

CONFORMING DISSENT: UTILITY OF DISSENTING AWARDS

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Dissenting awards in arbitration have long been a puzzle for legal professionals. This article unravels their complex role by examining recent SC judgments that clarify when and how these alternative opinions matter. While dissenting awards provide valuable insights into legal reasoning, the Court has definitively ruled that they cannot replace majority decisions. The research explores the delicate balance between judicial restraint and ensuring fair dispute resolution. It highlights a critical challenge: when a majority award is set aside, parties face the daunting prospect of restarting lengthy arbitration proceedings from scratch. The authors propose an innovative solution—allowing partial resumption of arbitration with a new tribunal—to save time, resources, and the integrity of the dispute resolution process. By offering a nuanced look at arbitration's inner workings, the article provides practitioners and legal scholars with a fresh perspective on managing complex legal disputes more efficiently.

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I. INTRODUCTION

Dissenting awards, though relatively uncommon, hold a pivotal role in the realm of arbitration proceedings. A dissenting award represents a formal written opinion by a member of an arbitral tribunal who disagrees with the majority decision, offering alternative reasoning and conclusions. While their existence enriches the arbitration discourse, in terms of enforceability, their value has been debatable. In a recent ruling,¹ the Supreme Court (‘SC’) has confirmed that a dissenting award cannot replace the majority award if the latter is set aside. This article explores the role of dissenting awards in arbitration, their treatment by the courts in the past, and the way forward in light of the recent ruling of *NHAI v. HCCL* for the future of arbitration in India.

II. SIGNIFICANCE OF DISSENTING AWARDS

Arbitrations, open discussion, collaboration, and unified decisions among tribunal members are essential for procedural fairness and legal integrity within multi-party tribunals. Parties are entitled to impartial and equitable resolutions by the tribunal, which must consider all perspectives, including dissenting ones. While an arbitrator may not be able to sway the other arbitrators on an issue in dispute during deliberations, every arbitrator should have the opportunity to present their alternate views.²

The significance of this collaborative approach extends beyond mere procedural requirements. In fact, failure to hold discussions between the tribunal members at the

¹ *HCCL v NHAI*, Civil Appeal No(s). 4658 of 2023.

² *Dalling v Matchett* [1740] 125 ER 1138.

time of writing the award can lead to setting aside the same on account of procedural impropriety.³ The tribunal's power, granted by the parties, applies to both its collective decisions as well as the individual arbitrator's contributions. This dual authority promotes transparency and cohesiveness within the tribunal, ensuring that each member can scrutinise and balance the decisions of others.

III. ROLE IN ENHANCING ARBITRAL AWARDS

Dissenting awards contribute to a more comprehensive understanding of the dispute, enhancing the overall fairness and robustness of the arbitration process. They serve as a crucial avenue for arbitrators to articulate their distinctive findings and viewpoints when their stance diverges from the prevailing consensus within the tribunal. These dissenting opinions often articulate the rationale for potential challenges to the majority award and offer an alternative perspective. That might prove valuable in subsequent proceedings. In some instances, where the majority award faces legal challenges that result in its overturning by the courts, the courts have turned to the minority award for resolution.

A. SUPPLANTING THE MAJORITY AWARD WITH THE MINORITY AWARD

In some instances, the courts have set aside either the majority awards in their entirety or specific sections of them and have instead chosen to supplant the majority view with the minority view, deeming them as binding and operative decisions. Several notable examples are *ONGC Ltd. v. Schlumberger Asia Service Ltd.*,⁴ *ONGC Ltd. v. Interocean Shipping (India) Pvt. Ltd.*,⁵ and *Modi Entertainment Pvt. Ltd. v. Prasara Bharati*.⁶ However, it is worth noting that the Courts did not provide any legal reasoning or justification in these cases, leaving uncertainty about whether such actions align with the provisions and intentions of the Arbitration and Conciliation Act, 1996 ('A&C Act').

B. AFFIRMING THE MINORITY AWARD IN THE JUDGMENT

³ *State of Rajasthan v Larsen & Toubro* (1996 Supp Arb LR 25).

⁴ *ONGC Ltd v Schlumberger Asia Service Ltd* 2006 (91) DRJ 370.

⁵ *ONGC Ltd v Interocean Shipping (India) Pvt Ltd* Arb. Pet. No. 549 of 2013.

⁶ *Modi Entertainment Pvt Ltd v Prasara Bharati* (2017) SCC OnLine Del 7509.

The Courts often tacitly support a minority award by indirectly affirming its findings in the judgment while setting aside the majority award. This subtle guidance informs future arbitral proceedings without direct enforcement, respecting the principle of limited interference in Section 34 of the A&C Act. This approach reflects judicial restraint while still acknowledging the merit of dissenting opinions.

C. UPHOLDING THE MINORITY AWARD WITH THE AIM OF DOING COMPLETE JUSTICE

In the landmark ruling of *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, the SC invoked its extraordinary powers under Art. 142 of the Constitution of India to uphold the minority award and directed execution of the same.⁷ The SC used this power to do complete justice between the parties, as referring the dispute to fresh arbitration would cause substantial delays, which would have contradicted one of the key objectives of the A&C Act.

IV. HCCL v. NHAI

In this case, the SC faced a cluster of petitions but singled out a specific one between HCCL and NHAI. The dispute between NHAI and HCCL arose out of a contract related to the Allahabad By-Pass Project, and included, *inter alia*, a differing interpretation of a clause regarding quantification and payment for embankments constructed using soil and fly ash. While HCCL advocated for a composite method, NHAI argued for a bifurcated approach. The arbitral tribunal unanimously decided issues in NHAI's favour on all issues except for the quantification issue, which was decided in HCCL's favour. However, in this regard, a dissenting award was made, which supports NHAI's method.

A. PROCEDURAL ANALYSIS & COURT'S ANALYSIS

HCCL challenged the award under Section 34, A&C Act, which was dismissed by the Delhi High Court ('HC'). However, the court upheld the majority award's interpretation of the quantification method in favour of HCCL. This led to NHAI appealing to the Division Bench under Section 37, A&C Act, which ruled in NHAI's favour even on the aspect of and set aside the majority award to the extent of the determination of the quantification method. Interestingly, the court has tacitly

⁷ *Ssangyong Engg. & Construction Co. Ltd v NHAI* (2019) 7 SCR 522.

affirmed the interpretation provided in the dissenting award but did not go to the extent of upholding it as enforceable along with the rest of the majority award.

Aggrieved, HCCL escalated the matter to the SC. The SC emphasised that the applicability of Section 34 and Section 37 of the A&C Act should be confined to a narrow scope and invoked judiciously. It strongly advocated for a “*policy of minimal intervention*”, asserting that judicial interference in arbitral awards is warranted only when it is unequivocally demonstrated that the tribunal's judgment was fundamentally based on egregious legal errors or a distorted interpretation of facts or contractual terms. As long as the view adopted by the majority was plausible, the court found no reason to intervene.

B. SUPREME COURT’S TREATMENT OF DISSENTING AWARDS

The SC clarified the treatment of dissenting awards, drawing attention to and re-affirming the previous ruling in *Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd.*,⁸ wherein while setting aside the majority award, the SC refrained from supplanting it with a minority award despite being in agreement with the same. The discussion in *Dakshini Haryana*, on commentaries on arbitration, namely *Born* and *Russel*, wherein *Russel* explicitly states that a dissenting opinion is not inherently considered an award and even *Born* has refrained from categorising it as an integral part of the award, was also reproduced. The SC stated:

“26. ...However, the court did not, in *Dakshin Haryana Bijli Vitran Nigam Ltd (supra)* direct the dissenting opinion to be treated as an award. In the opinion of this court, that approach is correct, because there appears to be a slight divergence in thinking between *Russel* and *Gary Born*. The former, *Russel* is careful to point out that a dissenting opinion is not per se an award, but “is for the parties' information only and does not form part of the award, but it may be admissible as evidence in relation to the procedural matters in the event of a challenge”. However, *Gary Born* does not expressly say that the opinion is not a part of the award. That author clarifies that this is an essential aspect of the process by which the parties have an opportunity to both, present their case, and hear the reasons for the Tribunal's decision; not hearing the dissent deprives the parties of an important aspect of this process”.

⁸ *Dakshin Haryana Bijli Vitran Nigam Ltd v Navigant Technologies (P) Ltd* (2021) (1) SCR 1135.

“27. It is, therefore, evident that a dissenting opinion cannot be treated as an award if the majority award is set aside. It might provide useful clues in case there is a procedural issue which becomes critical during the challenge hearings. This court is of the opinion that there is another dimension to the matter. When a majority award is challenged by the aggrieved party, the focus of the court and the aggrieved party is to point out the errors or illegalities in the majority award. The minority award (or dissenting opinion, as the learned authors point out) only embodies the views of the arbitrator disagreeing with the majority. There is no occasion for anyone- such as the party aggrieved by the majority award, or, more crucially, the party who succeeds in the majority award, to challenge the soundness, plausibility, illegality or perversity in the approach or conclusions in the dissenting opinion. That dissenting opinion would not receive the level and standard of scrutiny which the majority award (which is under challenge) is subjected to. Therefore, the so-called conversion of the dissenting opinion, into a tribunal’s findings, [in the event a majority award is set aside] and elevation of that opinion as an award, would, with respect, be inappropriate and improper”.

In addition to the inability to categorise a dissenting opinion as an ‘award’ another reason for refraining from upholding the same, which was cited, was that dissenting awards receive less scrutiny than the majority award. It was emphasised that supplanting a majority award with a dissenting award would be inherently unfair and arbitrary, especially since there would be no recourse to challenge this supplanted award.

V. THE WAY FORWARD

The SC has, vide the *HCCL v. NHAI* ruling, categorically set out now that parties to an arbitration cannot be bound by dissenting awards and had previously, vide the *NHAI v. M. Hakeem*⁹ ruling, shut the door to any modification of awards by courts at the Section 34 or Section 37 stage, to implement them. Some jurisdictions, such as the U.K. and Australia, do allow courts to cautiously modify awards in specific situations to ensure their enforceability (a power that was previously available to the courts under Section 16 of the Arbitration Act, 1940). While this might appear to be contrary to the sacrosanct “no-intervention” principle, it instils confidence in

⁹ *NHAI v M. Hakeem* (2021) 9 SCC 1.

arbitration by assuring the parties that the minor problems in an award can be addressed by the courts and that the efforts of the parties in arbitration do not go in vain. However, as it stands today, this recourse is not available to the parties.

A. LIMITED EXCEPTIONS & CURRENT CHALLENGES

The only situation where there may be a modification of an award or a minority award may be upheld is in exceptional circumstances such as those in the *Ssangyong* Judgment, where the SC may invoke its extraordinary powers under Art. 142. However, this recourse is sparingly exercised to deliver justice outside the four corners of the arbitration act.

A major predicament that then remains is that once the award is set aside, the parties find themselves back at the starting point with the time-consuming process of pleadings, evidence, and hearings staring down at them, rendering all their previous efforts wasted. This runs counter to the very essence of opting for what is often regarded as the fast and efficient path of dispute resolution among commercial parties.

B. POTENTIAL SOLUTIONS & RECOMMENDATIONS

At first instance, it seems that a potential solution lies in utilising Section 34(4) of the A&C Act, which grants courts the authority to suspend proceedings and provide the tribunal with an opportunity to rectify defects that led to grounds for setting aside the award. However, the Delhi HC has emphasised in a recent judgment¹⁰ that the power conferred by Section 34(4) should not be misconstrued as a means for the tribunal to re-evaluate findings or alter the award's substance and that this provision is limited to addressing curable defects only.

We believe that a viable solution lies somewhere in between. An effective way to save parties time and resources would be for the courts to allow the parties to refer the dispute back to arbitration, not from its inception, but solely for the determination of issues by a fresh tribunal. This approach can encompass the new tribunal's consideration of written submissions from the previous proceedings or, if necessary, holding oral submissions again.

¹⁰ *NHAI v Trichy Thanjavur Expressway Ltd, O.M.P. (Comm) 95/2023 DHC.*

Section 15 of the A&C Act permits the substitution of arbitrators under various circumstances, with the provision that hearings conducted before may be repeated at the tribunal's discretion. By leveraging the intent of this section and potentially amending relevant provisions, courts could authorise the replacement of the tribunal after setting aside an award. The newly appointed tribunal could then resume arbitration proceedings at the argument submission stage or be directed to render findings on limited issues, particularly in cases where only a partial award has been set aside.

However, this solution is limited to cases where awards are set aside on grounds that are capable of being rectified by a fresh tribunal and do not vitiate the proceedings as a whole. For instance, when an award is set aside on grounds of being against the public policy of India under Section 34(2)(b)(ii) of the A&C Act, a fresh tribunal can utilise the prior pleadings and hearings up to the final stage of arguments to issue a new award. This approach not only saves parties from starting afresh but also gives them an opportunity to challenge this new award, much like the previous one. This approach holds the potential to streamline proceedings, save parties valuable time and resources, and ultimately improve the efficiency and effectiveness of arbitration processes.

VI. CONCLUSION

The treatment of dissenting awards in Indian arbitration law has evolved significantly, particularly through recent SC judgments. While dissenting opinions serve valuable purposes in enhancing the quality and transparency of arbitral decisions, their legal status and enforceability remain limited. The current framework while respecting the principle of minimal judicial intervention, creates challenges when majority awards are set aside.

The proposed solution of allowing partial resumption of proceedings with a fresh tribunal offers a balanced approach that could preserve the efficiency of arbitration while maintaining its integrity. As arbitration continues to evolve as a preferred mode of dispute resolution, the role and utility of dissenting awards will remain important in shaping its future development