WHY ALWAYS SET ASIDE THE ARBITRAL AWARD WHEN IT CAN BE REMITTED? - REMITTAL OF ARBITRAL AWARDS: THE ROAD LESS TRAVELED

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ABSTRACT

There are instances where Indian judiciary remands/remits an arbitral award to the tribunal under Section 34(4) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as the "Indian Arbitration Act"). But, a continuous debate has been surrounded over its extent and on what grounds the judiciary can exercise the powers conferred upon it, and interfere with the arbitral proceedings.

The primary objective of this Article is to provide a comprehensive analysis of Section 34(4) of the Indian Arbitration Act in several aspects, considering the nature, the scope of powers conferred upon the Court, the pre-requirements for invocation, and curable grounds of challenges hereunder. The Article also examines the wide canvass of judicial pronouncements which while contributing in settling the controversy for the time being, has considered several facts and circumstances along with the position of law.

Furthermore, the author highlights the position of arbitration laws of other jurisdictions (namely, Singapore and United Kingdom) in comparison to Indian arbitration legislation, with respect to similar provisions which deal with setting aside and remission of arbitral awards.

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1. INTRODUCTION

With the international expansion of commercial arbitration, many countries worldwide like India and Singapore have adopted the Model Law (the "Model Law 1985") on International Commercial Arbitration of 1985 created by the United Nations Commission on International Trade Law (UNCITRAL), either entirely or in part. Whereas, countries like the United Kingdom have not enacted their arbitration legislation upon the Model Law 1985 but do have some provisions which are based on it. Article 34 of the Model Law 1985 lays down the provision for setting aside the award but at the same time to save the cost, time and parties' interest which has been spent on arbitration proceedings, it contained clause 4 which grants the power to a court to suspend setting aside proceedings.[1]

The provision facilitates the court to give another opportunity to the arbitral tribunal to resume the arbitration proceedings and rectify an arbitral award suffering from defects and challenged before the court. It also empowers the arbitral tribunal to take any other action as in its opinion would do away with the existing defects. And, it also act as a preventive as well as a curative measure thereby preventing the setting aside proceedings in the court.

Article 34(4) holds very great importance in the arbitration field because it could save the sole objective of the arbitration proceedings i.e., expeditious disposal of dispute with minimal judicial interference. The remittal of arbitral award is definitely a road less traveled, lesser explored by the major section of the legal fraternity including judges and lawyers, but there are instances where the Court took the road 'less travelled'.

The Indian Arbitration and Conciliation Act 1996 ("Indian Arbitration Act") , in significant part, is based upon the Model Law 1985. Under Section 34 of the Act provides that an arbitral award can be challenged before a Court through filing an application hereunder. Where the award is rendered/ delivered/ awarded by the arbitral tribunal and the party files an application under Section 34 for setting aside of the award, the Court has following course of actions under the Indian Arbitration Act where it may:

(i) dismiss the objections made and uphold the arbitral award; or

(ii) set aside the award under Section 34(2); or

[1] Model Law on International Commercial Arbitration of 1985 (the "Model Law 1985"), Article 34(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 do away with the grounds for setting aside.*

(iii) apply Section 34(4) to adjourn the set-aside proceedings and remit the award back to the arbitral tribunal in order to provide it another chance to eliminate the existing grounds for challenge and rectify the defects in the award.

It is, however, pertinent to note that the powers conferred to the Courts under Section 34 don't include any power to modify the arbitral award.[2] The most recent judgement where the same view has been reiterated is *National Highways Authority of India v. M. Hakeem*[3],the Supreme Court clearly stated that under Section 34, a Court while hearing a challenge to an arbitral award in no way can modify or vary that award. The bench presided by Hon'ble Justices RF Nariman and BR Gavai clearly expressed in para 47 of the judgement, "*If one were to include the power to modify an award in Section 34, one would be crossing the Lakshman Rekha".*

2. SECTION 34(2) AND SECTION 34(4): THE TWO DICHOTOMY OF SECTION 34

Section 34 of the Indian Arbitration Act exhibits a dichotomy in the form of Sections 34(2) and 34(4). While Section 34(2) elaborates on the area of what course of action the Court could adopt while dealing with an application of setting aside made under it, Section 34(4) provides for the Court to remand back the issue to the Tribunal and directs what a tribunal could do after the issue has been remanded back to it.

Protecting party autonomy and keeping in mind the ultimate goal of whole arbitration process, the Indian legislature as well as the judicature has always strived to minimize the judicial interference with arbitration proceedings and awards granted thereto. Among many other classic judgements where the court clearly limited the scope of judicial intervention, one is *Angel Broking Ltd. v. Sharda Kapur*[4] wherein the raised matter of judicial interference by the courts in modifying arbitral awards and granting alternative/additional reliefs was directly addressed and judgement was delivered by the High Court of Delhi in the same line as in the *National Highways*[5], *McDermott International Inc.* v. *Burn Standard Co. Ltd.*[6] In

[2]*National Highways v. M. Hakeem* (2021) SCC OnLine SC 473; *McDermott International Inc. v. Burn Standard Co. Ltd.* (2006) 11 SCC 181; *Cybernetics Network Pvt. Ltd. v. Bisquare Technologies Pvt. Ltd.* (2012) SCC OnLine Del 1155; *Angel Broking Ltd. v. Sharda Kapur* (2017) SCC OnLine Del 8211.

[3]*National Highways v. M. Hakeem* (2021) SCC OnLine SC 473 ('*National Highways*').

[4]*Angel Broking Ltd. v. Sharda Kapur*, (2017) SCC OnLine Del 8211 ('*Angel Broking*').

[5]*National Highways* (n 3).

[6]*McDermott International Inc. v. Burn Standard Co. Ltd.* (2006) 11 SCC 181.

this case, it was observed that in no way under Section 34 the courts can provide any modification, variance or remittance in the arbitral awards. Additionally, the court is also not entitled to grant any additional or alternative relief which was earlier prayed in the arbitral proceedings and got denied.[7]

Similarly, several efforts have been made to limit the judicial intervention through narrowing down the interpretation of the specified grounds (such as party's incapacity, arbitration agreement's invalidity, arbitral award in contrast to Indian public policy, etc) mentioned in Indian Arbitration Act under Section 34(2) on the basis of which an arbitral award can be challenged. Under the provision, if an aggrieved party successfully establishes the challenge against the arbitral award based on specified grounds, the award will be set aside by the Court.

However, in accordance with the Principles of Natural Justice, the legislature also has provided an opportunity to the award holding parties to get the grounds for setting aside eliminated by making an application under Section 34(4) of the Indian Arbitration Act. Through this provision, Court acquires the authority to adjourn the proceedings pending before it under Section 34(2) and give the arbitral tribunal another chance to resume the arbitration proceedings, or take any other action that, in its opinion, will eliminate the existing grounds for setting aside the award. Hence, it can be rightly concluded that the legislative intention behind Section 34(4) is to make the award enforceable to avoid any wastage of time and money, after the arbitration tribunal has had its chance to correct any curable defects.[8]

2.1 SET-ASIDE OR ELIMINATE THE DEFECTS OF AN ARBITRAL AWARD?

Section 34(2) of the Indian Arbitration Act contains an exhaustive list of grounds which must be established by the parties challenging the award to get it set aside by the Court.[9] Section 34(2)(b) is comprised of the grounds which are substantive in nature and directly go to the root of the award. To substantiate, if an award pertains to any dispute having such a subject-matter which cannot be resolved through arbitration then it is clearly a defect that cannot be fixed just by elimination, notwithstanding an application under Section 34(4), and therefore, the Court must set aside such award. Furthermore, remanding the matter back to the arbitral

[7] *Angel Broking* (n 5).

[8] *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd* (2019) SCC OnLine SC 1656 ('*Dyna Technologies*').

[9] Arbitration and Conciliation Act 1996, s 34(2).

tribunal in such case is unintelligible and will cause grave injustice to the parties who will also have to bear unreasonable cost of arbitration again. Additionally, the ground of challenge based on a conflict with public policy is not capable of being rectified by the arbitral tribunal which itself only has issued the award contrary to public interest. Such contravening award is against the principle of morality and justice and adversely affects the administration of justice.[10]

The Supreme Court clearly stated in *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd*[11] that if an award is challenged on the basis of perversity in reasoning, then it is liable to be challenged solely on the grounds set out in Section 34 because award's perversity gets right into the root of the matter. This case while drawing a clear distinction between the "unintelligible" awards and "inadequacy" of reasons in award, delivered the scope of interference under Section 34. Furthermore, it observed that only the ordinarily "unintelligible" awards are to be set aside, subject to party autonomy to eliminate reasoned awards.[12] The "inadequate reasoned" awards are not set aside; that means if an award is in absence of any reasoning or has some gap in it which can be cured, then Section 34(4) must be utilized to avoid any detrimental effect on the very purpose of arbitration i.e. speedy trial with minimal judicial interference.[13]

3. NATURE & SCOPE OF SECTION 34(4) OF THE INDIAN ARBITRATION ACT

The Hon'ble Supreme Court ruled out a general mandate including the nature & scope of the conditions required to invoke Section 34(4) of the Indian Arbitration Act in *Kinnari Mullick & Ors. v. Ghanshyam Das Damani*[14]. The points which were highlighted in accordance to arbitration legislation are herein mentioned below:

i. In order to invoke Section 34(4), an application filed under Section 34(1) of the Indian Arbitration Act must first be made by a party to the arbitration.[15]

ii. In light of the principle of *functus officio*, a party must invoke Section 34(4) prior to the setting aside of the award by the approached Court. The Latin maxim "*functus*

[10] *Renu sagar Power Co. Ltd. v General Electric Co* (1994) AIR 860 (SC); *ONGC Ltd v Saw Pipes Ltd.* (2003) 5 SCC 705.

[11] *Dyna Technologies* (n 9).

[12] ibid.

[13] *Dyna Technologies* (n 9) [24], [35].

[14] *Kinnari Mullick & Ors. v. Ghanshyam Das Damani (2018) 11 SCC 328 ('Kinnari Mullick').*

[15] *ibid [16], [18].*

officio" states that the designated authority's jurisdiction/mandate ends once it has completed the responsibilities for which it was appointed. Similarly, the Court is deemed to become *functus officio* after the setting aside proceeding under Section 34 of the Indian Arbitration Act is completed.[16]Another important development which can be seen herein view of the same observation is that, though the arbitrators/arbitral tribunal becomes *functus officio* after rendering the award, remittal of award forms an exception to the principle of *functus officio* which states that mandate of the Tribunal ends with the rendering of the Arbitral Award.

iii. A party which is filing an application under Section 34(4) of the Indian Arbitration has to keep in mind that the application must be in writing.[17]

iv. If the award holding party fails to request the Court to suspend the setting aside proceedings under Section 34, the party is also barred from filing an application under Section 34(4).[18]

v. Under Indian Arbitration Act, the Court cannot take *suo motu cognizance of the* power conferred on it by Section 34(4).[19]

The Hon'ble Supreme Court also reiterated the dictum of *MMTC v. Vicnivass Agency*[20] in the abovementioned case while dealing with the purport of Section 34(4) of the Indian Arbitration Act. The judgement goes back to 2008, where the appeal was filed in Madras High Court which provided a comprehensive analysis of Section 34(4). Here, in this particular case the arbitrator failed to provide an opportunity to one of the party to the suit to present its case with respect to the other party's documents & affidavits, and the award was granted solely based on the same documents which were only produced after the completion of the arbitration proceedings. As a result, the aggrieved party challenged the award before the District Court under Section 34(4), where the trial was carried out for six months. The District Court while directing the arbitral tribunal to provide equal chance to both the parties, remanded the matter back to it for fresh consideration.

[16] *ibid* [16].

[17] *ibid* [15], [16].

[18] *Kinnari Mullick* (n 17) [16].

[19] ibid.

[20] *MMTC v. Vicnivass Agency* (2009) 1 MLJ 199 ('*MMTC')*.

Thereafter, in the appeal made before the High Court of Madras, the Court while endorsing the decision taken by the District Court in exercising its power under Section 34(4) observed that:

(i) The failure to grant one party the opportunity to challenge the other party's document is a *prima facie* cause for setting aside the award under Section 34(2)(a);

(ii) In accordance with remittal of award, it is necessary that the defect in the award or the ground so made out should be capable of elimination by the arbitrator/arbitral tribunal. Here, the ground (i.e., lack of opportunity to one party to present its case) is capable of elimination and can be rectified by the arbitrator who can do justice by giving the required opportunity to the aggrieved party to present its case; and

(iii) Since, the defect in the award can simply be cured by the arbitration tribunal itself, Section 34(4) can be invoked.[21]

However, it is to be noted that the Supreme Court recently held in *Radha Chemicals v. Union of India*[22] that, unlike Section 16 of the Indian Arbitration Act, 1940 (the "1940 Act"), Section 34(4) doesn't give the Court the power to remit the case to the arbitral tribunal for any fresh consideration.[23]

Thus, it can be concluded that the *MMTC*[24] case has widened the discretionary power to the arbitral tribunal contemplated under Section 34(4) of the Act. Not just that, the classic judgement also clarified the position of law in accordance with the current and antecedent legislation. It was of the opinion that the power under Section 34(4) of the Indian Arbitration Act is not the same as the power conferred on the Court by Section 16 of the 1940 Act i.e., as per the former, the Court can make a fresh award after reconsidering the previous award.[25] Unlike Section 16 of the 1940 Act, Section 34(4) of the Indian Arbitration Act defers to the arbitral tribunal's discretion instead of the Court's in determining the scope & extent of inquiry to be conducted in order to rule out grounds for setting aside the award.[26]

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[21] ibid.

[22] *Radha Chemicals v. Union of India* (UOI) (10.10.2018 - SC): MANU/SC/1630/2018.

[23] 'Section 34(4) of the Arbitration and Conciliation Act, 1996 – A Fly in the Ointment? (Part I) | India Corporate Law' <https://corporate.cyrilamarchandblogs.com/2020/05/section-34-4-of-arbitration-and-conciliation-act-1996-part-i/#_ftn2> accessed 8 July 2021.

[24] *MMTC* (n 23).

[25] ibid.

[26] *MMTC* (n 23) [21].

The following are the relevant observations in regard to the current legislation that the Madras High Court noted in the abovementioned case:

i. Section 34(1) of the Indian Arbitration Act specifies what course of action the Court could take while dealing with an application to set aside an award; while on the other hand, Section 34(4) depicts what the arbitral tribunal could do after the issue has been remitted back to it by the Court. Because there is no constraint on what the arbitral tribunal can do under Section 34(4), the arbitral tribunal may even refuse to do anything further and leave the case to the Court to determine under Section 34(2).[27]

ii. Section 34(4) is an enabling provision rather than a strict remand order, which implies that the arbitrator cannot be compelled by the Court to do something. The arbitral tribunal may not or may consider the additional evidence after resuming the arbitral proceedings. The primary subjective consideration of the arbitral tribunal after it has undertaken the venture is that it would eliminate the curable defects on the basis of which the award was to be set aside.[28]

4. REMITTAL OF ARBITRAL AWARDS: THE ROAD LESS TRAVELED

The remittal of arbitral award remained a road less travelled so far, lesser explored by the major section of the legal fraternity including judges and lawyers, but there are precedents where the Court took the road 'less travelled'. Under certain classic judgements, the judiciary in order to save time, efforts, and cost invested in arbitration proceedings by the arbitrator and parties both, has examined and categorized the grounds of challenge where defects stood curable under Section 34(4) and gave the arbitral tribunal an opportunity to resume the proceedings, in order to cure the defects.

The following are some instances where Courts have considered it appropriate to invoke Section 34(4) of the Indian Arbitration Act:

- In *Suresh Prabhu v. Bombay Mercantile Co-op. Bank Ltd. and Ors*[29]case, the arbitrator failed to frame an issue on the petitioner's particular contention based on which the jurisdiction of the tribunal can be ruled out. When the arbitral tribunal

[27]*MMTC* (n 23) [18].

[28]*MMTC* (n 23) [25].

[29]*Suresh Prabhu v. Bombay Mercantile Co-op Bank Ltd. & Ors.* (2007) 5BomCR 205 ('*Suresh Prabhu*').

neglected to address the objection in regard to its jurisdiction, a Single Judge of the High Court of Bombay exercised its power conferred by Section 34(4) and provided an opportunity to the tribunal to eliminate the defect by recording a finding on the issue whether the arbitral tribunal had no jurisdiction to entertain the dispute.

- In 2009, the *MMTC*[30]case where the Madras High Court exercised its power under Section 34(4) where a party was denied the opportunity to submit its case, i.e. to deal with a document relied on by the arbitration tribunal. The Court while remitting the award back to the tribunal for re-adjudication directed the arbitrator to act in accordance with the principle of natural justice, and now provide equal opportunity to both the parties to put their case.[31]

- It was held in *Geojit Financial Services Ltd. v. Kritika Nagpal*[32], by the Division Bench of the Bombay High Court that the power under Section 34(4) could be invoked if the arbitration tribunal ignored a particular issue on which the parties presented evidence and made arguments.[33]The Court further observed that since the issues and the points so read in claims and counter-claims are inter-linked and inter-connected, setting aside the award would delay the proceedings. But if matter is remanded back to the tribunal along with the special direction to dispose the matter, then it will eventually expedite the matter and save the time & money of both the parties.[34]

- The Court in the case *Dyna Technologies*[35]while distinguishing between the awards based on impropriety/perversity in reasoning and awards with inadequate reason held that 'unreasoned' award or a gap in reasoning was categorized as a curable defect to be eliminated by the arbitral tribunal under Section 34(4), contrary to 'unintelligible' award/'perversity' in reasoning, which could result in the award to be set aside.[36] The

[30]*MMTC* (n 23).

[31]ibid.

[32]*MMTC* (n 23).

[33]*Geojit Financial Services Ltd. v. Kritika Nagpal* (Judgement dated 25th June 2013 passed by the Bombay High Court in Appeal No. 35 of 2013 in Arbitration Petition No. 47 of 2009) ('*Geojit Financial Services*').

[34] ibid [17].

[35]*Dyna Technologies* (n 9).

[36]ibid.

reasoned awards are said to have reasoning which should be proper, intelligible and adequate.[37]

5. APPROACH OF OTHER COUNTRIES

In this section, the author highlights the position of Arbitration Laws of other jurisdictions, namely, Singapore and the United Kingdom, with special emphasis on the provisions involving remittal of arbitral awards. And, subsequently provides a comparative analysis of other jurisdiction provisions with that of Indian Arbitration legislation.

The Arbitration laws of Singapore have adopted the Model Law 1985 with some minor modifications in the International Arbitration Act (IAA) of 1994.[38] On the other hand, the English law (i.e., Arbitration law of the United Kingdom) has not adopted the Model Law 1985 but the English Arbitration Act of 1996 (the "English Arbitration Act") do have some provisions based on it.[39]

5.1 SINGAPORE

There are basically two pillars of arbitration legislation in Singapore; (i) the International Arbitration Act which is principally concerned with international arbitrations, and (ii) the Arbitration Act, 2001 (the "2001 Act") which applies to domestic arbitrations.[40]

Section 48(3) of the 2001 Act incorporating the Article 34(4) of Model Law 1985[41]states that-

> "*When a party applies to the Court to set aside an award under this section, the Court may, where appropriate and so requested by a party, suspend the proceedings for setting aside an award, for such period of time as it may determine, to allow the arbitral tribunal to resume the arbitration proceedings or take such other action as may eliminate the grounds for setting aside an award".*

[37] *Dyna Technologies* (n 9) [34].

[38] 'Singapore International Arbitration Centre | UNCITRAL Model Clause' <https://www.siac.org.sg/model-clauses/uncitral-model-clause/71-resources/frequently-asked-questions> accessed 8 July 2021 ('SIAC').

[39] 'Model Law | Practical Law' <https://uk.practicallaw.thomsonreuters.com/7-205-6044?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 8 July 2021.

[40] 'Arbitration Procedures and Practice in Singapore: Overview | Practical Law' <https://uk.practicallaw.thomsonreuters.com/3-381-2028?transitionType=Default&contextData=(sc.Default)> accessed 8 July 2021.

[41] SIAC (n 41).

Section 48(3) provides for remission of the arbitral award to the tribunal to provide it an opportunity to re-adjudicate/reconsider/resume the arbitral proceedings in order to cure the defect in arbitral award.[42] The provision is very much similar to the Indian provision i.e., Section 34(4) of Indian Arbitration Act.

To have a better understanding, let's consider some of the cases in which the Singaporean judiciary has discussed the remittal of arbitral award, as well as the circumstances in which it remitted/ set aside and the explanation it provided.

(i) *In Front Row Investment Holdings v. Daimler South East Asia*[43] case, the arbitrator failed to act in accordance with the principle of natural justice. Thus, in view of the same the Court set aside the arbitral award due to the breach of principle of natural justice and remitted the award to a newly constituted tribunal presided by a new arbitrator for fresh consideration and elimination of the defect present herein.[44]

(ii) At another such instance, in the matter of *Kempinski Hotels SA v. PT Prima International Development*[45], the Court deciding the matter under the International Arbitration Act had set aside the award passed by the arbitral tribunal, stating that the tribunal exceeded its jurisdiction and passed the decision that was out of the scope of matters submitted therein. But due to the fact i.e., the parties to the suit had their agreement that the arbitrator didn't become *functus officio*, the Court remitted the award back to the same arbitrator/arbitral tribunal after setting it aside. It further held that the award can be remitted back to the same arbitrator/ arbitral tribunal as long as it hadn't been disqualified from presiding over the hearing proceedings by the parties themselves.[46]

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[42]Arbitration Act 2001, s 48(3).

[43]*Front Row Investment Holdings v. Daimler South East Asia* (2010) SGHC 80 ('*Front Row'*).

[44]'Singapore Law on Arbitral Awards - Leng Sun Chan - Google Books' <https://books.google.co.in/books?id=uabFhTftv5gC&pg=PA209&lpg=PA209&dq=Kempinski+Hotels+SA+v.+PT+Prima+International+Development+and+Front+Row+Investment+Holdings+v.+Daimler+South+East+Asia&source=bl&ots=ska9FghCPy&sig=ACfU3U1HP4ftiqDy1Zmopi1NBoHQkFyO0A&hl=en&sa=X&ved=2ahUKEwiMlpjWw9XxAhWVbisKHal8BGoQ6AEwAnoECAIQAw#v=onepage&q=Kempinski Hotels SA v. PT Prima International Development and Front Row Investment Holdings v. Daimler South East Asia&f=false> accessed 9 July 2021.

[45]*Kempinski Hotels SA v. PT Prima International Development* (2012) SGCA 35 ('*Kempinski Hotels'*).

[46]ibid.

(iii) Unlike the above two judgements, the Singapore Court of Appeal in *AKN v. ALC* [47]decided to set aside the arbitral award and provided a very keenly reasoned judgement for its decision. The Singapore Court of Appeal observed that remission is an alternative remedy which can be invoked only before the award is set aside, and it must be utilized in the cases where the setting aside of an arbitral award is preventable.[48] Some major points observed by the Court are herein below:

- The Court relied on the dictum of *BLC and Ors v. BLB and Anor*[49], where it observed that Article 34(4) of the Model Law 1985 only allows the remission of an arbitral award to the same tribunal which has passed it. Hence, the Court cannot remit it to a newly constituted tribunal.[50]
- Operating in accordance with Article 34(4) of the 1985 Model Law, the Court may only direct the award to be reviewed. It cannot be remitted back after it had been set aside as the tribunal deems to become *functus officio* after it has passed the final award.[51]
- The Court also clarified that the decisions of *Front Row*[52]and *Kempinski Hotels*[53]do not at all support the proposition that the court has the authority to remit the award after it has been set aside. *Front Row*[54] was differentiated by the Court as a case involving a subsequent instruction to the parties to initiate new arbitration rather than a case of remission. Furthermore, the Court pointed out that the case was not even remanded to the same tribunal/arbitrator, so there was no question of remitting the award. Similarly, the Court categorized the *Kempinski Hotels*[55]as a case in which the parties themselves agreed that the arbitrator was not *functus officio*. However, the Court for providing more clarity

[47]*AKN v. ALC* (2015) SGCA 63 ('AKN').

[48]'Taking a Second Bite of the Cherry: When Is It Appropriate to Remit an Award Instead of Setting It Aside in Singapore? - Kluwer Arbitration Blog' <http://arbitrationblog.kluwerarbitration.com/2019/03/17/taking-a-second-bite-of-the-cherry-when-is-it-appropriate-to-remit-an-award-instead-of-setting-it-aside-in-singapore/> accessed 9 July 2021.

[49]*BLC and Ors v BLB and Anr* (2014) SGCA 4.

[50]ibid.

[51]*AKN* (n 50).

[52]*Front Row* (n 46).

[53]*Kempinski Hotels* (n 48).

[54]*Front Row* (n 46).

[55]*Kempinski Hotels* (n 48).

stated that if the *Kempinski Hotels*[56]decision is interpreted as standing for the contention that remission may be granted after the completion of setting aside proceedings, it is "incorrect and should be treated as overruled at this time."[57]

While looking at the abovementioned cases, the decision in *AKN v. ALC*[58] must be much welcomed as it abundantly cleared its stand on the powers vested in the Court by Article 34(4) of the 1985 Model Law. Similar to India, Singaporean judiciary has now well settled that remittal cannot be done after completion of setting aside proceedings and in no way can be sent to a new arbitral tribunal/arbitrator. Further, it opined that in any case, a broad interpretation would be at odds with the history and stated aim of Art 34(4), which states that remission should be viewed as a substitute for setting aside. The judiciary conclusively laid down that remission is a curative remedy that the court can exercise if it believes that it will be possible to avoid setting aside the award in specific circumstances.[59]

5.1.1 Indian Arbitration Act vis-à-vis Singaporean Arbitration Laws

Since the Indian Arbitration Act and the 2001 Act of Singapore are based on the Model Law 1985, Section 34(4) of the Indian Arbitration Act and Section 48(3) of 2001 Act of Singapore both spell out similar provisions for remission of arbitral awards. The judiciary of both the countries also has nearly laid down the similar observations such as-

- As per the legislative intent of Art 34(4) of the Model Law 1985, remission is a curative measure and should be viewed as a substitute for setting aside.
- No remittal of award is allowed after setting aside, as the tribunal deems to become *functus officio* after it has passed the final award.
- Remission is only allowed to the same tribunal which has passed it.

However, a distinction can be drawn out between the arbitration legislation of both the countries is on the basis of an expressed provision in the 2001 Act of Singapore which allows

[56]ibid.

[57]*AKN* (n 50).

[58]ibid.

[59]*AKN* (n 50).

the Court to remit the arbitral award for want of reasons. This power of Court emanates from Section 50(4) of the 2001 Act of Singapore.[60]

If an appeal is made against the award, and the Court is of the view that the award lacks the reasoning and proper justification for passing such a decision then under Section 50(4) in order to expedite the matter and avoid the delay in further proceedings, the Court can remit the award back to the tribunal instead of setting it aside for want of reasons.[61]By way of background, it should also be noted that unlike the Indian law, there is no automatic right of appeal to the Court of Appeal in Singapore, and the High Court has sole discretion on appeals.[62] Whereas, multiple appeal mechanisms in the Indian system during enforcement actions cause significant delay in the entire arbitration process, prompting international parties to decline arbitration in India. These are innovative provisions, and comparable measures should be incorporated into the Indian law.

Unlike the 2001 Act of Singapore, the Indian Arbitration Act doesn't have any such expressed provision which allows remission in the absence of reasoning in the arbitral award.

5.2 UNITED KINGDOM (ENGLAND AND WALES, NORTHERN IRELAND)

The arbitration in United Kingdom is governed by the English Arbitration Act of 1996 (the "English Arbitration Act"). In English law, the arbitral award can be challenged to set aside on the grounds of "serious irregularity" affecting the tribunal, the proceedings, or the award under Section 68 of English Arbitration Act.[63] The English Parliament has attempted to eliminate every ambiguity and as a result, it has defined eight circumstances/grounds that constitute a "severe irregularity" under Section 68(2). Furthermore, under Section 68(3) the Courts are empowered to take three courses of actions when a serious irregularity has

[60]2001 Arbitration Act of Singapore, *Section 50(4): If on an application or appeal it appears to the Court that the award —*

> *(a)does not contain the arbitral tribunal's reasons; or*
>
> *(b)does not set out the arbitral tribunal's reasons in sufficient detail to enable the Court to properly consider the application or appeal,*

the Court may order the arbitral tribunal to state the reasons for its award in sufficient detail for that purpose.

[61] ibid.

[62] Mr Aswini Patro and Pradip Kumar Sarkar, 'European Journal of Molecular & Clinical Medicine A Comparative Analysis Of Indian Arbitration Provisions With That Of Singapore: Special Emphasis On Enforcement Provisions'<https://ejmcm.com/pdf_3154_a068fac3519b82f6b5f652c1b4ad1051.html> accessed on 9 July 2021.

[63]Arbitration Act 1996, s 68.

occurred,[64] namely; remit the award, set aside the award, or declare it to be of no effect, either in its entirety or in part.[65]

There has been a point of differences between the approach adopted by Indian judiciary and English Court in almost similar circumstances where the English Commercial Court could have remitted the arbitral award but it still chose to upheld a challenge to the award and set aside it on the grounds of "serious irregularity" under Section 68. Such matters are herein given below:-

(i) In the matter of *Oldham v QBE Insurance*[66]*, the Court granted a challenge to an arbitral award on costs where the applicant was denied the opportunity to make submission as to costs.*

(ii) Furthermore, in the case of *P v D*[67], the arbitrator failed to deal with all the submitted issues based on party's contentions, specifically, he failed to frame an issue on the claimant's contribution claim in the proceedings; hence, the Court allowed the challenge to the defected award.

(iii) In *RJ and another v HB*[68] *case*, the Court set aside an arbitral award on the grounds of "serious irregularity". As in here, the arbitrator failed to provide the proper notice and a reasonable opportunity to the party to present its case on a new contention that basically affected the arbitral tribunal's decision and reasoning in the award.

In all of the abovementioned cases, the English Court took the 'long route' for the settlement by setting aside the awards on the grounds of "serious irregularity". The circumstances were such that the matter could have been remitted back to the tribunal for additional awards and curing the existing defect, but the parties and the judiciary were ignorant enough by directly resorting to the setting aside proceedings.

5.2.1 Indian Arbitration Act vis-à-vis English Arbitration Laws

Unlike the Indian judiciary, the English Court invoked Section 68 and set aside the award, even when it could have facilitated a speedy and amicable resolution of disputes, and saved cost and time by simply remitting the award back to the tribunal instead of setting it aside.

[64]ibid.

[65]ibid.

[66]*Oldham v. QBE Insurance (Europe) Ltd* (2017) EWHC 3045 (Comm).

[67]*P v D* (2017) EWHC 3273 (Comm).

[68]*RJ and another v HB* (2018) EWHC 2833 (Comm).

Highlighting the same concern, Hon'ble Justice Akenhead in the matter of *The Secretary of State for the Home Department and Raytheon Systems Ltd*[69], observed that remission of an award is the "default" remedy for a finding of serious irregularity, according to Section 68(3), and the Court should only set aside if remission would be "inappropriate". While setting aside the arbitral award on the ground of serious irregularity, he further stated that passage of time along with the costs of remitting the award back in comparison to the costs of new tribunal are very important considerations in determining whether or not remission is appropriate.[70]

Similarly just like the Indian law, the English Arbitration Act has also a room for remission of "unreasoned" awards to the tribunals to obtain reasons, except if the parties to the agreement have agreed to the contrary.[71]In *Islamic Republic of Pakistan v. Broadsheet LLC*[72], Moulder J pointed out that one of the main goals of the Arbitration Act was to limit the English judiciary's involvement in arbitrations and arbitral verdicts.[73] In view of the Arbitration Act's principles and aims, she believed that allowing challenges based on "inadequate reasons" would overburden the High Court's supervisory authority.[74] Section 68 was only intended to be used "to support the arbitral process, not to interfere with that process," according to the drafters.[75] Furthermore, Section 68 was actually planned as a long pause, only possible in severe instances where the tribunal has gone so wrong in its conduct of the arbitration that justice demands it be addressed, according to the court.[76] There were three main points in the Judge's reasoning; The Judge stated:-

[69]The Secretary of State for the Home Department and Raytheon Systems Ltd., (2015) EWHC 311 (TCC) and (2014) EWHC 4375 (TCC).

[70]'Remission or Set Aside for an Arbitral Award Where a Challenge for Serious Irregularity Is Made out before the English Courts? | Arbitration Notes' <https://hsfnotes.com/arbitration/2015/02/20/remission-or-set-aside-for-an-arbitral-award-where-a-challenge-for-serious-irregularity-is-made-out-before-the-english-courts/> accessed 9 July 2021.

[71]Arbitration Act 1996, s 52(4), s 68(2)(h).

[72] *Islamic Republic of Pakistan v Broadsheet LLC* (2019) EWHC 1832 (Comm), (2019) WLR(D) 402 ('*Islamic Republic').*

[73]*ibid* [42].

[74]ibid.

[75]Departmental Advisory Committee on Arbitration Law, "1996 Report on the Arbitration Bill" (1997) 13 *Arbitration International* 276. See also Andrew Tweeddale and Keren Tweeddale *Arbitration of Commercial Disputes: International and English Law and Practice* (OUP, Oxford, 2005) 280.

[76]ibid.

(i) *The juxtaposition of Sections 57 and 70(4) with Section 68 meant that "inadequate reasons" cannot be used to dispute an award under S.68.*[77]

(ii) *A party may seek to the tribunal to correct or issue an additional award under Section 57.*[78]

(iii) *If the English Court believes that the arbitral award passed by the tribunal lack reasons or reasoning are inadequate/insufficient, such that the court is unable to properly assess the merits of a challenge to the award under Section 68, Section70(4) confers the power on the Court to remit the award back to the tribunal to state its reasons appropriately and adequately.*[79]

Conclusively, Akenhead and Moulder JJ rightly pointed out that setting aside is the long way route due to which the party has to incur more unnecessary cost and time, apart from the one which has been already invested in the arbitration process itself. Moulder J also correctly interpreted the legislation and believed in providing the tribunal another chance to eliminate any defects in the award or provide additional reasons as well. But, the position of law pertaining to remittal of awards in United Kingdom is still not that much well settled as it is in India and Singapore. The judgement delivered by Moulder J is only another High Court judgement which is still not concrete, given the doctrine of *stare decisis* in English tradition. However, the holding by Akenhead and Moulder JJ was more of an *obiter dictum* which seemed persuasive and could form a building block in the development of the English Arbitration law pertaining to remission of awards.

6. CONCLUDING REMARKS

Following the foregoing discussion, we may be able to determine the scope of Section 34(4) of the Arbitration Act by summoning up the observations of the above-mentioned precedents. The Indian judiciary is proceeding parallelly with the Indian Arbitration Act's clear objective, i.e., limiting and narrowing down the judicial interference in arbitral proceedings. All the landmark judgements, namely, *National Highways*[80], *Suresh Prabhu*[81], *MMTC*[82], *Geojit*

[77] *Islamic Republic (n 77).*

[78] ibid.

[79] ibid.

[80] *National Highways* (n 3).

[81] *Suresh Prabhu* (n 32).

Financial Services[83], and *Dyna Technologies*[84] have analyzed the position of law with respect to Section 34(4). The opinions that may be carved out are that legislature has not vested any power on the Court to remand the matter back to the arbitration tribunal for any fresh consideration, except adjourn or suspend the setting aside proceedings for a limited time determined by the Court. Further, the Court is entitled to grant an opportunity to the arbitral tribunal to eliminate any curable defects on the basis of which set aside challenge has been raised.

It is well established that an arbitration tribunal lacks the authority to review its own award.[85] As a result, an arbitral tribunal cannot be authorized to review/rewrite the proper reasoned award which has been passed on merits under the pretext of being given an opportunity under Section 34(4) to do away with the grounds for setting aside the arbitral award. But, the MMTC judgement has laid an exceedingly broad discretionary power on arbitral tribunal itself to decide the extent of eliminating the grounds of objection which now can also be abused by the losing party, causing grave damage to the other party. Consider a case in which the court determines that the award is liable to be set aside because the arbitral tribunal failed to address a specific curable claim, but simultaneously, observes that the basic rational behind passing the same award is contrary to Indian law's fundamental policy. In such instance, invoking Section 34(4) may be completely unbefitting, because even if the arbitral tribunal cures the curable ground and considers the overlooked claim, the award would still qualify to be set aside because of its contrariness to fundamental policy.

Furthermore, the entire intention of Section 34(4) is to rectify the curable defect in the award, save the cost and time of the parties, avoid judicial intervention, and do not unnecessarily burden the Court. Due to the multiple appeal mechanism present in the Indian law, the erring parties directly resort to set aside proceedings. Such right of appeal adds more pressure on already overburdened Courts which cause enormous delay in the entire arbitration process shattering the sole arbitration's objective of expeditious disposal of the matter. The Indian legislation has provided the remittal provision as an alternative of the award being set aside due to curable deficiencies, so that the parties wouldn't have to "start from scratch" again.

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[82] *MMTC* (n 23).

[83] *Geojit Financial Services* (n 36).

[84] *Dyna Technologies* (n 9).

[85] *State of Arunachal Pradesh v. Damani Construction Co.* (2007) 10 SCC 742.

Remission is also more convenient than setting aside and an arbitration-friendly mechanism too.

Moreover, the lessons from foreign jurisdictions and provisions should be taken for consideration by the Indian arbitration. As pointed above, no automatic right of appeal in Singapore arbitration law. Such mechanism provide expeditious disposal of the matter and avoid unnecessary litigation by the erring party. Thus, Indian arbitration should consider and adopt such novel provisions for speedy trials. Whereas, the observations made by the English Court which calls the setting aside a ‘long way’ route, should be sincerely taken into consideration by the Indian judiciary as well.