an occasion to review hereinabove thus lends credence to our conclusion that courts could resort to a partial setting aside of an award subject to the conditions noticed above. We however note that while theoretically it may be permissible to view such decisions rendered by an AT as distinct awards in themselves, the complexities of the question which stands posited arises when one proceeds to consider the issue of a partial setting aside or annulment of an award in actuality. Even though an award may be viewed as an agglomeration of the decisions rendered by an AT on various claims, the question of partial setting aside would ultimately depend on whether there is an inextricable link between the offending part of the award with any other part of the disposition.

63. The power to partially sever an offending part of the award would ultimately depend on whether the said decision is independent

and distinct and whether an annulment of that part would not disturb or impact any other finding or declaration that may have been returned by the AT. The question of severability would have to be decided bearing in mind whether the claims are interconnected or so intertwined that one cannot be segregated from the other. This for the obvious reason that if the part which is sought to be set aside is not found capable of standing independently, it would be legally impermissible to partially set aside the award. A partial setting aside should not lead to a component of the award being rendered vulnerable or unsustainable. It is only when the award relates to a claim which is found to stand on its own and its setting aside would not have a cascading impact that the Court could consider adopting the aforesaid mode.

64. For the purposes of demonstration, if the Court views that a finding with respect to entitlement is liable to be upheld, it could be possible to deal with issues of quantification independently. This, since, if the entitlement of the claimant is found worthy of affirmation and it is only a quantification exercise which is found to suffer from a patent illegality that a partial setting aside power could be exercised. Thus. while considering the question of severability, the Court would have to necessarily examine the issue not from a facile or textual point of view but be convinced that the principles of severability can be validly invoked and exercised so as to exorcise an offending part of the award without effecting or impacting any other part thereof.

65. In fact, Dr. George had commended for our consideration the principles of "polycentricity" and referred to an illuminating article by **Lon L. Fuller** titled **The Forms and Limits of Adjudication** as published in the Harvard Law Review. While rendering a view in the context of the adjudicatory process, Fuller spoke of how adjudication may have a ripple effect on various subjects. While dealing with this aspect, the learned author had observed as follows:-

> "As a second illustration suppose in a socialist regime it were decided to have all wages and prices set by courts which would proceed after the usual forms of adjudication. It is, I assume, obvious that here is a task that could not successfully be undertaken by the adjudicative method. The point that comes first to mind is that courts move too slowly to keep up with a rapidly changing economic scene. The more fundamental point is that the forms of adjudication cannot encompass and take into account the complex repercussions that may result from any change in prices or wages. A rise in the price of aluminum may affect in varying degrees the demand for, and therefore the proper price of, thirty kinds of steel, twenty kinds of plastics, an infinitude of woods, other metals, etc. Each of these separate effects may have its own complex repercussions in the economy. In such a case it is simply impossible to afford each affected party a meaningful participation through proofs and arguments. It is a matter of capital importance to note that it is not merely a question of the huge number of possibly affected parties, significant as that aspect of the thing may be. A more fundamental point is that each of the various forms that award might take (say, a three-cent increase per pound, a four-cent increase, a five-cent increase, etc.) would have a different set of repercussions and might require in each instance a redefinition of the "parties affected."
>
> We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the

doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered" - each crossing of strands is a distinct center for distributing tensions.

Suppose, again, it were decided to assign players on a football team to their positions by a process of adjudication. I assume that we would agree that this is also an unwise application of adjudication. It is not merely a matter of eleven different men being possibly affected; each shift of any one player might have a different set of repercussions on the remaining players: putting Jones in as quarterback would have one set of carryover effects, putting him in as left end, another. Here, again, we are dealing with a situation of interacting points of influence and therefore with a polycentric problem beyond the proper limits of adjudication. Let me now mention a polycentric problem that would be difficult to handle by adjudication as usually conducted, where the form of adjudication is sometimes modified to accommodate it to the nature of the problem. A textile mill is in agreement with a labor union that its internal wage scale is out of balance; over the years the payments made for certain kinds of jobs have "got out of line" and are now too high or too low in comparison with what is paid for other jobs. The company and the union agree that a fund equal to five cents an hour for the whole payroll shall be employed to create a proper balance. If the parties are unable to agree on the adjustments that should be made, the question shall go to arbitration.

Here we have a problem with strong polycentric features. If the weavers are raised, say, more than three cents an hour, it will be necessary to raise the spinners; the spinners' wages are, however, locked in a traditional relationship with those of the spinning doffers, etc. If there are thirty different classifications involved, it is obvious how many different forms the arbitration award might take; each pattern of the award could produce its own peculiar pattern of repercussions. If such a problem is presented to a single arbitrator, he will be under strong temptation to "try out" various forms of award in private conversations with the parties. Irregular and improper as such conversations may appear when judged by the usual standards of adjudication, it should be noted that the motive for them may be the arbitrator's desire to preserve the reality of the parties' participation in the decision-to preserve, in other words, the very core of adjudication.

> Now it is in cases like this that the "tripartite" arbitration board finds its most useful application. The "impartial chairman" is flanked by two fellow arbitrators, one selected by the company, the other by the union. After the hearings the three consult together, the impartial chairman at some point proposing to the other members of the board various wage scales. He will in the process learn such things as that an increase for a particular occupation that seemed to him both proper and feasible will have repercussions in the bleachery of which he was unaware.
>
> This is what I have called a "mixed" form of adjudication. In fact the device as I have stated it amounts to a mixture of adjudication and negotiation. All mixed forms have their dangers, and tripartite arbitration is no exception. The danger lies in the difficult role to be played by the flanking arbitrators. They can be neither wholly advocates nor wholly judges. They cannot perform their role adequately if they are completely impartial; it is their task during the deliberations to represent an interest, a point of view. It may be that they will wish to communicate with the parties they represent to inform themselves of the implications of some step proposed - though whether they should feel free to indulge in such consultations, and if so, to what extent, is one of the ambiguities that plague this form of arbitration. If, on the one hand, each of the flanking arbitrators must represent the party who appointed him, he must at the same time observe some of the restraints that go with a judicial position. If he runs back and forth between those he represents and the meetings of the arbitration board, reporting freely everything that happens during those meetings, the adjudicative process breaks down and there is substituted for it an awkward form of bargaining-in a situation, be it remembered, where negotiation has already failed to produce a solution."

66. The learned author had drawn an analogy from the various tugs and multi-directional pulls to which a string may be subjected and thus distributing tension across an interconnected web. The proverbial spider's web being an allusion to a web of issues. It was in this context that the learned author had spoken of the multi-centred aspect of adjudication where the process itself relates to criss-crossing

strands. What essentially would therefore have to be borne in mind is whether a partial setting aside of a particular module of an award would not precipitate a chain reaction which adversely impacts other parts of the award. The award, as was rightly explained by learned counsels, essentially constitutes Jenga blocks. While it may be possible in fact to remove an individual block, Courts would have to be circumspect and proceed down that path with utmost care and caution and beware of the polycentricity effect of their judicial power.

67. Mr. Gautam Narayan had commended for our consideration the adoption of the "blue pencil test" which is generally employed in the context of contractual provisions. The blue pencil test enables a severance of offending parts of the contract while preserving the substantive bargain struck by parties. The said precept could be validly adopted while considering the issue of severability of an award. However, while hypothetically the adoption of the blue pencil rule could be permissible, Courts would have to proceed with precedence and circumspection bearing in mind the obligation to ensure that the use of the surgeon's scalpel does not scar the other parts of the award.

68. Dr. George had in this regard cited for our consideration the following instructive observations as made by the Supreme Court in **Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.**[27]

> **"27.** The proper test for deciding validity or otherwise of an agreement or order is "substantial severability" and not "textual divisibility". It is the duty of the court to sever and separate trivial

[27] (2006) 2 SCC 628

> or technical parts by retaining the main or substantial part and by giving effect to the latter if it is legal, lawful and otherwise enforceable. In such cases, the court must consider the question whether the parties could have agreed on the valid terms of the agreement had they known that the other terms were invalid or unlawful. If the answer to the said question is in the affirmative, the doctrine of severability would apply and the valid terms of the agreement could be enforced, ignoring invalid terms. To hold otherwise would be
>
> "to expose the covenanter to the almost inevitable risk of litigation which in nine cases out of ten he is very ill-able to afford, should he venture to act upon his own opinion as to how far the restraint upon him would be held by the court to be reasonable, while it may give the covenantee the full benefit of unreasonable provisions if the covenanter is unable to face litigation"."

69. The Court is thus of the firm opinion that the power to set aside an award in part would have to abide by the considerations aforenoted mindful of the imperatives of walking a line which would not dislodge or disturb another part of the award. However as long as the part which is proposed to be annulled is independent and stands unattached to any other part of the award and it could be validly incised without affecting the other components of the award, the recourse to partial setting aside would be valid and justified.

D. THE SECTION 34(4) QUESTION

70. In order to understand the width of the power exercisable in terms of Section 34(4) of the Act one may usefully refer to the drafts which were circulated for the consideration of the Working Group and the notes of discussion drawn in the course of its deliberations. As far back as in the Sixth Session, the Working Group while drafting

Article 30 included therein sub-article (3) which is akin to Section 34(4) as it stands presently. Draft Article 30(3) sought to empower courts, where it was found appropriate, on a request of a party to direct arbitral proceeding to be continued and thus enabling the AT to attend to procedural defects. The discussion which followed appears to indicate that member Nations had all agreed that Article 30(3) was a salutary provision which would enable an AT to cure a procedural defect without courts being constrained to "vacate" the award. When the matter was taken up again in the Seventh Session of the Working Group, Article 34(4) was framed recognising an identical exercise of limited remission being resorted to by courts where it was found that an omission or other procedural defect could be cured without the court being compelled to set aside the award. The discussion of the Working Group suggests that Article 34(4) was accepted to constitute a useful device for the purposes of attending to procedural defects and thus avoiding the situation of the award being set aside in its entirety.

71. From the Travaux Préparatoires which have been noticed in the preceding parts of this decision, it is evident that the sentiment of a power vesting in courts to remit the award enabling arbitrators to cure defects was reiterated. It becomes significant to note the suggestion which was mooted by the Observer for Bulgaria who had suggested that paragraph 4 of Article 34 be reworded to be read as an opportunity to eliminate such grounds as may be remediable without a re-opening of arbitral proceedings. The Observer for the Islamic

Republic of Iran had suggested that paragraph 4 should be restricted to curing defects in the award itself and had raised a cautionary note of the said provision not being viewed as one empowering arbitrators to either review the award or attempt to revalidate the same. However, and on account of a lack of consensus, paragraph 4 came to be adopted and retained in terms as originally drafted.

72. The UNCITRAL Year Book while explaining the scope of Article 34(4) of the Model Law has spoken of the same being aimed at empowering the AT to take appropriate measures for eliminating "remediable defects" and which may constitute a ground for setting aside the award itself.

73. The scope and intent of the Section 34(4) power has formed the subject matter of consideration of various decisions handed down by our Supreme Court itself. The issue firstly fell for consideration in **Kinnari Mullick v. Ghanshyam Das Damani**[28] where the principal question which arose was whether the Court could relegate parties to the AT after having set aside the Arbitral Award in purported exercise of powers conferred by Section 34(4). In *Kinnari Mullick*, the Supreme Court held that Section 34(4) can be invoked only while an Arbitral Award still exists. It was thus held that once the award has been set aside, the matter cannot be remanded to the AT. The relevant passages of that decision are extracted hereinbelow:-

[28] (2018) 11 SCC 328

"15. On a bare reading of this provision, it is amply clear that the Court can defer the hearing of the application filed under Section 34 for setting aside the award on a written request made by a party to the arbitration proceedings to facilitate the Arbitral Tribunal by resuming 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. The quintessence for exercising power under this provision is that the arbitral award has not been set aside. Further, the challenge to the said award has been set up under Section 34 about the deficiencies in the arbitral award which may be curable by allowing the Arbitral Tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award. No power has been invested by Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in sub-section (4) of Section 34. This legal position has been expounded in *McDermott International Inc.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] In para 8 of the said decision, the Court observed thus : (*Bhaskar Industrial case* [*Bhaskar Industrial Development Ltd.* v. *South Western Railway*, 2016 SCC OnLine Kar 8330] , SCC OnLine Kar)

> "*8. … Parliament has not conferred any power of remand to the Court to remit the matter to the Arbitral Tribunal except to adjourn the proceedings as provided under sub-section (4) of Section 34 of the Act*. The object of sub-section (4) of Section 34 of the Act is to give an opportunity to the Arbitral Tribunal to resume the arbitral proceedings or to enable it to take such other action which will eliminate the grounds for setting aside the arbitral award."
>
> (emphasis supplied)

16. In any case, the limited discretion available to the Court under Section 34(4) can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings. It is crystal clear that the Court cannot exercise this limited power of deferring the proceedings before it suo motu. Moreover, before formally setting aside the award, if the party to the arbitration proceedings fails to request the Court to defer the proceedings pending before it, then it is not open to the party to move an

application under Section 34(4) of the Act. For, consequent to disposal of the main proceedings under Section 34 of the Act by the Court, it would become functus officio. In other words, the limited remedy available under Section 34(4) is required to be invoked by the party to the arbitral proceedings before the award is set aside by the Court.

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18. In *MMTC* [*MMTC* v. *Vicnivass Agency*, 2008 SCC OnLine Mad 584 : (2008) 3 LW 1063] , the Madras High Court, while dealing with the purport of Section 34(4) of the Act in para 22(*c*) of the reported judgment, observed thus : (SCC OnLine Mad)

> "*22.* … (*c*) … On the other hand, Section 34(4) of the new Act, does not prescribe any condition precedent on the substance of the matter but prescribes *three procedural conditions*, namely, that there should be an application under Section 34(1) of the new Act and that a request should emanate from a party and the Court considers it appropriate to invoke the power under Section 34(4) of the new Act."
>
> (emphasis supplied)
>
> Again, in para 22(*e*)(*iv*) of the reported judgment, it observed thus : (SCC OnLine Mad)
>
> "*22.* … (*e*)(*iv*) … But under the 1996 Act, the Court has only two sets of powers after the award is pronounced viz.
>
> (*i*) to set aside the award under Section 34(2); or
>
> (*ii*) to adjourn the proceedings to enable the Arbitral Tribunal to resume the proceedings or to take such other action as in the opinion of the tribunal will eliminate the grounds for setting aside the arbitral award."

74. The issue arose for consideration yet again in **Dyna**

Technologies (P) Ltd. v. Crompton Greaves Ltd.[29] *Dyna Technologies* explained the scope of the provision in the following terms: -

> **"35.** When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.
>
> **36.** At this juncture it must be noted that the legislative intention 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. This provision cannot be brushed aside and the High Court could not have proceeded further to determine the issue on merits.
>
> **37.** In case of absence of reasoning the utility has been provided under Section 34(4) of the Arbitration Act to cure such defects.

[29] (2019) 20 SCC 1

> When there is complete perversity in the reasoning then only it can be challenged under the provisions of Section 34 of the Arbitration Act. The power vested under Section 34(4) of the Arbitration Act to cure defects can be utilised in cases where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34 of the Arbitration Act. However, in this case such remand to the Tribunal would not be beneficial as this case has taken more than 25 years for its adjudication. It is in this state of affairs that we lament that the purpose of arbitration as an effective and expeditious forum itself stands effaced."

75. As is evident from the passages extracted above, this decision too advocates the scope of Section 34(4) as being applicable only in respect of curable defects. Section 34(4) again came up for consideration in **I-Pay Clearing Services (P) Ltd. v. ICICI Bank Ltd.**[30] when the Supreme Court observed**:** -

> **"18.** It is pleaded the appellant that Section 34(4) of the Act is based on Article 34(4) of the UNCITRAL Model Law on International Commercial Arbitration, which came up for consideration before the Singapore Court of Appeals in *AKN* v. *ALC* [*AKN* v. *ALC*, 2015 SGCA 63] , wherein, it was held that remission is a "curative alternative" to setting aside the award. Reference is also made to the judgment of the Singapore High Court in *Permasteelisa Pacific Holdings Ltd.* v. *Hyundai Engg. & Construction Co. Ltd.* [*Permasteelisa Pacific Holdings Ltd.* v. *Hyundai Engg. & Construction Co. Ltd.*, 2005 SGHC 33]
>
> ********
>
> **22.** It is submitted by Shri Viswanathan that in spite of sufficient evidence on record to prove that there was "accord and satisfaction" between the parties, without considering such evidence, the arbitrator has proceeded on the premise that there was

[30] (2022) 3 SCC 121

no "accord and satisfaction" and passed the award in favour of the appellant. The findings recorded on the plea of "accord and satisfaction" in the award without considering the entire evidence on record, constitute patent illegality, as such, same is to be considered only by the Court while considering the application filed under Section 34(1) of the Act. Even assuming that on remittal, the arbitrator wants to consciously hold that there was accord and satisfaction of claims and there was no abrupt and illegal termination of the contract, he would not be able to do so, as he cannot change his own award. The judgments relied on by learned counsel for the appellant are distinguishable on facts and would not render any support to the case of the appellant. Oral submissions made before this Court, run contrary to pleadings on record in the application.

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37. In our view, Section 34(4) of the Act can be resorted to record reasons on the finding already given in the award or to fill up the gaps in the reasoning of the award. There is a difference between "finding" and "reasons" as pointed out by the learned Senior Counsel appearing for the respondent in the judgment in *ITO* v. *Murlidhar Bhagwan Das* [*ITO* v. *Murlidhar Bhagwan Das*, AIR 1965 SC 342] . It is clear from the aforesaid judgment that "finding is a decision on an issue". Further, in the judgment in *J. Ashoka* v. *University of Agricultural Sciences* [*J. Ashoka* v. *University of Agricultural Sciences*, (2017) 2 SCC 609 : (2017) 1 SCC (L&S) 517] , this Court has held that "reasons are the links between the materials on which certain conclusions are based and the actual conclusions".

38. In absence of any finding on Point 1, as pleaded by the respondent and further, it is their case that relevant material produced before the arbitrator to prove "accord and satisfaction" between the parties, is not considered, and the same amounts to patent illegality, such aspects are to be considered by the Court itself. It cannot be said that it is a case where additional reasons are to be given or gaps in the reasoning, in absence of a finding on Point 1 viz. "whether the contract was illegally and abruptly terminated by the respondent?".

39. Further, Section 34(4) of the Act itself makes it clear that it is the discretion vested with the Court for remitting the matter to Arbitral Tribunal to give an opportunity to resume the proceedings or not. The words "where it is appropriate" itself indicate that it is the discretion to be exercised by the Court, to remit the matter when requested by a party. When application is filed under Section 34(4) of the Act, the same is to be considered keeping in mind the grounds raised in the application under Section 34(1) of the Act by the party, who has questioned the award of the Arbitral Tribunal and the grounds raised in the application filed under Section 34(4) of the Act and the reply thereto.

40. Merely because an application is filed under Section 34(4) of the Act by a party, it is not always obligatory on the part of the Court to remit the matter to Arbitral Tribunal. The discretionary power conferred under Section 34(4) of the Act, is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award.

41. Under the guise of additional reasons and filling up the gaps in the reasoning, no award can be remitted to the arbitrator, where there are no findings on the contentious issues in the award. If there are no findings on the contentious issues in the award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself. Under the guise of either additional reasons or filling up the gaps in the reasoning, the power conferred on the Court cannot be relegated to the arbitrator. In absence of any finding on contentious issue, no amount of reasons can cure the defect in the award.

42. A harmonious reading of Sections 31, 34(1), 34(2-A) and 34(4) of the Arbitration and Conciliation Act, 1996, make it clear that in appropriate cases, on the request made by a party, Court can give an opportunity to the arbitrator to resume the arbitral proceedings for giving reasons or to fill up the gaps in the reasoning in support of a finding, which is already rendered in the award. But at the same time, when it prima facie appears that there is a patent illegality in the award itself, by not recording a finding on a contentious issue, in such cases, Court may not accede to the request of a party for giving an opportunity to the Arbitral Tribunal to resume the arbitral proceedings."

76. It becomes pertinent to note that *I-Pay Clearing Services* while taking note of the decision rendered earlier in *Dyna Technologies* and which had expounded the test of a "gap in the reasoning" as being a justifiable ground to proceed under Section 34(4), significantly holds that the provision can be resorted to only in respect of a finding already existing or a conclusion recorded. The Supreme Court significantly observed that the curative tool of "gap in the reasoning" or "additional reasons" would only be liable to be invoked in a case where a finding already exists. Their Lordships observed that Section 34(4) cannot be resorted to where no finding has been returned at all. This since their Lordships found that the absence of any reasoning would constitute a ground which would justify the award itself being set aside. The aforesaid principles as enunciated in *I-Pay Clearing Services* reinforces the curial character of Section 34(4).

77. A reading of the report of *I-Pay Clearing Services* would indicate that the appellant had also cited for the consideration of the Supreme Court a judgment rendered by the Singapore Court of Appeals in **AKN and another v. ALC and others and other appeals**[31]. The Singapore Court of Appeals explained the scope of Article 34(4) in the following terms: -

> "**25.** We deal briefly with the latter two points first. In relation to the second point, although Art 34(4) might be enabling or permissive (presumably with particular emphasis on the word

[31] [2015] SGCA 63

"may" contained in Art 34(4)) in that it enables the court to remit matters in certain circumstances, we cannot see how this advances Mr Yeap's position. The extent to which it enables the remission must be as prescribed by the words of the section. In this regard, it is evident that to avail itself of this power, the court must be satisfied that it is appropriate to suspend the setting aside proceedings in order to give the tribunal an opportunity to take such steps as may be required to eliminate the grounds for setting aside. This is plainly a curative provision which enables the court, faced with the fact there has been some defect which could result in the award being set aside, to take a course that might forestall that consequence. Though this is discretionary, we see no basis for concluding just from the use of the word "may" that there are *no* limits to the power to remit that is conferred by the provision.

26. As to the third point, the argument that an expansive reading is cognisant with the policy of minimal curial intervention is, with respect, misplaced. First, a policy of minimal curial intervention nonetheless calls for such intervention whenever it is warranted; and where it *is* warranted, there is no basis for suggesting that the court should seek somehow to negate or mitigate the effects of its intervention by referring the matter back to the same tribunal. Aside from this, the argument seems to us to be internally inconsistent. An expansive reading of Art 34(4) would mean *more* intervention – not less – for the simple reason that the court would be able to confer further jurisdiction on tribunals in *more* cases and this would almost necessarily be contrary to the legitimate expectations of at least one of the parties, namely the one with a grievance that has been found to be valid. Finally, in our judgment, the expansive interpretation that Mr Yeap urged upon us was simply incapable of being applied without doing violence to the language used in Art 34(4) and indeed, as we shall momentarily see, without breaking faith with the intent of the drafters of the Model Law.

27. We turn now to the history of Art 34(4). In support of his contention that the history of Art 34(4) spoke in favour of an expansive approach, Mr Yeap placed particular emphasis on an excerpt from the work of Mr Chan Leng Sun SC which, according to Mr Yeap, suggests that the *travaux préparatoires* of the Model Law indicate that Art 34(4) "was intended to preserve the national

courts' option to remit an award where it was deemed appropriate": see Chan Leng Sun SC, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 6.219. The full paragraph from the work in question reads:

> **Nonetheless, it is clear from the *travaux preparatoires* of the UNCITRAL Working Group that Article 34(4) of the Model Law 1985 was intended to preserve national courts' option to remit an award where it was deemed appropriate**. The UNCITRAL Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration was ***more explicit on the intent of Article 34(4)***:
>
> > Paragraph (4) envisages a procedure which is similar to the 'remission' known in most common law jurisdictions, although in various forms. Although the procedure is not known in all legal systems, it should prove useful in that in enables the arbitral tribunal to cure a certain defect and, thereby, ***save the award from being set aside by the Court***.
> >
> > Unlike in some common law jurisdictions, the procedure is ***not conceived as a separate remedy but placed in the framework of setting aside proceedings***. The Court, where appropriate and so requested by a party, would invite the arbitral tribunal, whose continuing mandate is thereby confirmed, to take appropriate measures for eliminating a certain remediable defect which constitutes a ground for setting aside under paragraph (2). ***Only if such 'remission' turns out to be futile at the end of the period of time determined by the Court, during which recognition and enforcement may be suspended under article 36(2), would the Court resume setting aside proceedings and set aside the award***.
>
> [emphasis added in bold and bold italics]

28. The portion of the quote that we have highlighted in bold was emphasised by Mr Yeap in his written submissions. However, later in the same paragraph, which, to be fair, was also excerpted in

Mr Yeap's written submissions, it becomes clear from the portions in bold italics that the "explicit intent" of Art 34(4) was that remission was conceived as an *alternative* to setting aside (see the UNCITRAL Analytical Commentary extracted in the previous paragraph).

29. Turning to the history of Art 34(4), it is equally difficult to find support for Mr Yeap's proposition. In one of the earlier drafts, the equivalent provision, which, at the time, was numbered Art 41(4), read (excerpted in *Holtzmann & Neuhaus* at p 933):

> If the court sets aside the award, [it may order that the arbitration proceedings continue for re-trial of the case] [a party may within three months request re-institution of the arbitration proceedings], unless such measure is incompatible with a ground on which the award is set aside.

30. When this draft was reviewed by the UNCITRAL Working Group on International Contract Practices ("the Working Group") in its fifth session, the following was noted (*Report of the Working Group on International Contract Practices on the Work of its Fifth Session*, UN Doc A/CN.9/233 at paras 190–193, excerpted in *Holtzmann & Neuhaus* at pp 936–937):

> 190. Divergent views were expressed as to the appropriateness of retaining a rule along the lines of paragraph (4). Under one view, the provision should be deleted since it dealt in an insufficient manner with procedural questions which were answered in a way not easily reconciled with the different concepts of the various legal systems. It was also pointed out that setting aside should be regarded as a remedy separate from remission to the arbitral tribunal and that the wording between the second square brackets and the following provisio lacked clarity.
>
> 191. However, there was more support for retaining a provision along the lines of paragraph (4), subject to various modifications …
>
> …

> 193. The Working Group, after deliberation, requested the Secretariat to prepare a revised draft …

31. The later draft (excerpted in *Holtzmann & Neuhaus* at p 938) read:

> (3) The Court, when asked to set aside an award, may also order, where appropriate [and if so requested by a party], that the arbitral proceedings be continued. Depending upon the [reason for setting aside] [procedural defect found by the Court], this order may specify the matters to be considered by the arbitral tribunal and may contain other instructions concerning the composition of the arbitral tribunal or the conduct of the proceedings.

32. This, in turn, was reviewed by the Working Group which noted the following in its sixth session (*Report of the Working Group on International Contract Practices on the Work of its Sixth Session*, UN Doc A/CN.9/245 at paras 154–155, excerpted in *Holtzmann & Neuhaus* at p 940):

> 154. Divergent views were expressed as to whether paragraph (3) should be retained. Under one view, the draft provision was useful in that it provided some guidance on procedural questions which were relevant in the case of remission. Under another view, the provision should be deleted since remission was not known in all legal systems and, in particular, the idea of orders or instructions to an arbitral tribunal was not acceptable. Under yet another view, the option of remission should be retained, without the giving of orders or instructions as envisaged in the second sentence; it was stated in support that this device *would allow to cure a procedural defect without having to vacate the award.*
>
> 155. The Working Group, after deliberation, *adopted this latter view* and requested the Secretariat to revise the provision accordingly.
>
> [emphasis added]

****

> **34**. We therefore disagree with Mr Yeap on this point. In our judgment, the court has no power to remit an award *after* it has been set aside. Not only is this founded on the plain words of Art 34(4), but it also accords with good sense. Remission is a curative option that is available to the court in certain circumstances where it considers that it may be possible to avoid setting aside the award. For that reason, remission, in the correct sense, will always be to the same tribunal that made the award that is under the consideration of the court……..”

78. From the aforesaid decisions which have been rendered on the subject, it is manifest that once the Court has been moved by way of an application referable to Section 34(4), it must, at least prima facie, be satisfied that the award suffers from a defect which is curable and thus the ends of justice warranting the AT being accorded an opportunity to take appropriate measures to eliminate the spectre of the award itself coming to be set aside. The necessity of the Court being satisfied in the first instance flows from the provision adopting the phrase *“the Court may where it is appropriate….”*. However, as had been explained by the Supreme Court in *Dyna Technologies* as well as *I-Pay Clearing Services*, the suspension of the setting aside proceedings and the remit to the AT in the meanwhile stands restricted to an opportunity being accorded to it to attend to curable defects only. The said provision clearly appears to be guided by the intent of the Legislature to stave off the possibility of an award coming to be set aside even though it may suffer from a defect or mistake which is remediable.

79. The power conferred by Section 34(4) also cannot be viewed or understood as empowering the AT to either review or reconsider

findings or conclusions that may have already been rendered. Such a course clearly stands injuncted in light of the clear enunciation of the limited review which stands conferred by Section 34(4) in *I-Pay Clearing Services.* The structure of Section 34(4) thus appears to be limited to an opportunity being afforded to the AT to rid the award of defects which are manifest and can be remedied without the foundation of the award or the various findings and conclusions recorded therein being impacted. The remit to the AT in terms of the said provision also cannot be read as a conferral of authority on the AT to reconsider or modify a finding and which may entail what in legal terms is alluded to as a *"merit review"*. It is within this limited window that a court could possibly invoke Section 34(4) and consequently enable the AT to take appropriate measures.

80. To discern the true scope of Section 34(4) and the circumstances in which that provision may be invoked, let us examine certain instances of least complexity which could fall within its ambit. It would be apposite to briefly notice Section 33. The said section makes provisions for a certain category of remedial or curial measures being adopted by a party within 30 days of the award being rendered. While Section 33 (1) (a) provides for correction of computational, clerical, typographical or other errors of a similar nature, Section 33 (1) (b) speaks of the power of the AT to give an interpretation on any particular aspect of an award. The word interpretation as used in that provision appears to be the conferment of a power on the AT to enter

a clarification or explanatory note on any aspect covered under the award. Apart from the above, the AT in terms of Section 33(4) is empowered to pronounce an additional award on claims submitted but not ruled upon.

81. Section 34(4) is undoubtedly and fundamentally curial in character since the same is liable to be invoked in a situation where the Court finds that the adoption of such a course would save the award from being otherwise set aside. The grounds on which an award could be set aside are stipulated in clauses (a) and (b) of Section 34(2). That power has been understood and explained in *M. Hakeem* to stand restricted to a measure relating to setting aside as opposed to variation or modification, powers which were otherwise available with a court under the 1940 Act. Therefore, what *M. Hakeem* proscribes under Section 34(2) cannot be introduced by way of a side wind and read into Section 34(4). Consequently, it must be held that if an award be found to suffer from any of the illegalities which are spelt out in Section 34(2) (a) or (b), it must suffer the fate of being set aside and cannot be saved with the aid of Section 34(4).

82. That leaves one to decipher the true intent behind the introduction of Section 34(4). In order to understand the true scope of that provision one must balance the power of setting aside against the power which is otherwise reserved by Section 34(4). If the power under Section 34(2) be understood to be independent of and separate from the power to afford an opportunity permitting the AT to rectify,

the meaning would be clear. Section 34(4) can only operate in a narrow window which is ordained by the statute to exist outside of Section 34(2). In the scheme of Section 34, sub-section (4) can only be understood to be curative and remedial. It must consequently be accorded a meaning which is distinct from a setting aside power which is otherwise recognized under Section 34(2).

83. It could thus extend to the curative measures contained in Section 33. It could also be recognized to stretch to Section 33(4). However, it cannot extend to the AT undertaking a review of the award or revisiting or revising its opinion which already stands recorded therein. This would also be in accord with the decisions in *Dyna* and *I-Pay Clearing Services* which had recognized that provision as extending to a situation where the AT may have failed to provide adequate reasons or where a gap in the reasoning is discerned. However, those two decisions had also emphasized the narrow window within which such recourse would be available and the folly of the same being extended to a case where no reasons had been recorded. It would thus stand confined to curative and remedial measures which could be adopted by the AT without influencing or modifying the basic structure or edifice of the award.

84. The power under Section 34(4) must thus be held to be confined to an opportunity being accorded to the AT to correct typographical, arithmetical errors akin to those which are conceived in Section 33. It could also extend to situations contemplated under Section 33(4). This

since an award rendered on a claim which has been overlooked would essentially be a fresh award untainted by the adjudicatory proceedings initiated by the AT. This would be a conceivable and justifiable ground to resort to Section 34(4) bearing in mind the plain language and intent underlying Section 32(3) of the Act. It becomes pertinent to note that the mandate of the AT terminates upon the happening of any one of the contingencies stipulated in Section 32. Thus, while ordinarily arbitral proceedings would terminate upon the final award being rendered or where no steps in terms of Section 33 are initiated, Section 32(3) makes the closure of proceedings subject to a court framing a direction in terms of Section 34(4). The Section 34(4) power, undoubtedly, is one which would be invoked only after the award has been rendered. However, in a case where the AT has failed or omitted to rule upon a claim, the Court may exercise its authority under Section 34(4) rather than being compelled to set aside the award merely on the ground that the AT had failed to rule on one of the various claims laid before it. Courts may adopt such a course provided the claim on which the AT is being invited to render its award is independent and the question of entitlement relating thereto not connected to other parts of the award.

85. Steps in terms of Section 34(4) can clearly be taken where the AT is required to provide additional reasons or fill in gaps in the line of reasoning set forth in the award subject to the cautionary note entered by *I-Pay Clearing Services*. The reasoning would necessarily

have to rest on material already existing on the record of the AT. The Court further notes that while it was urged that evident fallacies could also be envisaged as falling within the Section 34(4) power, the argument though attractive, especially when viewed in light of the likely prejudice to be caused to parties in the sense of they being constrained to initiate proceedings afresh, it would be imprudent to concur to the aforesaid submission as broadly articulated for the following reasons.

86. A curative alternative, which Section 34(4) has been understood to represent, cannot be invoked to call upon the AT to review a finding or conclusion that stands rendered or recorded. The examination of a plea of apparent errors or fallacies would necessarily require the AT to revisit its conclusions on merits. An assertion of an ex-facie error may also not and invariably be free of disputation. While apparent mistakes in respect of which parties are ad idem may fall within the ken of Section 34(4), it would be impermissible in the scheme of that provision to acknowledge a mistake or error apparent, as those phrases are legally understood, as constituting valid grounds for application of Section 34(4) *de hors* the facts of a particular case. Ultimately, whether the mistake or error is one which is clearly evident and would merit rectification would be a subject matter of contestation and the position of parties in a particular case. The acceptance of the aforesaid submissions may lead courts down a perilous path and open a further floodgate of judicially recognised

grounds to assail an award. If the delicate and nuanced balance which is sought to be struck by the Legislature between the power of setting aside and the curial measures which are envisaged in Section 34(4) is to be maintained, wisdom lies in restricting its essay within the narrow confines as enunciated above.

D. CONCLUSIONS

87. The Court thus records its conclusions as follows: -

A. While attempting to answer the issues flagged above, we must at the outset, acknowledge the shift in legislative policy which underlies the Act and which mandates intervention by courts to be minimal. This flows from the recognition of the theory that once parties have agreed to the resolution of their disputes by an alternative adjudicatory forum, courts must, as a matter of first principle, refrain from interfering with the same except on the limited grounds that the statute recognises. Courts are thus obliged to bear in mind the principle of minimalist intervention insofar as awards are concerned.

B. However, at the same time while courts are enjoined to follow the minimalist intervention route, it would clearly be a travesty of justice if courts were to fail to intervene where circumstances warrant and demand corrective measures being adopted. It is these compulsions which have led to courts evolving the serious irregularity or the patent illegality grounds to interfere with an award. Section 34 is a clear and unequivocal

embodiment of the Legislature's intent to balance these competing facets of arbitration.

C. Undisputedly, Section 34(2)(a)(iii) speaks of a part of an award being exorcised from the rest. The Court finds no justification to confer too much credence on Article 34 of the Model Law ultimately failing to allude to a partial setting aside power even though that was provisioned for in explicit terms in draft Articles 29, 30, 40 and 41. This since neither the Working Group Reports nor the contemporaneous material that we have noticed hereinbefore seem to suggest a conscious deletion of that power. The considerable material, on the aspects surrounding partial setting aside that we have had an occasion to review, does not evidence any deliberation or discussion which may have predicated or actuated its deletion. The said material is also not indicative of any principled decision that may have been taken by member nations for deletion of the partial setting aside power. Its absence from Article 34 which came to be ultimately adopted stands lost in a mist of conjecture.

D. We find that the key to understanding the intent underlying the placement of the Proviso in sub-clause (iii) of Section 34(2)(a) is in the nature of the grounds for setting aside which are spoken of in clause (a). As would be manifest from a reading of the five sub-clauses which are positioned in Section

34(2)(a), those constitute grounds which would strike at the very heart of the arbitral proceedings. The grounds for setting aside which are set forth in clause (a) strike at the very foundation of validity of arbitration proceedings. Sub-Clauses (i) to (v) thus principally constitute grounds which would render the arbitration proceedings void ab initio. Although the Section 34(2)(a)(iv) ground for setting aside also falls in the same genre of a fundamental invalidity, the Legislature has sought to temper the potential fallout of the award being set aside in toto on that score.

E. The Proviso to sub-clause (iv) seeks to address a comprehensibly conceivable situation where while some parts of the award may have dealt with non-arbitrable issues or disputes falling outside the scope of the reference, its other components or parts constitute an adjudication which could have been validly undertaken by the AT. The Proviso thus seeks to address such a situation and redeems as well as rescues the valid parts of an award. This saves the parties from the spectre of commencing arbitral proceedings all over and from scratch in respect of all issues including those which could have validly formed part of the arbitration.

F. The grounds for setting aside encapsulated in Section 34(2)(b) on the other hand relate to the merits of the challenge that may be raised in respect of an award and really do not deal

with fundamental invalidity. However, the mere fact that the Proviso found in sub-clause (iv) of Section 34(2)(a) is not replicated or reiterated in clause (b) of that provision does not lead one to an inevitable conclusion that partial setting aside is considered alien when a court is considering a challenging to an award on a ground referable to that clause. In fact, the Proviso itself provides a befitting answer to any interpretation to the contrary. The Proviso placed in Section 34(2)(a)(iv) is not only an acknowledgment of partial setting aside not being a concept foreign to the setting aside power but also of parts of the award being legitimately viewed as separate and distinct. The Proviso itself envisages parts of an award being severable, capable of segregation and being carved out. The Proviso is, in fact, the clearest manifestation of both an award being set aside in part as well as an award comprising of distinct components and parts.

G. Undoubtedly, an award may comprise a decision rendered on multiple claims. Each claim though arising out of a composite contract or transaction may be founded on distinct facts and flowing from separate identifiable obligations. Just as claims may come to be preferred resting on a particular contractual right and corresponding obligation, the decision which an AT may render on a particular claim could also be based on a construction of a particular covenant and thus stand

independently without drawing sustenance on a decision rendered in the context of another. If such claims be separate, complete and self-contained in themselves, any decision rendered thereon would hypothetically be able to stand and survive irrespective of an invalidity which may taint a decision on others. As long as a claim is not subordinate, in the sense of being entwined or interdependent upon another, a decision rendered on the same by the AT would constitute an award in itself.

H. While awards as conventionally drawn, arranged and prepared may represent an amalgam of decisions rendered by the AT on each claim, every part thereof is, in fact, a manifestation of the decision rendered by it on each claim that may be laid before it. The award rendered on each such claim rules on the entitlement of the claimant and the right asserted in that regard. One could, therefore, validly, subject of course to the facts of a particular case, be entitled to view and acknowledge them as binding decisions rendered by the AT on separate and distinct claims.

I. Once an award is understood as consisting of separate components, each standing separately and independent of the other, there appears to be no hurdle in the way of courts adopting the doctrine of severability and invoking a power to set aside an award partly. The power so wielded would continue

to remain one confined to "setting aside" as the provision bids one to do and would thus constitute a valid exercise of jurisdiction under Section 34 of the Act.

J. The Supreme Court in *M. Hakeem*, has enunciated the setting aside power as being equivalent to a power to annul or setting at knot an Arbitral Award. It has essentially held that bearing in mind the plain language of Section 34 coupled with the Act having desisted from adopting powers of modification or remission that existed in the erstwhile 1940 Act, a court while considering a challenge under Section 34 would not have the power to modify.

K. The expression "modify" would clearly mean a variation or modulation of the ultimate relief that may be accorded by an AT. However, when a Section 34 Court were to consider exercising a power to partially set aside, it would clearly not amount to a modification or variation of the award. It would be confined to an offending 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 must be borne in mind.

L. The power to partially sever an offending part of the award would ultimately depend on whether the said decision is independent and distinct and whether an annulment of that part would not disturb or impact any other finding or declaration that

may have been returned by the AT. The question of severability would have to be decided bearing in mind whether the claims are interconnected or so intertwined that one cannot be segregated from the other. This for the obvious reason that if the part which is sought to be set aside is not found to stand independently, it would be legally impermissible to partially set aside the award. A partial setting aside should not lead to a component of the award being rendered vulnerable or unsustainable. It is only when the award relates to a claim which is found to stand on its own and its setting aside would not have a cascading impact that the Court could consider adopting the aforesaid mode.

M. The Court is thus of the firm opinion that the power to set aside an award in part would have to abide by the considerations aforenoted mindful of the imperatives of walking a line which would not dislodge or disturb another part of the award. However as long as the part which is proposed to be annulled is independent and stands unattached to any other part of the award and it could be validly incised without affecting the other components of the award, the recourse to partial setting aside would be valid and justified.

N. From the contemporaneous material as well as the decisions rendered on the subject, it is manifest that once the Court has been moved by way of an application referable to

Section 34(4), it must, at least prima facie, be satisfied that the award suffers from a defect which is curable and thus the ends of justice warranting the AT being accorded an opportunity to take appropriate measures to eliminate the spectre of the award itself be coming to be set aside. The necessity of the Court being satisfied in the first instance flows from the provision adopting the phrase *"the Court may where it is appropriate…."*.

O. However, as had been explained by the Supreme Court in *Dyna Technologies* as well as *I-Pay Clearing Services*, the suspension of the setting aside proceedings and the remit to the AT in the meanwhile stands restricted to an opportunity being accorded to it to attend to curable defects only. The said provision clearly appears to be guided by the intent of the Legislature to stave off the possibility of an award coming to be set aside even though it may suffer from a defect or mistake which is remediable.

P. The power conferred by Section 34(4) also cannot be viewed or understood as empowering the AT to either review or reconsider findings or conclusions that may have already been rendered. Such a course clearly stands injuncted in light of the clear enunciation of the limited review which stands conferred by Section 34(4) in *I-Pay Clearing Services.* The structure of Section 34(4) thus appears to be limited to an opportunity being afforded to the AT to rid the award of defects which are

manifest and can be remedied without the foundation of the award or the various findings and conclusions recorded therein being impacted.

Q. The remit to the AT in terms of the said provision also cannot be read as a conferral of authority on the AT to reconsider or modify a finding and which may entail what in legal terms is alluded to as a *"merit review"*. It is within this limited window that a court could possibly invoke Section 34(4) and consequently enable the AT to take appropriate measures.

R. Section 34(4) is undoubtedly and fundamentally curial in character since the same is liable to be invoked in a situation where the Court finds that the adoption of such a course would save the award from being otherwise set aside. The grounds on which an award could be set aside are stipulated in clauses (a) and (b) of Section 34(2). That power has been understood and explained in *M. Hakeem* to stand restricted to a measure relating to setting aside as opposed to variation or modification, powers which were otherwise available with a court under the 1940 Act.

S. Therefore, what *M. Hakeem* proscribes under Section 34(2) cannot be introduced by way of a side wind and read into Section 34(4). Consequently, it must be held that if an award be found to suffer from any of the illegalities which are spelt out in Section 34(2) (a) or (b), it must suffer the fate of being set aside

and cannot be saved with the aid of Section 34(4).

T. The Section 34(4) power could thus extend to the curative measures contained in Section 33. It could also be recognized to stretch to Section 33(4). However, it cannot extend to the AT undertaking a review of the award or revisiting or revising its opinion which already stands recorded therein. This would also be in accord with the decisions in *Dyna* and *I-Pay Clearing Services* which had recognized that provision as extending to a situation where the AT may have failed to provide adequate reasons or where a gap in the reasoning is discerned. It would thus stand confined to curative and remedial measures which could be adopted by the AT without influencing or modifying the basic structure or edifice of the award.

U. The power under Section 34(4) could also extend to situations contemplated under Section 33(4). This since an award rendered on a claim which has been overlooked would essentially be a fresh award untainted by the adjudicatory proceedings initiated by the AT. This would be a conceivable and justifiable ground to resort to Section 34(4) bearing in mind the plain language and intent underlying Section 32(3) of the Act. Section 32(3) makes the closure of proceedings subject to a court framing a direction in terms of Section 34(4). The Section 34(4) power, undoubtedly, is one which would be invoked only

after the award has been rendered. However, in a case where the AT has failed or omitted to rule upon a claim, the Court may exercise its authority under Section 34(4) rather than being compelled to set aside the award merely on the ground that the AT had failed to rule on one of the various claims laid before it. Courts may adopt such a course provided the claim on which the AT is being invited to render its award is independent and the question of entitlement relating thereto not connected to other parts of the award.

V. Steps in terms of Section 34(4) can clearly be taken where the AT is required to provide additional reasons or fill in gaps in the line of reasoning set forth in the award subject to the cautionary note entered by *I-Pay Clearing Services*. The reasoning would necessarily have to rest on material already existing on the record of the AT.

W. The Court further notes that while it was urged that evident fallacies could also be envisaged as falling within the Section 34(4) power, the argument though attractive, especially when viewed in light of the likely prejudice to be caused to parties in the sense of they being constrained to initiate proceedings afresh, it would be imprudent to concur to the aforesaid submission as broadly articulated for the following reasons.

X. A curative alternative, which Section 34(4) has been understood to represent, cannot be invoked to call upon the AT to review a finding or conclusion that stands rendered or recorded. The examination of a plea of apparent errors or fallacies would necessarily require the AT to revisit its conclusions on merits. An assertion of an ex-facie error may also not invariably be free of disputation. While apparent mistakes in respect of which parties are ad idem may fall within the ken of Section 34(4), it would be impermissible in the scheme of that provision to acknowledge a mistake or error apparent, as those phrases are legally understood, as constituting valid grounds for application of Section 34(4) *de hors* the facts of a particular case.

Y. Ultimately, whether the mistake or error is one which is clearly evident and would merit rectification would be a subject matter of contestation and the position of parties in a particular case. The acceptance of the aforesaid submissions may lead courts down a perilous path and open a further floodgate of judicially recognised grounds to assail an award.

Z. If the delicate and nuanced balance which is sought to be struck by the Legislature between the power of setting aside and the curial measures which are envisaged in Section 34(4) is to be maintained, wisdom lies in restricting its essay within the narrow confines as enunciated above.

88. Having ruled on the questions of law which stood raised, these two cross petitions may now be placed before the concerned Roster Bench for further consideration on 14.09.2023.

YASHWANT VARMA, J.

AUGUST 21, 2023
Neha/SU