TERES

INDIA ADR WEEKDAY 2: MUMBAI

SESSION 4

Debate on 'Whether Courts need to be empowered to modify Arbitral Awards under the Arbitration Act'

2:15 PM To 04:00 PM IST

Moderator – Bindi Dave, Co-Managing Partner, Wadia Ghandy & Co.

Speakers:

Zal Andhyarujina, Senior Counsel

Sarita Kamath, General Counsel, TATA Capital

Sharan Jagtiani, Senior Counsel

Deepak Chauhan, Director and General Counsel, Welspun Group

HOST: We'll be starting with our next session soon. I request you all to please be seated. The next session is by Wadia Ghandy & Co. It's a debate on, 'Whether courts need to be empowered to modify arbitral awards under the Arbitration Act'. I would like to invite the speakers for the session. On the stage we have Ms. Bindi Dave, Co-Managing Partner at Wadia Ghandy & Co. as the moderator for the debate. We have Mr. Zal Andhyarujina, Senior Counsel. We have Ms. Sarita Kamath, General Counsel at Tata. We have Mr. Sharan Jagtiani, Senior Advocate, and Mr. Deepak Chauhan, Director and General Counsel at Welspun Group.

BINDI DAVE: Hi, everyone. I'm Bindi Dave. I am a partner at Wadia Ghandy & Company. I put in a fair number of years in the practice and a lot of them to do with arbitration. I always tell people that the Arbitration Act of 1996. I have a special affection for it because that is the year that I got my [UNCLEAR]. And therefore, it's an act where I feel I can relate the most to because I've seen it evolve. Of course, we've done arbitrations under the earlier act as well, but the 96 Act I have, as I said, a special affection, and therefore, whenever an opportunity arises, I am more than happy to take it up and see what we can do with it and suggestions that we can make and all of that.

I have put in a lot of effort to get this panel together and let me assure you, it's not been easy. This is the first time that Wadia Ghandy is organizing something like this. So, a) It was a learning experience for me. And as I was telling Neeti and Madhukesh, that I can understand what they go through, because it's definitely not easy to put up a show like you all have. So, all, cheers and congratulations to you guys. I have Mr. Zal Andhyarujina here who I think needs no introduction he's a Senior Counsel practicing at the Bombay High Court and has a several years of experience in commercial matters NCLT, Supreme Court, international arbitrations.

I have Mr. Sharan Jagtiani here, who equally needs no introduction. He's a Senior Counsel practicing before the Bombay High Court and has years of experience. Has done arbitration, the NCLT, High Court, Supreme Court, and please let me know if I've missed out on anything. So, I am sitting next to two stalwarts. Having said that, we have other stalwarts also on our panel. I have Ms. Sarita Kamath here, who is the legal counsel heading the legal department at the Tata Capital who I think would have had done maximum number of arbitrations, I think all of us puts together because of the sheer volume that they are faced with, who also brings with her hordes of experience. I also have Mr. Deepak Chauhan here, who would have had a fair amount of experience even in international arbitrations, of course domestic, yes. Because Welspun, as you all know, is a large group has presence worldwide and internationally would have had, I don't think as many disputes because Welspun is as it's known as a popular, practical approach. And with Deepak at the helm of affairs it's even better. So, I've been able

to put this panel together in hope that both, of course, Zal and Sharan can share their courtroom experience and arbitration experience. And Sarita and Deepak can, of course, share the industry perspective.

The topic I thought would be the right one for this session is "Whether courts should be empowered to modify awards" as and when they are coming up before the courts in challenge. Just a bit of a background. So that we have a perspective to the discussion. As we stand today, the Arbitration Act does not seem to provide for this kind of a power to the courts. Section 34 as it stands provides for an application where a court can either set aside or uphold the award. The application itself says that, this provision itself says that it's for setting aside. So, one would presume that either the court can set aside or uphold, and these are the only two options in that sense. The 1940 Act clearly contained a provision for setting aside modification or varying an award. The '96 Act does not contain this provision. So, the interpretation or the natural logical analysis that one would give is that therefore there is no power to modify today as it stands. However, I'm sure Zal and Sharan will take us through the law on the point, the case law. But clearly, after the Supreme Court decided there is a decision of the Supreme Court where it has taken a view that, no, there is no such power today. And you cannot read that power into the setting aside. I understand that the matter has again gone back to the Supreme Court for reconsideration of this so that's where it stands today, and therefore there is a lot of room for people to give their interpretations, give us their views and that's why I thought this was a good topic. And I now give the floor first to....so we proposed a motion. Of course, the motion is whether courts should be empowered. I have suggested that Zal and Sarita go for the motion and speak for the motion and, of course, Sharan and Deepak to speak against it. But, guys, this is how I thought I should put the panel, but feel free to give your views.

So Zal or Sarita, if you all think you all want to be on this side and Sharan and Deepak if you all think you want to be on that side it's entirely up to you. This is how I thought the panel would be rightly placed. But it's up to you. And I hand over the floor to Sarita first.

SARITA KAMATH: Thanks, Bindi. Am I audible? Yes. Thanks for the introduction, and indeed an honour to be on this panel and sharing this stage with the eminent panellists. I think, whether the law today provides for this power to the arbitral tribunal...the courts to modify an award or not, I think the matter is subdued and Supreme Court. I think the matter is listed for tomorrow. Supreme Court will eventually decide. But without getting into that aspect my view on this subject would be the court should indeed be allowed to modify an award. And the reason I say this, I think the proposition for why court should not have the power is to minimize the interference of courts in an arbitral proceeding. Parties choose

arbitration and as Bindi said, arbitration for us is mainstay that is our default dispute resolution mechanism. Why do parties choose to arbitrate? Because of the simplicity and the speed that it offers versus the traditional judicial process. So, the lawmakers and the UNCITRAL Model also where it minimized the interference of law, is to give prominence to the arbitrator in dispute resolution. But having said that, the law today does provide for interference by courts in Section 34, 37. To interpret that power to interfere being limited only to set aside an award, be it partly or fully, and not to include the power to modify, to my mind does injustice to the parties.

The grounds for challenge under 34 are well settled by now. On the same grounds if the parties before a court who have challenged the award, if the court comes to a conclusion that there is some curable error in the award, which, if it sets right, the award is regular in all other respects, then what sense does it make for the court to because of not having a power to remand it back to arbitrator. Whether parties then again, start from a scratch and no matter gets resolved or goes back to the arbitrator. From a party's perspective, it is a waste of time, effort, and, of course, other resources. When I say that the court should have the power to modify, it's not about deciding the dispute afresh. It is only on the basis of the materials which were there before the arbitrator. If on the same basis, if the court is able to cure an error, then that power should be given. I think that is also a recommendation made by the working committee which has been set up to amend the law, the Vishwanathan Committee on the same basis that power to modify should be there. I would defer to the views of Zal.

ZAL ANDHYARUJINA: Thank you very much, Bindi. Thank you, Sarita. Thank you, my colleagues, for all leaving your busy practices and coming this afternoon. And for those of you who have come from further afield, I hope you've thus far enjoyed your stay in Bombay. I hope you found it conducive place to arbitrate. I'm sure you've met some of our wonderful people from the MCIA who do a wonderful job with arbitration in Mumbai. And I'm sure you have interacted with our talented pool of lawyers both in court as well as in arbitration and long established practitioners such as Wadia Ghandy and Bindi. So, I hope you continue to have a fulfilling experience.

Thank you, Sarita, for your introductory comments and to Bindi, who have given you a very accurate view of the state of play today with regard to the question of variation of awards. In a leading case, ***Hakeem's*** case, one of the leading judges dealing with arbitration, Justice Nariman noticed that there was little room in the Act as it stands today which is, as you all know, based on the UNCITRAL Model Law for reading in the power to vary awards. He rightly, in my view, referred the matter to Parliament and the judgment does not express a view one

way or the other. And it's interesting that in a subsequent judgment of the Supreme Court and almost directly contrary view has now been taken to suggest that, in fact, the power to vary may be found in Section 34 of the Act. And they have referred the matter to a larger bench to consider this question, and that's what Sarita spoke about. It's an interesting feature of the earlier judgment in ***Hakeem's*** case that Justice Nariman, while concluding that the power could not be found within the Act actually dealt with the judgment which eventually reached the Supreme Court in the matter, which referred it to a larger bench. That was the matter of ***Gayatri Balaswamy*** and Justice Nariman expressly disagreed with the views that were expressed by the single judge and the division bench in ***Gayatri Balaswamy's*** case. But with those of you who are familiar with our Supreme Court, you always know that well, the sort of enemy lies within in the Supreme Court and in their infinite wisdom, they've now decided to refer it to a larger bench.

I thought that I would use my time today with you to actually think through and express some views on whether we think it's a good idea that there should be a variation or whether we should stick with the existing system, which only provides for a binary outcome more or less, which is to uphold or to set aside the awards. I think the one thing that is somewhat obvious but worth mentioning is the fact that variation is an appellate function. So, the minute you speak about modification of variation we are now considering introducing the idea of an appeal into the arbitral process. The current provision which we have, which is the provision which is frequently referred to as the challenge provision or the recourse provision is very much unlike an appellate provision, for the simple reason that the sort of central feature of that challenge procedures that you cannot consider the merits of the award.

I spoke a little earlier about ***Hakeem's*** case and I also hinted at some of the country underlying currents which were there in the case law when I spoke about ***Gayatri Balaswamy's*** case. There have been several such attempts by courts at the High Court level; Bombay High Court, Madras High Court, Delhi High Court and other such High Court to one way or the other modify awards. So, there is an underlying tension that the courts have felt to give effect to a modification. Often it has been done in an unarticulated manner, in the sense that the courts have simply gone ahead and modified some aspect of the award without grappling with this aspect of whether they can actually do so or not.

The Supreme Court, it's interesting to note, in effect, modifies awards not so infrequently, but exercising its constitutional power to do justice between the parties, which is in Article 142. And there are numerous judgments exemplifying that approach as well. Most of those judgments are judgments where the interest rate has been varied. We have some more extreme

examples of that. Perhaps the most extreme example is a judgment in which the Supreme Court actually preferred the minority award to the majority award and went on to rule that the minority award should be regarded as the award in the matter. I think most commentators in arbitration would say that was a somewhat startling result but they did do that. We have a landscape which is currently driven with some elements of contradiction, and I think it would be a welcome move to have some clarity, whether from Parliament or whether from the Supreme Court on this aspect of the matter.

Arbitration in India, it has to be said, it has to be said by those who have been very critical of the process such as me, has improved immeasurably. I think most of us now who deal with arbitration would perhaps grudgingly acknowledge the fact that the old delays, which were so frustrating in arbitration, are things of the past. I think we would also, quite rightly, be acknowledging the fact that our courts are very restrained now when it comes to dealing with intervention in arbitration awards, and I would say that having dealt with arbitration matters from the beginning of my practice for the better part of 25 odd years, I would think it's vastly improving now. And it's a space where there is a considerable incentive to move further and to align ourselves with international practices. That, of course, is a major positive for arbitration in India. The other thing, of course, to look out for you don't need to be a lawyer to see this. You could sort of be a cursory observer of India is that the country is at inflection point. We have new airports, new cities, new hospitals, new hotels, so on, so forth being built. There is a crying need to service this within efficient arbitration system.

Now in view on and in context of all of this if we draw some inspiration from some other established jurisdictions, where arbitration has been embedded for some time and is generally regarded as being a successful mode of dispute resolution, we will notice, I think, that on the whole, that such jurisdictions have incorporated appellate provisions of a limited extent into their arbitration framework. When I say this once again, in the sort of short period that I have, I can't really do a proper survey of that. But just to enumerate a few England under the English Arbitration Act, Australia under the Australian Arbitration Act, Singapore and Canada. So many of these, actually have appellate provisions. And all of these appellate provisions are generally limited to questions of law. Now, my own view is that with the maturing of the arbitration process which we have had in India and which is an ongoing process, and it's taking place quite rapidly, I believe that our courts are now ready and equipped to deal with a limited appeal.

Now, some aspects of this limited appeal. If you look, for example, at the appellate provisions under the English Arbitration Act, you will see that there are several filters before the appeal

can actually be heard. The first is that the parties are given the option to contract out of that particular provision in various ways. One is that if you say you don't want reasons that is viewed as a contracting out. Secondly, you can expressly contract out of that particular provision. It then has a provision for leave, which my understanding is quite carefully guarded by the English Courts and leave is granted only when there is a genuine need in the facts of the case to actually decide that question of law. The question of law must also fulfil certain requirements. Such as it must be a question which definitely arises in the arbitration, it must be a question where either the general public importance requires it to be decided or it severely and unfairly prejudices some of the parties to the arbitration.

It's interesting that the English Act, as we all know, is very different from ours. It has several interesting provisions, many of which I think we can have a serious look at and think of incorporating into our own legislation. But Australia, which also has the UNCITRAL Rules, has actually inserted 34A as an appellate provision very similar to the English provision. Singapore also has a similar such provision. So, I think the first point that I would like to make is that my view is that the arbitral process would be enhanced if the courts were given this power. It would be up to the parties to decide whether to arbitrate using this power or not. But I think the advantages of this power is that questions of law can be decided conclusively by courts. Courts are good at deciding questions of law. It maintains the spirit of arbitration where the questions of fact are all decided by the Arbitral Tribunal. And it is also my suggestion that courts should not venture into decision making on the merits of the dispute with regard to matters of fact.

You will also find from some other statutes that arbitration courts do retain a discretion to bury the award. For example, the English Act once again, on questions of substantive jurisdiction. They retain a discretion to uphold vary or to set aside the award on that aspect of the matter. We may consider whether to have a slightly enhanced appellate provision as well. As I said earlier, I believe that Indian Courts have now come of age in dealing with arbitration. And I believe that if the current trend continues, they will continue to exercise restraint, and I do believe that it's important that we have quick finality to this process.

I just want to give you a quick sort of personal example of an arbitration, which I have been involved in, which is actually crying out for an exit from this sort of spiralling effect of arbitration. It's a joint venture dispute between a German manufacturer and an Indian party. Joint venture of '96, went to arbitration in 2006. The award came out 14 years later in 2020, bristling with questions of law. We had a majority award, two retired Supreme Court judges. We had a minority award, one retired High Court judge. The award was primarily on questions

of law. So many things happened after the award. Incidentally, one of the arbitrators died, which has compounded the problem with regard to what happens next. Both parties being dissatisfied with the award filed Section 34s or challenge petitions against the award. They are currently admitted and likely to succeed. So, the parties are effectively have been locked into mortal combat. Really for the sake of mortal combat for the last 14 years.

The other interesting feature of this arbitration is that it involved more than 100 sittings, and I think that the arbitrators fees and the fees of counsel actually exceeded the amount which was eventually awarded. So lovely for the bar and fantastic for the arbitrators. Let's start all over again, but not a very user friendly system. Perhaps the parties might consider it better if, having gone down the rabbit hole of arbitration, they had a sort of parachute whereby they could actually somehow emerge from it. I think in this case, for example, because there are so many questions of law, it might have been a good idea for them to exercise that appeal. Was there such an appeal? So, I do believe from my own personal experience that this provision could have many, many salutary effects. Have I overrun my time Bindi? Okay, just one or two minutes more just to complete this thought process. Most of these jurisdictions allow this particular ruling by the courts to be appealed further as well. And I am conscious of the sort of opposing point of view where people would say that, oh, but it's an elongation of the arbitration process. It's not really clear that it is. Questions of law are more expeditiously decided generally than questions of fact. And if the arbitration courts are running a discipline, and in a time sensitive manner, I think that this could actually have many, many salutary effects.

I think that's it. Those are my suggestions. The spirit in which I've said many of the things is not so much to win the debate, but to actually put forward before you. Some thoughts to suggest that there is a very genuine case for a balanced restrained amendment to our Act, bringing in the power for courts to vary awards. Bindi over to you.

BINDI DAVE: No. So, Zal do I take it, therefore, you feel that currently, as. We stand today the provision. So, of course, there is no provision clearly for modifying, permitting, but there is a lot of debate, even as to whether the expression setting aside would within itself include modification.

ZAL ANDHYARUJINA: Well, it's interesting you mentioned that. I didn't want to delve deep into sort of the Indian judgments but maybe, Sharan, you use your time to speak about this. I found the reference to be perplexing. They asked four questions. Actually, three of them are the one are only one question. And the real question is, is it embedded in 34? Frankly, I don't see how that question could be asked because Justice Nariman clearly answered that it

is not. Therefore, he said, go for legislation. So, this quest for the appellate provision, where none exists and sort of the search for this appellate provision in a very different provision, to my mind is a fruitless task. But as I said, the Supreme Court, in its infinite wisdom, has proved many of us wrong before, so let me not say more on that.

BINDI DAVE: Thank you. Thank you, Zal. Thank you, Sarita. Before we move to the other side, may I request Deepak to give his thoughts and views first?

DEEPAK CHAUHAN: Thank you. Thank you, Bindi. So, I represent the industry. And I can share with you that none, litigation or arbitration, either way, that's not our choice. First choice remains mediation, solving disputes confidentially. And I think if you take it forward from there the choice is between litigation and arbitration, court litigation and if you ask us all our contracts, effectively, less than one crore would provide for arbitration means. Once you have chosen that as a means then you move to the next step of ever getting into a situation and appointing arbitrators who are basically going to be experts in their own field. That's again, a choice you start with. So, you end up having an arbitral Tribunal which is well formed, well defined, and you want to go ahead with the process in a very time bound manner, confidentially handling all the matters. Once you sort of culminate all this into an arbitration award is what you're looking for. As an industry, I would say that the expectation generally is that it will be a fair award. It would be something that you would want to stick with it. There could be aberrations. But obviously that's a choice which we have made. There were options available, and then we have consciously decided to move in that direction. What processes, even in situations where we've seen, there is where even in arbitrations, where you had to go to the courts, our experience has been that example, Section 11. We have a Section 11 which is ongoing from 2021 still to decide on the Arbitral Tribunal on the arbitrator itself. So, wherever we've seen this interface, even in the current operation regime also, we find that it takes away a lot of time. So, our view is that we should stick to arbitration. Stick to arbitration award. We understand it's a sort of a tunnel vision. You end up one way or the other. But I think. Perhaps that's a choice which parties have made and once that decision is made, I think we would much rather stick to it.

SHARAN JAGTIANI: Good afternoon, everyone. And good afternoon to Bindi and to Zal Sarita, Deepak and to everyone over here. And I think one of the advantages of speaking in a post lunch session is that if the lunch is good, you'll forgive us for anything that happens after that. But that said, Bindi said that we have something different for you to do on a weekday afternoon. I said, what is that? She said, you have to debate against Zal. I said, since when has that become different. It's just that we've changed the environment in which we are. But I think

let's make it different by not calling this perhaps a debate in the conventional sense, but an opportunity for us to express a rival point of view, both of which have something to be said in support of the point of view.

I think that Zal is, of course, with his usual articulation and clarity indicated that there have been significant improvements in the arbitration regime in India and I agree with that. So as a starting point, there is no dissension. In fact, there's concurrence. But I use that as a platform for the point of view that I want to advocate, which is what is it that has brought about a significant improvement in the arbitration regime in India. And to my mind, if I have to point to a single event or a piece of legislation that has contributed to this improvement, I would say it's perhaps the change to the provisions of Section 34 under the 2015 Amendment Act. And what that provision did was to really restrict and circumscribe the role of the courts in their supervisory jurisdiction in respect of the arbitral process. So, the improvement in the arbitration system has been brought about by a legislative change, and everyone in this room or perhaps most of us in this room, would be familiar with what that legislative change is, and what the problems were in the legal regime prior to that. It's when we identify the benefit that we have all received with that legislative change, it is that benefit which I say is what may perhaps be undermined or compromised by allowing courts to modify awards.

So, in an ideal world, which really doesn't exist, and certainly not with legal systems in India. You might be able to have this wonderful cohabitation between a restrictive regime for intervention under Section 34 and marry that with a limited power to modify arbitration awards. But when I look at these two, I actually feel in the Indian context, and I will therefore take the opportunity to respond to why, perhaps we may not be equated to foreign jurisdictions. But in the Indian context, it is this cohabitation between keeping the benefits of the 2015 Amendment, the limited role of courts in their supervisory jurisdiction, and yet trying to expand the powers to allow courts to modify awards. I think that this cohabitation of these two ideals will be extremely difficult to combine. Yes, undoubtedly there will be as Zal mentioned, the odd case where there would be in the facts of a particular case a crying need to wish that you had a power to modify awards, and to avoid the torture of recommencing an arbitration process. But I think that on balance, we're looking at that as a minority of situations.

The counterpoint to that, if I can put it across, is this, that if you have a power to modify an arbitration awards introduced by whatever statutory language one can command. We can borrow the statutory language from the 1940 Act, which came with its own problems. We can borrow a statutory language from the Vishwanathan Committee report which was submitted

to government on the 7th February 2024 and I'll allude to the proposed language in that. And I think immediately the problem that occurs to me is that if we engraft such a provision into the Act, necessarily a power to modify an award will entail to some degree, and that degree will vary depending upon the subjectivity of the judge and of course, the persuasiveness of the lawyer, but it will involve to some degree an appreciation of the merits of the matter. I don't think there are power to modify or vary an award by whatever language called, can coexist with the existing improvement, which is a no merits review.

Now, what's the existing improvement that Zal and me both concur on? The existing improvement under Section 34 post 2015 to do away with the problems caused by ***ONGC Saw Pipes*** and many in this room will know what those problems are. The existing improvement is to say that for a domestic award, patent illegality. Patent illegality has been explained by the Act mean not a reappreciation of the matter on merits and certainly no reappreciation of the merits. That's an existing improvement. Another existing improvement is for international commercial awards or arbitrations seated in India. You don't even have the patent illegality standard. You have to strike much higher than that, which is the public policy of India standard where, unless you can show that the award violates a fundamental notion of Indian public policy, you get no entry under 34.

Now, if you continue to retain that which I think is a *sine qua non* for developing, the progress of arbitration in India. How does that reconcile with any statutory provision that we might borrow or engraft? So, looking at an award to decide whether to modify or not. And undoubtedly, if one was to include that power, it would be on the basis of existing material that was there before the arbitrator. That goes without saying. But it would still mean the court exercising some form of appellate function to review existing material and to see whether Decision A ought to be substituted with Decision B. Now, if the court is going to undertake that exercise, in the process of deciding whether to modify an award or not, it's then very hard for the adjudicator or the judge to compartmentalize and say that to exercise the power of modification, I will peep behind the material to see what the material actually says. But to decide whether to set aside or not, I will maintain military-like discipline and not look at the merits of the matter at all.

And that's why I say that it's this coexistence which I perceive as being a problem. I wish that I could say with mathematical certainty that judges and lawyers would be able to keep both of these benefits, but I suspect that we can't. And as a consequence of perhaps not being able to coexist these two values and these two ideals from the point of view that we stand we say that on balance, it would be better to preserve what we have and not jeopardize it, rather than shoot

for something higher and compromise or possibly compromise the benefits that we have already achieved post 2015.

Now, if I take this back to something which is more fundamental and more philosophical, and I think Deepak touched upon it. In 2018, there was a survey that was conducted jointly by White & Case and Queen Mary University. It's a survey of 2018, where industry and people in commerce and business were asked, in that survey, that what was the most valuable characteristic of international arbitration. And at page 7 of the survey response, 60% of the responders said that the most valuable characteristic was avoiding a specific legal system. And of course, as a corollary to that, answer, one of the worst features of international arbitration identified in that survey was subjecting the arbitration to whatever limited degree to some sort of review of a national court system. So, when we choose arbitration and at the base of it lies this principle and philosophy of party autonomy, the choice that is made by industry and people is not merely to opt out of a court system at the trial court level. But the choice that's made is to opt out of a court system per se.

Of course, we do know that there is bound to be some involvement, whether it is to support the arbitration through provisions such as Section 9 and Section 27 and a supervisory power as it exists to make sure that rank perverse awards are simply not allowed to stand. That is the minimal role of courts that our legislation has recognized. And it has tightened that with the 2015 Amendment. The underlying philosophy of arbitration is recognized by Section 5. It's recognized by various other provisions, by judgments of the Supreme Court under Section 8 and 11, where Deepak gave the example that how you can get bottlenecked in the court system even at the 11th stage at the time when arbitration is supposed to commence. And it is these bottlenecks of the court system which we suspect will only be exacerbated if you're going to make a statutory amendment to allow courts to modify awards when the underlying philosophy of the Act and various judgments such as SsangYong and Associate builders and Recon of the Bombay High Court has been to buttress the statutory change and said let's really limit court intervention as far as possible. And that I say takes me to a famous idiom which is "Let not the best be the enemy of the good". Where we are right now is good, it's not perfect. Where we strive to be with having the good and the power to modification is the ideal of the best but the danger in that is that when you have a power of modification. Now let me come to how that power could perhaps be added in the problems with that. I'll give you two illustrations.

In the 1940 Act, the power of modification existed in Section 15 of the Act, and it was there in three sub-clauses. The one that would be perhaps relevant to any introduction today by way of

legislation would be a provision which said that courts could modify awards where they perceive or where they identify there to be an obvious error. Now, that phrase means many things to many different people. And therein lies a problem even if one was to tighten the language. Let me come to the suggestion of the proposal that was made by the Vishwanathan Committee Report which Zal alluded to a short while ago. And the language of the Vishwanathan Committee Report on the proposed provision for modification is through a proviso one, I'll read it out. And it says, 'provided further, that in cases where the court sets aside the arbitral award, in whole or in part. The court may make consequential orders varying the award in exceptional circumstances to meet the ends of justice'. Now, again the subjectivity of exceptional circumstances to meet the ends of justice. Now, this was a high powered committee report with many senior representatives from the industry. I'm not suggesting that this language cannot be in any other form. But I'm only saying that if we take the 1940 Act or take this proposal as templates of powers to modify, what you're going to find is that there is going to be the introduction of a legal standard which is inevitably going to undermine the existing attempt at making Section 34 of the Act as precise and watertight as possible. At a practical level, too.

Suppose we had a power to modify the award how would a petition or some petitions under 34 read prayer Clause A of the petition? The court exercises part to modify an award in the alternative to set aside an award. That's usually how we would word a prayer. Again, when you undertake that exercise, or the court undertakes the exercise in looking to see whether a case is made out to modify, you are looking at the material which otherwise is off limits. It's very difficult to then say that, having chosen not to modify the award, I would jettison or wipe the slate clean in my mind and look at the prayer to set aside the award within the confines of the existing restrictions, which is a no merits review.

A further point I'd like to make, and I think Zal makes a very valid point that when I thought about it, we too looked at foreign legislations. And yes, there are bars to modify arbitration awards in the jurisdictions that Zal mentioned. In those countries, some of them very candidly describe the power of the court as an appellate power. Of course, one option is to do that and it may have an appeal, which is that if it's worked in those jurisdictions an arbitration is kind of bound together with certain well recognized international principles, why wouldn't work in India? I think the point that I would like to make, perhaps as a counterpoint to what Zal said is this, that there are two reasons why we would have to be somewhat cautious in following a foreign legislation or jurisdiction. I think the first is this, that the reality of the court system in India compared to the abroad is that we simply have statistically much less time than we can afford to give to a matter as compared to any of the jurisdictions that we've spoken of abroad.

And much less time means that changes in legislation have to also be considered from the point of view of are they going to add to the bottleneck of an arbitration system where the bottleneck is really seen when the arbitration matters go to court.

The second point I want to make over here is that we also have to keep in mind that in these jurisdictions where arbitrations go to well established commercial courts with judges of many years of experience, whilst in India, our experience is largely in the High Court, where I think we've got judges of exceptional calibre who perhaps will catch on to the nuances. The 34 jurisdiction is not restricted to the High Court. The 34 jurisdiction in India would entail matters involving modification/setting aside going to district courts now designated as commercial courts in different parts of the country. In a country which is as large and as diverse, with varying experiences and varying exposure to commercial matters. So, if we're going to have the power engrafted into the Act, we also have to be conscious of the fact that the ground realities in terms of the time that we have and in terms of the collective experience of judges across all courts in India, not just select High Court, has to be kept in mind.

And the last point that I will make is that whenever we've had an arbitration regime which is allowed for subjectivity in approach of courts to arbitration, we have generally suffered. It's not too long ago that we had the arbitration regime popularly referred to by the case of ONGC Saw Pipes, where the standard under 34 pre 2015 was public policy and the Supreme Court explained that to be any error of Indian Law or any misapplication of Indian Law equates to a violation of public policy, and the courts were converted into, effectively, a court of appeal. That is what changed with the 2015 Amendment. And I think that it is to avoid a regression to that regime, albeit in different circumstances. That the counterpoint is, that let us hold on to what we have, and for the present, eschew this power of modification which may cause some kind of conflicts within the regime that we have today. So, whilst I think that there's undoubtedly in specific cases, a lot of merit in what Zal suggested and what Sarita suggested we only place for your consideration a counter point of view.

BINDI DAVE: Thank you, Sharan. So, like we have in litigation and arbitration. Mr. Andhyarujina, would you like a rejoinder? Sarita?

ZAL ANDHYARUJINA: Yes, as I said, with Sarita's permission. So, my friends on the other side made several valid points. And I think they are very useful discussion points on which perhaps we could kick around a few more of these ideas. I think that Sharan is of course right. And most of us have felt this that the tightening up and the careful defining of the grounds for setting aside under Section 34 have considerably helped in giving a lot of discipline to the

judges by, truth be told, taking away a lot of their discretion. One celebrated judge who recently, unfortunately for us, retired said that there should be only one ground under 34, and that should simply be, if you find the award to be patently illegal. So, that's a point of view. And it's a point of view that in a system which is less trained you give the decision maker less discretion. It's certainly a point of view.

My approach is informed by our recent experience. And our recent experience is that the amendments to 34 have given the judges the necessary discipline and exposure to arbitration. They've instilled in them the cautionary approach against running wild with the arbitration award. And I think, as I said earlier, I think the time has now come to build upon this discipline, by improving the system to allow them to have a slightly more nuanced attack at the award. Sharan also spoke about, on this, I slightly disagree with Sharan. Where Sharan spoke about the inevitably of a look behind the sort of merits of the award. I think it's very important that judges should, it should be clearly set out in the statute that it is going to be a look only at the law. We are not unfamiliar with that as lawyers. We had the second appeal, which was only on questions of law perhaps a very bad example is that we have the SLP, which is only on substantial questions of law and public importance, which is used by the courts to deliver social justice. So perhaps one example to follow, perhaps one not to follow. But the point that I am making is that I think that the bar and the judges are now ready to exercise a little more discretion and I believe that this discretion can only improve the system.

I think it was Denning who said it that we should never allow the dead hand of the past to rule us in the future. So, we have learned our lessons. Yes, there was a problem with the judges being interventionist, but I think we've turned that corner. And having turned that corner. Once again going back to Denning, I think that we should no longer be timorous spirits, but we should be the bold spirits who take things forward to improve the system. And of course, change brings its own problems, because change requires the systems to settle down a little bit. There will be some aberrant results, et cetera, but we must view institutional change from a long term perspective, and we must view it, I believe, from the perspective that the dust has now settled on the amendment, and we have a regime where that particular amendment has now stabilized in its use.

So, I do believe my view, I mean, at first blush, actually, when Bindi told me to support this position my reaction was very much like what Sharan has said. You know, impossible. Indian courts are unwilling. It will be a disaster. But I've thought a little more about it. I actually think that we are actually ready for a little more discretion to be given to Indian Courts. Sharan's example of international arbitration also, I slightly disagree with. International arbitration is

a sort of different species of arbitration from domestic arbitration, which obviously disconnects it from municipal courts. And it sort of interfaces once again with the municipal courts at the execution and the enforcement stage. So just so that sort of, I clarify my vision for you. It's not envisaged that the international arbitral award will be will have a challenge or will have an appellate provision. The international arbitral award will be enforced in accordance with New York Convention sort of enforcement. The Vishwanath Committee report actually, which I saw I tend to disagree with. I mean, who am I to say it, but I tend to disagree with that. I agree with Sharan. I think that is over broad, and I agree with Sharan that I don't think that the courts are ready for such a wide discretion. Of course, some of our judges are exemplary but I think that would be a little too much, a little too soon. So, my preference is to give parties an escape route out of a downward spiral into unending arbitration. Our experience has shown that there are such cases. The parties are free to accept it. The parties are free to exclude it from their arbitration sort of considerations and to my mind we should all strive for a system that is more complete and delivers a better result for the user. So those are my thoughts on some of the very valid points which have been raised by the other side as well.

BINDI DAVE: Thank you. Thank you, Zal. Sharan, any sort of rejoinder?

SHARAN JAGTIANI: Yes, just a few points. One, by way of clarification, I wasn't referring to international arbitration. I was referring to international commercial arbitrations, which were seated in India and therefore governed by Part 1, of the Act. It is those international commercial arbitrators which are subjected to a public policy standard even under Part 1. That is the gradation which has been brought in by the 2015 Amendment. So, I was only referring to that. I was not referring to enforcement under the New York Convention. To respond to what Zal said, when Zal said that the power should be brought in by only exercising it in circumstances where the courts will look at the law, I'd just like to break that down and try and understand what exactly that would mean. The first thing is that yes, of course you may look at the law as the entry point for exercising a power to modify the award. But once you get past that, what are you actually modifying? You are modifying the award, which is the decision on facts. You're not looking at the law to interpret the law in the same way that a constitutional court would. You're looking at the law to see whether the award goes wrong on the law and then take the correct application of the law to see how it can change the result of the arbitration award. That's bound to involve a second step look at the facts even after you've made an entry point determination of the law because you are ultimately changing the award, which is a determination of the facts or an outcome of facts.

Even if we have the entry point as being a power to modify by looking only at the law or on a question of law, by whatever word it is called, again it takes me to the diverse meanings that our legal system is given to this phrase, question of law. We know that in the context of second appeals under the CPC, the Supreme Court has said that a question of law includes a perverse finding on fact. So, the question of law itself may involve looking at how wrong the Tribunal went on facts. Zal himself said that the SLP example under 136 of the Constitution is not a good example. So therein again comes the challenge of what is a question of law. It need not be a pure question of law, but also a horrible application of the law to a given set of facts, which, again, is really where we have this problem of starting to look beyond the existing limits of 34 and looking to what may be a merit's determination on the facts.

So, these are my very, very quick responses to what Zal said in response right now. And that's why I feel that in the odd case, there will be an injustice, and I accept that. But in the majority of cases where arbitration reaches finality. Because the courts are now very clear about what they can and cannot do under the 2015 Amendment. In those majority of cases, the finality brought about by the existing regime is an upside that I think we should not be easily compromised only for dealing with the apparent injustice in a minority of cases where you feel that there is a need for the courts to modify an award to prevent the process from starting from square one again. And that's really the value judgment that we have to make. I think we've got two rival points of view of where the different values lie for each of these points of view. Thank you very much.

BINDI DAVE: Thank you. Thank you, Sharan. Deepak, anything more from your side? So, we've heard both sides. And of course, I want the audience now to ask any questions if you all have either to Zal... Yes, of course. But just before I come to that I just thought I should just give my two bits as well. I agree with Zal and Sharan both that the recommendations in the report, unfortunately are very broadly worded. But, but, but I do have an agreement with what Zal was mentioning earlier. And let me give my perspective, from an attorney perspective because as Zal mentioned, that we can see how the courts are reacting in terms of 34 in terms of 11, in terms of 9. Most importantly, even when I'm calling up a potential arbitrator to accept an arbitration because of the timelines which are now imposed of finishing the arbitration in a year and of course, the challenges in 34 and all of that. As I mentioned, I have spent considerable number of years starting from 1996 itself I have actually seen the trend of how the courts are, as Zal mentioned very strict in allowing 34s and granting orders under 9 and all of that. So, I'm actually seeing this shift and from our perspective, also, when clients inquire, I'm actually recommending arbitrations all the time because of this shift that we are seeing.

So, I do tend to agree with Zal in the sense that, yes, we are ready. We are ready to take on more challenges. At the same time, I, of course, also agree with Sharan. The report, the recommendations in the report are extremely wide. So, what we'll have to look at that and narrow it down and possibly narrow it down even to even more than what the tests are provided for 34. That is something that one will have to examine, and that, of course, I agree. As far as Deepak is concerned, your 11 has taken unusual long time. And I'm just going to say two things to that. You obviously didn't have MCIA because then you wouldn't have had to file an 11. And you definitely don't have Wadia Ghandy, because then so I'll just say that. And Sarita madam, anything more from your side? You have...all right? Yes. Audience, what questions? Can we just go one by one? The gentleman here.

AUDIENCE: Do we get to vote as to which team has won?

BINDI DAVE: Yes, of course. I thought, let the audience question and answers also...So I must tell you all I originally had thought of having a judge as well. Unfortunately, so I requested Mr. Freddie Devitres, Senior Counsel apart from...he was a commentator earlier. I'm sure you all would have known that, and I thought he would have made an excellent judge. And more because Freddie and I have had the benefit of doing a matter where we were asking for a modification, and, of course, because a law as it stands today the courts held otherwise. So, Freddie and I have worked a lot on this subject, and I would have really wanted him to be here, but he's unfortunately not well, and that's why Sharan and Zal and I spoke, and we said, okay, we'll let the audience be the judge of this motion. So I'll put it to vote, but let's just finish the questions first so that if anybody wants any questions to be answered before even making a vote, I think that will help. Yes, sir

AUDIENCE1: I just have one question where I'm from [INAUDIBLE] Partner ....So this issue of modification, power of modification, definitely is an important issue, and we are waiting for the Supreme Court judgments. What I feel personally is that one aspect which we all miss is that, in McDermott case in 2006, the court had very categorically said that it is an annulment proceeding. No modification. Now, why did the need arise now in 2024 or maybe two years ago to think about it. The problem is that after this 2015 amendment now we have timeline for at least the arbitrator to pass an award and after that we have seen by and large, I have done number of arbitration. By and large I am saying we had 29A applies those arbitration get over within two years. But when you go to 34, then the there is no time limit. Yesterday only I argued a matter in Delhi High Court which I had filed in 2011, it is only 34. So why the client or counsels are worried about this power of modification is this reason? Because supposing the

award gets over in two years, 34 gets, let us say gets over in one year. But the courts have said that this is not a mandatory provision and let us assume everything gets over within five years. Now, even if there is no power of modification I don't think that there is any problem in going back to arbitration and again, having another verdict. Provided again, you don't have to go and do the evidence, et cetera, all over again.

So, I think issue is more from that perspective, because the reason why arbitration was resorted to was the time and in fact, it has served that purpose. But because of the pendency in the courts, now nobody talks about that, those pendency. What can be done? Like there can be separate benches. Though there are some effort, but still the petition 34 are taking such a long time. That by the time you get an award, you really feel frustrated. So, then we start talking. There should be a power of modification, so perhaps that is the reason why modification is talked about. It may not really be required in the sense.

BINDI DAVE: Zal, may I request you to respond?

ZAL ANDHYARUJINA: Well, it's certainly a point of view. I mean, much of that has also been said by Sharan. Undoubtedly there is room for improvement in court, and I think it is our experience that things do get stuck when it comes to court. You're right that the timelines impose something that Bindi and Sharan both spoke about have actually dramatically changed what happens in the arbitration. So, my only response to you, sir, would be that for correct decision making on whether we should have a variation power or not, we should look to the question of whether that's desirable or not. There are so many problems in the arbitration ecosystem with courts. And I do understand that one of the marginal problems is the fact one of the central problems is the fact that courts are slow. But it seems to me the answer to that is that we should find a way to speed up the courts, not to have a provision which would otherwise be salutary omitted from the Act. So, yes, that is, you have identified what is the elephant in the room. In one sense that the courts are slow and Indian courts are particularly slow. We do have to really seriously work at speeding them up. I mean, there is no two ways about that. But that, in my respectful submission, would be an argument to say it shouldn't go to court at all, right? It's not an argument in my view, to say that we shouldn't have a beneficial provision under the Act. And just one thing I wanted to say, maybe I was not clear on this. Something that's come up when you mentioned it and when Sharan also spoke about it. That actually, the appellate provision is a separate provision from the setting aside provision. It's a facility which is given to the parties. They may avail of it or they may not. Right? So, it's sort of optional.

AUDIENCE1: I think that they are not even discussing. They're confining themselves to only the modification part.

ZAL ANDHYARUJINA: That they are not discussing. I think it's universally acknowledged that maybe...

AUDIENCE1: That is a better idea also.

ZAL ANDHYARUJINA: I don't know what you would call it, compounding the problem or rubbing salt into wounds anyway.

BINDI DAVE: But the reference, I think, is for 34 and 37 both, whether the power is included under both. Yes I think you had a question.

AUDIENCE2: hi, Kartik Mittal from [UNCLEAR]. My question is whether there's a midway between the two opposing arguments where the court can make certain obiter comments and I underline the word 'orbiter', while remitting the matter back to the Tribunal. Thank you.

SHARAN JAGTIANI: Sure. I think to your question. The Act as it stands doesn't even have a power to remit, the closest we have to that is 34(4). Which is not the same as the power to remit as it existed under Section 16 of the 1940 Act. In the real world, in the practical world, Zal will tell you that judges strong arm us as counsel, and they tell us that if we don't agree with the consensual remission of the matter to the arbitrator they'll hold against us, but that doesn't mean that there's a statutory power to remit. On what your point is on the power to make orbiter observations I think that is, of course, something that a judge can do. So, for example, I was in a matter on the losing side. Surprise, surprise. And in that matter when the court set aside an award which was granted against the Claimant in giving its reasons for setting aside the award, the court said many things on what would be the correct understanding of the law. That would mean that the Claimant would recommence the arbitration and undoubtedly have the benefit of those observations. So, the court could not modify the award. But in the process of setting aside an award it clearly will make those observations. And when it goes back to the arbitrator in round two, there's no reason why the arbitrator will not look at those observations to perhaps hold in favour of the Claimant the second time around, but that's still not a power to set aside.

BINDI DAVE: Deepak, you...

ZAL ANDHYARUJINA: Actually, to your point, it's actually the same point to the gentleman. I refer to the fact that I think we all witness the fact that there is an underlying tension in the system which is crying out for modification. So, some judges are doing it without grappling with the problem. Your suggestion that superior courts will pass a whole lot of obiter comments, which will then control the arbitrators into doing that is another approach to the problem. But it's all a back to our modification. It's all sort of trying to address the problem without facing the problem front off. So, my view is that we must recognize the fact that experience has shown that there is a need for modification and that we should address that. I mean all valid concerns expressed by everybody. So, we should put our heads together and try to see how we can make the modification work. That's my response to you.

BINDI DAVE: Also, since he asked something for a suggestion of something in between. I thought you had some thoughts on 34(4), Deepak.

DEEPAK CHAUHAN: So, currently, the way 34(4) reads is, of course, only if a party were to make an application that could ever come back. Our thought was that possibly if any case, you were to reach a situation like this and only with the consent of the parties that you could actually send the matter back for again being decided on any matter on a specific way is what perhaps maybe a better approach to follow.

BINDI DAVE: Yes.

AUDIENCE3: Nish from Singapore. I just wanted to make an observation and I'm going to do this with the utmost respect to all arbitration practitioners in India at the moment. Obviously, this is an area of much interest to me personally, and I would say let's avoid the two steps forward, one step back approach. And let me explain what I mean by that. First of all, Zal, as a participant in a debate, you are perfectly entitled to take certain liberties with the presentation. So, there's one part of your presentation, but I'm sure you're aware of which I'm just going to side with Sharan on, and that's whether or not an appeal is possible under Australian and Singapore Law. It is in the context of an arbitral award. It is, but in very limited circumstances. So in Singapore, you have two separate acts, the International Arbitration Act and the Arbitration Act. The International Arbitration Act deals with international commercial arbitration, and the Arbitration Act deals with domestic arbitration. It's only in the context of domestic arbitrations that an appeal lies on a question of law, and that, too it's an opt out provision. So it's not as wide as it was presented, which I'm sure you know Zal, but I understand in the context of a debate that we want we must put forward a position. But I

thought it's quite important for the audience to be aware of that. So, it's not as wide as has been presented.

And the same applies in Australia. It is limited to domestic arbitrations and does not apply to international arbitrations. And it's quite an important distinction. Because I think the positive when someone looks at the change in the arbitration landscape in India since 2015, is the fact that there is limited judicial interference. So, while I know that a view has been expressed that Indian judges are getting it right now and are doing better. In my view, they're doing it better because they are not interfering, not because they are interfering. So, let's not change that with all due respect, yeah? So, if the solution that you're looking for, for the problem of an unending arbitration, the answer is not a known, unending litigation, which is what India is known for but really adopt MCIA Rules and your unending arbitration may end quickly.

BINDI DAVE: Okay thanks. Any other question?

AUDIENCE4: Yes, Vikram, Rajah and Tann Singapore. But yes, I think Nish picked up the first point. So, in Singapore, there is a distinction between domestic and international. And in the context of domestic, I think the rationale for allowing points of law to be raised to court really, is that many of the domestic tribunals are less sophisticated. Some may not be legally trained. So that's the rationale. But it is not widespread. The second point is this whole point about modification. So, in Singapore, all we allow generally for international awards is setting aside for domestic, of course they appeal on point of laws allowed but by setting aside awards partially in substance, I think what courts achieve is a modification of the award. And I believe in India, partial setting aside is also allowed. It's just that that doesn't go into the merits. So typically, the grounds raised are straying beyond the ambit of the Tribunal's jurisdiction. And the second is breach of natural justice. So, if any part of the award reaches that and it's severable, then that will be removed and then you have a modification in substance. And the third point, I think, on speed is usually, if you have some kind of institution driving it, then there will be timelines and things will move along, largely in line with Nish. So...

ZAL ANDHYARUJINA: Thank you very much. Actually, that's an important point both of you have raised. I actually have the Singapore Act here, as I have the English and the Australian Act and I thought I did say that it is a very restrictive provision actually. Perhaps you guys missed it. I don't know. Perhaps I was not clear on that. So, it should be restrictive. In fact, I am in favour of a very restrictive modification to the Act. Precisely because, as I mentioned, I think it has to be taken in a graded manner. But I am very much in favour of having an appeal on law. And as Nish rightly pointed out, I think I mentioned it at least twice, that actually it is

a provision where the parties can opt out from. And I think the exact language that I used was that there are several filters involved, such as there's a leave provision and such as the fact that it has to be a particular question of law before the court will entertain. So, I'm actually in agreement with what many of you gentlemen have said.

I'm also in agreement with what was said about the structure of international arbitration. I said that towards the end of the address, I think that is actually a misnomer to think that you would have an appeal with regard to that. So, I just wanted to say that great minds generally think alive and I'm glad you raised those points it allowed me to agree with all of you.

SHARAN JAGTIANI: Sorry. If I can just quickly come in on the aspect of severance and severability. That again, is not something which is in the black and white of the law. But the courts in India through judicial decisions such as for example, in the case of ***RS Jiwani versus Ircon*** have recognized that if an award is on various aspects, and just because an award may be wrong or patently illegal in respect to one of them that doesn't contaminate the award as a whole. And that stands to reason. So, you can sever that part of the award, but I think unlike the position in Singapore, it's not restricted to aspects of natural justice. It could be on the substances substantive aspects of the award as well, and the reason why that was necessary is because the earlier view, which was too mechanical, is that you may have six completely disparate claims decided by an arbitrator who went wrong on one but you were required to set aside the entire award, and that made little sense. So, the position on severability is more flexible, provided that what you're severing is actually several from the rest. Tat's on, that is concerned.

And the other point I wanted to make on appeal which may be the nomenclature that is being suggested by those who want this power on a question of law. Again, I think the tension comes in because in the present frame of the Indian Act, Section 34 says in the context of a challenge on the patent illegality standard, and this is the language provided that an award shall not be set aside merely on the ground of an erroneous application of law or by reappreciation of evidence. So again, the present position is that an erroneous application of the law, which may otherwise in legal balance constitute a question of law, is not a ground to set aside the award on the patented legality standard. And I'm sure that there are better ways to moot a change than the present Vishwanathan committee report and Zal of course, makes one or two suggestions. But my overarching concern is that whatever language we may use there is an imminent and a likely risk that we're going to lose what we have. And I think that's the judgment that we have to all make.

ZAL ANDHYARUJINA: Sorry. I've got way in interest in this debate now. Sharan raised like court now except it's unending. Now we can go on. Actually, the point that Sharan...

BINDI DAVE: We have Neeti standing there with a clock, actually.

ZAL ANDHYARUJINA: Oh. Where is Neeti with a clock? Fortunately, I can't see her. Actually, Sharan raised the point, which did occur to me, that actually there is a slight problem with our appeal. Right? Because we have a setting aside provision which says you're not allowed to set aside merely because of an error of law. And Irecon, et cetera, which are unreferred to it says that it must actually be exhibited in an incorrect application in the arbitration awarded. Well, so that is one of the provisions which requires a little bit of a streamline. The gentleman raised actually, another very interesting question. And I don't know, Sharan, your thoughts on this, but when I always consider severance or severability of the award, at one level you are setting aside part of the award. At one level, you're modifying the award. Because you're setting aside a part and upholding the rest of the part, and I think this is the consistent trend that I have been trying to identify for you is that there is a crying need for modification. The countervailing tension is the fear that Indian courts are sort of going to go with a wrecking ball on the appellate provision. And they are just going to once again, sort of inevitably delay the process. It's a founded fear. Yes. It's happened in the past. But once again, I do believe that just as they have corrected the errors of the past, there may be a period which will require some settling down, but I think beyond the horizon it will be a better arbitration scheme if we have this.

SHARAN JAGTIANI: So, anyway just on whether severability or severance is modification, I actually don't look at severance or severability as a power of modification or as a facet of modification. My understanding of severability is really a partial exercise of the power of setting aside. And by what I mean is this that if the arbitrator grants five claims which are all severable, what the courts can do is to say that instead of setting aside the award on all five, because you're wrong on one. I will set aside the award on one. But retain what the arbitrator has done for the balance four. In other words, it's really a partial exercise of the power to set aside in a strictly technical sense, are you modifying the award? In a very technical sense, yes. Because the award is now not five claims, but it's four claims. But in any, to my meaningful sense, it's only a partial exercise of the power of set aside. What I understand is being the power to modify is typically something that the courts will do to grant to a party something that the arbitrators did not grant. That's really the sense of modification. So, for example, in the matter that Bindi did with Mr. Devitre, and she alluded to in a construction contract, the arbitrators granted cost of construction at X rate and not at the higher Y rate. When they made

the argument that the court must, on existing material, modify the award. What they were asking the court to do is to enhance X to Y. That's the typical situation of a modification. So, I look at severability as not being a facet of modification, but being a facet of setting aside. Modification is more in the nature of giving you something that the arbitrators didn't, which they well could have on the basis of existing material.

BINDI DAVE: Thanks, Sharan. I'll just add so that it does not come out as what should I say bluntly, as Sharan said. But while we were asking for a modification. Yes. But we had a minority award in the matter, so it was not as bizarre as we made it out to be and of course...

SHARAN JAGTIANI: It is never bizarre when Bindi's appearing. And Zal, in fact, alluded to this earlier on, on the Article 142 power and this is nothing to do with the debate. But the irony of judgments in India, the irony of all irony is that when you're arguing for the Respondent in India, Zal me and everyone in this room would know that the first judgment, you pull out to show the very, very narrow grounds for interference is the case of ***SsangYong***. And when you read ***SsangYong*** till the 95% part of the judgment everything is pro Respondent. The last 5% is when Justice Nariman says that the majority is so horribly wrong and exercises are 142 power to say that the minority award will become the majority award and says that this is now your award. So, ***SsangYong*** is really, in one sense, a sting in the tail. If ever there was one.

BINDI DAVE: Right. Do we have any other question?

AUDIENCE5: Yeah, one so this is in response. Sorry, I'm Sushil Shankar. This is in response to what Karthik Mittal just said and also Section 34(4), that was alluded to by Sharan and Deepak. Karthik suggested sort of a via media where the orbiter of the court would go back as feedback to the Tribunal and they would then modify or change improve their award. But isn't the problem with these things, in the Act as it stands today that by this time, the mandate of the Tribunal has ended already. So how can they do this?

SHARAN JAGTIANI: So, as I was saying, there's no express power of remission. There is none. So today the court can't do it. Can't send it back to the same arbitrator. But if the court were to simply set aside by making the orbiter observations, the law is very clear that the Claimant can recommence arbitration. So, these orbiter observations, as Karthik called them would be orbiter, with reference to the newly constituted Tribunal, which would be a fresh reference.

BINDI DAVE: And, of course, 34(4), which Deepak was refereed to does contain that.

AUDIENCE5: True reason, yeah. But wouldn't the same problem be there? It would be for the next...

SHARAN JAGTIANI: For 34(4), the court will never express an orbiter observation because 34(4), the court has to only find that the award may be supplanted with more reasons or gaps can be filled in and in fact, in the judgment of the Supreme Court in ***NHAI versus Hakeem***, Justice Nariman analyses 34(4) to say that the role of the court under 34(4), is to merely send it back, but the decision of whether more reasons are required or gaps are required to be filled is not the decision of the court, but the decision of the Tribunal once it's gone back. Thank you.

BINDI DAVE: Okay, we'll take one or two last questions. Sorry, Neeti Madam is saying. Okay. All right. Okay. I'm sorry. We'll have to wind up now yes, of course we can ask. I mean, whoever needs to ask more questions who won the debate? Who won the debate? Neeti Madam, will you just come here and please shall we take a poll? Show of hands. Okay. All right. So obviously the motion just so that everybody's get, the motion was, 'whether the courts should be empowered to modify awards?'. So maybe have all the yays first, okay. I am also a yay. All right. So I guess the answer is very clear. Everybody else is a nay. So that's the rule. That's the decision of this motion.

SHARAN JAGTIANI: I am voting. Yay. And honestly, when Bindi told me appeal against this.

BINDI DAVE: Sarita? All right. Thank you. Thank you very much. Thank you, Sharan. Thank you, Zal. Thank you, Deepak. Thank you Sarita.

~~~END OF SESSION 4~~~