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To Vary or Not To Vary: The Future of Modification of Arbitral Awards in India

Urvashi Misra, Natasha Singh (AZB & Partners) · Tuesday, December 24th, 2024

In October 2024, the Indian Department of Legal Affairs unveiled the highly anticipated Indian Arbitration and Conciliation (Amendment) Bill, 2024 ("Bill"), inviting comments and feedback on the proposed amendments. While the Bill addresses important aspects, including the formal recognition of emergency arbitration and a clarification of the longstanding ambiguity around the "venue" of an arbitration, it is conspicuously silent on the issue of the power of the Indian courts to modify arbitral awards when they rule on challenges to them.

The modification of arbitral awards by courts is a hotly debated issue in India. With conflicting decisions of co-equal benches on the power of courts to modify awards, in February 2024, this question was referred to a five-judge constitutional bench of the Indian Supreme Court ("SC"), and is currently pending consideration. With this reference, the five-judge bench of the SC is set to decide whether a court while considering a challenge to an arbitral award can only annul, refuse to annul, or remand an arbitral award to the tribunal, or whether it is also empowered to modify the award.

In this post, we examine the Indian legal position concerning the modification of awards and potential paths forward in light of the Bill's reticence on this crucial issue.

Statutory Framework Under the Indian Arbitration and Conciliation Act, 1996

Section 34 of the **Indian Arbitration and Conciliation Act, 1996** ("Act") empowers courts to hear challenges to an arbitral award, and annul the award if one or more of the limited grounds identified in the provision are present. These grounds include the non-arbitrability of the subject-matter of the dispute, the award being in conflict with Indian public policy, or the applying party successfully establishing from the tribunal's record that the arbitration agreement is not valid under the law to which the parties have subjected it. The bare text of Section 34 indicates that courts are only empowered to set aside the arbitral award, not vary the same. Section 37 of the Act further allows parties to appeal a court order setting aside or refusing to set aside an arbitral award under Section 34.

Hands off! Modification Is Not Permissible

Starting with the decision in *McDermott International v. Burn Standard* (2006), the SC has repeatedly warned that the Act only prescribes a supervisory role for Indian courts. While Indian courts are empowered to review arbitral awards for the limited purposes of ensuring fairness, they cannot correct errors committed by the arbitrators. Instead, a court can only set aside the award, leaving the parties with the choice to initiate arbitration afresh.

In subsequent decisions like *Project Director, National Highways No. 45E and 220 National Highways Authority of India v. M. Hakeem* (2021), the SC has bolstered this interpretation by drawing a comparison with Sections 15 and 16 of the erstwhile Indian Arbitration Act, 1940, which specifically empowered courts to vary the content of an arbitral award. In contrast, no such power has been granted in Section 34 of the 1996 Act, which is based on Article 34 of the 1985 UNCITRAL Model Law.. The SC reviewed these provisions and reasoned that Sections 15 and 16 of the erstwhile Indian Arbitration Act, 1940 had been deleted in order to minimize this sort of judicial interference. Under Section 34(4) of the Act, an Indian court can adjourn judicial proceedings so that the arbitral tribunal itself can correct the errors in the remitted award. Courts also have the option to partially annul the award.

Subsequently, the SC in *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India* (2016), *Larsen AC & Refrigeration Co. v. Union of India* (2023), and *S.V. Samudram v. State of Karnataka* (2024) more firmly entrenched this position. In particular, the SC made it clear that the "domino effect" of opening a review on merits under Section 34, particularly on Section 37 appeals, makes modification impermissible.

…Except When It Is

Despite this settled legal position, over the years, there have been several instances of Indian courts revising arbitral awards, including the SC's decisions in *Hindustan Zinc v. Friends Coal Carbonisation* (2006) and *Oriental Structural Engineers Pvt. Ltd. v. State of Kerala* (2021). In other words, the SC has in theory censured the expansion of its jurisdiction to vary arbitral awards, but condoned it in practice. This begs the question: why and how has the SC circumvented its own legal position to allow the judicial revision of arbitral awards?

Article 142 of the Indian Constitution permits the SC to exercise extraordinary jurisdiction when "necessary for doing complete justice". Somewhat counterintuitively, Article 142has regularly been invoked to revise arbitral awards as a residuary provision,. Such a revision has almost always operated in order to vary the sum awarded to the award-holder.

For example, in *Tata Hydro-Electric v. Union of India* (2003) the date from which award-interest would accrue was altered. In *MP Generation v. Ansaldo Energia* (2018), the party was restrained from encashing certain bank guarantees, though the arbitral tribunal had directed the same. Lastly, in a long line of cases, the SC has also altered the amount of interest payable by the award-debtor, amongst them *Royal Education Society v. LIS (India) Construction Co.* (2009), *Vedanta v. Shenzhen Shandong Nuclear Power Construction Co.* (2019) and *Shakti Nath v. Alpha Tiger Cyprus Investment* (2020).

Reference to a Larger Bench

On 10 February 2024, in view of the abovementioned conflicting decisions, a two-judge bench of the SC in *Gayatri Balasamy v. ISG Novasoft Technologies* referred two questions of law to a larger, five-judge bench: *first*, whether a court's power to hear challenges to an award under Sections 34 and 37 of the Act includes the power to revise the award; and *second*, if the court does possess such a power, then to what extent.

Can the Power of a Court to Revise an Award Be Located Within Section 34 of the Act?

As noted above, Section 34 of the Act itself reads that "recourse to a Court against an arbitral award may be made only by an application for setting aside such award", indicating that annulment is the exclusive remedy available to an award-debtor. This is also consistent with the phrasing of heading of Article 34 of the 1985 UNCITRAL Model Law ("Application for setting aside as exclusive recourse against arbitral award") [emphasis supplied].

Interestingly, in *Gayatri Balasamy*, the case which has been now referred to the constitutional bench of the SC, a single-judge bench of the Madras High Court had originally modified the arbitral award, relying, amongst other grounds, on comparable powers in the arbitration statutes of other jurisdictions. These included Sections 67, 68 and 69 of the English Arbitration Act, 1996; Section 49 of the Singapore Arbitration Act, 2001; Section 11 of the US Federal Arbitration Act, 1925; and Section 34A of Australian Model Commercial Arbitration, all of which expressly carve-out powers for the court to vary an arbitral award in limited circumstances.

After analysing the above provisions, the single judge of the Madras High Court opined that the expression "recourse to a Court against an arbitral award" could not be construed to mean only a right to seek the set aside of an arbitral award, but could also be used for setting aside, modifying, enhancing, varying, or revising the arbitral award.

The decision of the single judge was subsequently challenged before a two-judge bench of the Madras High Court. Though the comparative analysis of the single-judge was not specifically addressed by the two-judge bench, each of these statutes expressly provide for the modification of an arbitral award. In contrast, the present construct of Section 34 does not contain any explicit power of the courts to vary the award, and in the absence thereof, it was held that it was implausible to interpret "recourse to a Court against an arbitral award" as an "comprehensive and inclusive expression" which would include such a power simply because a court considers that it is suited for the parties.

The Way Forward

Given the above ambiguity, it is surprising that the Bill remains silent on this issue, leaving unresolved nearly two decades' worth of judicial equivocation on the subject. This omission is particularly noticeable given the fact that the Bill otherwise extensively revamps Section 34, including by introducing the novel mechanism of appellate arbitral tribunals. Interestingly, the Viswanathan Expert Committee, constituted to examine extant arbitration law and propose reforms to the Act, had recommended that Section 34 be amended to allow courts to make "[…] consequential orders varying the award only in exceptional circumstances to meet the ends of justice".

Regardless of whether it was a deliberate choice or an oversight, given the present lacuna in the Bill, there are two paths ahead. Following the practice in other jurisdictions, the legislature can still consider following the recommendation of the Expert Committee and amending the Act to address this issue, *i.e.*, it can permit the Indian courts to modify arbitral awards in "exceptional circumstances", perhaps on an "opt-in" basis, or with the agreement of the parties. Under such a provision, a defect could be rectified where it is possible to do so without altering the award's substantive rights and obligations, or its fundamental basis. This would ensure that the integrity of the arbitral process is maintained while avoiding unnecessary set-asides.

In the event that the legislature opts to maintain *status quo* in this round of amendments, then the entire onus will fall on the five-judge bench in *Gayatri Balasamy* to settle these questions of law and put an end to the ongoing debate. The bench will need to address several key issues, including how to reconcile the competing precedents on award modification, and how these judicially-assumed powers can be situated within the Model Law framework.

Most crucially, the SC will have to decide whether and how the power to do "complete justice" under Article 142 should be balanced with the restrictive construct of Section 34. In the past, the SC, recognising its jurisdictional excesses, has often cautioned against the overuse of Article 142. In *AR Antulay v. R.S. Nayak* (1988), the SC clarified that provision could not be used to defeat a legislative directive. Similarly, in *Bharat Sewa Sansthan v. UP Electronics Corporation* (2007), the SC specifically emphasised that an Indian court "[…] could not bypass the provisions of [the Act] in exercise of its power and jurisdiction under Article 142". The broader jurisprudence around the Act, too, indicates that the SC is generally unwilling to override the statute, and restricts itself to interpreting its provisions. This would be an important jurisprudential consideration for the five-judge bench while deciding this issue.

However, even a definitive ruling from the five-judge bench may not fully resolve practical challenges. Even notwithstanding the inevitable period of wait before a bench is constituted and a decision is rendered, we may continue to see instances of parties convincing courts to invoke their residuary powers to modify awards, particularly in routine matters such as interest-rate adjustments, including by identifying interpretational loopholes in the directions which are passed. Such instances would necessitate repeated court interventions, perpetuating uncertainty and delays–the very issues any sound arbitration framework should seek to avoid. This will again raise the need for a legislative intervention to conclusively address this issue.

What remains clear is that the current uncertainty serves neither disputants nor India's aspirations to become a global arbitration hub. The legislature's decision to overhaul Section 34 while remaining silent on modification powers suggests this issue will likely persist unless addressed explicitly, preferably through clear legislative guidance, or atleast a constitutional bench decision robust enough to deter judicial deviation.

This entry was posted on Tuesday, December 24th, 2024 at 8:02 am and is filed under India, Modification of awards
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