FRAUD, CORRUPTION AND BRIBERY – DISSECTING THE JURISDICTIONAL TUSSLE BETWEEN INDIAN COURTS AND ARBITRAL TRIBUNALS

*Janhavi Sindhu**

ABSTRACT

Recently, there has been a rampant increase in judgments of the Indian Supreme Court that seek to remedy the step-motherly treatment that has been meted out to arbitration in the country in the past. A crucial signal reflective of this attitudinal shift is the scope of arbitrability i.e. the ability and appropriateness of the arbitral tribunal to rule on certain issues and disputes. More specifically, the arbitrability of fraud, corruption and bribery has recently generated significant debate in India despite being long settled the world over, in favour of arbitration. The issue of fraud is crucial owing to its invariant appearance in commercial disputes, both as a *general* allegation with respect to the conduct of parties' and as a tactic to avoid the contract altogether. The latter instance exemplifies a more general issue of arbitrability – of (or?) the validity of the contract and/or arbitration agreement. Interestingly, the most recent judgment of the Supreme Court in *Swiss Timing* demonstrates an interesting convergence of both these attributes of fraud. This paper will map out the present status of both these issues.

I. INTRODUCTION

It is opined that arbitrability serves as a check on autonomy of parties, the cornerstone of arbitration.[1] At one point, it was widely acknowledged that parties should not have the autonomy to refer disputes involving allegations of bribery and illegality to a private arbitral tribunal. The decision of Judge Gunnar Lagergren in 1963 is widely cited to evince the unwillingness of courts to let arbitral and party autonomy prevail when fraud is involved.[2] While such reluctance might seem alien to most jurisdictions today, India is only gradually letting go of this reluctance. The question of arbitrability of fraud is a '*rationae materiae*' notion, for it is objective in nature, independent of the parties.[3] The question of what kind of considerations should factor in the question of arbitrability ranging from public policy, expediency and propriety is indeed debated.[4] As will be seen through this paper, arbitrability of fraud is unique in that it involves the application, and thus exhibits the importance, of all these factors. Since arbitrability is usually considered a question of jurisdiction,[5] the issue is brought up time and again before courts so as to challenge the arbitrator's jurisdiction and avoid arbitration. Therefore, the stance that courts of a country choose to adopt on the issue is an important barometer of the attitude of a State towards arbitration. Usually, a party would expect the court to consider the question of arbitrability at the following stages:

(a) *At the pre-award stage*:

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* Currently pursuing her Final Year at National Law School of India University, Bengaluru

[1] Loukas A. Mistelis, *Arbitrability – International and Comparative Perspectives*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 2 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).

[2] ICC Case no. 1110, Award of 1963, 10 ARB. INT'L 282, 293 (1994) at 277-281 [hereinafter ICC Case 1110] "I am convinced that a case such as this, involving such gross violations of good morals and international public policy, can have no countenance in any court either in the Argentine or in France or, for that matter, in any other civilised country, nor in any arbitral tribunal. Thus, jurisdiction must be declined in this case. It follows from the foregoing, that in concluding that I have no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature rather than from any national rules on arbitrability. Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for the assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes."

[3] Loukas A. Mistelis, *Part I Fundamental Observations and Applicable Law, Chapter 1 - Arbitrability – International and Comparative Perspectives, in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 5 (Loukas A. Mistelis and Stavros L. Brekoulakis eds., 2009).

[4] *Id.*

[5] Laurence Shore, *The United States' Perspective on "Arbitrability", in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 75 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).

a. When one party files a civil suit and the other makes an application to the court to refer the parties to arbitration owing to the existence of an arbitration agreement eclipsing the dispute.

b. In the specific context of India, in an application under Section 11 for the appointment of arbitrators by a judicial authority.[6]

(b) *At the Post award stage:*

a. When a party applies to set aside the award.

b. When a party raises an objection to the enforcement of the award.

This paper will largely be concerned with how courts have dealt with the question at the pre-award stage. In order to evaluate why certainty still evades this issue, it is necessary to analyse its judicial trajectory and the changing policy considerations that shaped this trajectory. The issue of arbitrability of fraud can cast its net far and wide. Apart from the arbitrability of general allegations of fraud in a dispute, whether the court should go into questions of validity of contracts (on grounds of fraud) is at times cast as an issue of arbitrability. This paper will dedicate different sections to the implications of both these issues. Given the indelible influence of the position in English Law on Indian Courts, this inquiry must commence with English Law.

II. ARBITRABILITY OF FRAUD IN ENGLISH LAW

Today, in an arbitration-friendly jurisdiction like England, the question of arbitrability has been rendered almost irrelevant and it rarely finds place in the litigation strategy of a party trying to avoid arbitration.[7] Akin to India[8] and unlike many other national jurisdictions,[9] no legislative guidance on arbitrable issues is provided.[10] Such a determination is carried out on a case-to-case basis when a party applies for stay of proceedings.[11]

In erstwhile English arbitration statutes, the relevant provisions for stay of proceedings were broadly worded, leaving scope for courts to exercise discretion while deciding the issue of arbitrability. It will be seen that different considerations were at play at different points in time to steer this exercise of discretion against a stay in matters involving fraud, bribery and corruption.

A. ARBITRABILITY & THE COMMON LAW PROCEDURE ACT, 1854

The reluctance of English judges to refer such matters to an arbitral tribunal pre-dates the award of Judge Lagergen.[12] One of the first cases in this regard, *Wallis* v. *Hirch*, involved allegations of fraud in a contract of sale of linseed cake. The buyers sought to recover money paid, as the cakes supplied did not match the description of the contract. In light of an arbitration clause (arbitration by colonial brokers) in the contract, the issue of staying proceedings under the 11th Section of the Common Law Procedure Act, 1854 fell for the court's consideration. The Court refused to stay the proceedings in favour of arbitration reasoning that the parties could not have contemplated referring a case of fraud and the dispute would, thus, not be covered by the arbitral clause.[13] The court opined that the issue of fraud, which comprised

[6] Arguably, the door on this has been closed to an extent by the recent decision of the Supreme Court in Arasmeta Captive Power Co. Pvt. v. Lafarge India Pvt. Ltd., A.I.R. 2014 S.C. 525 (India). See subsequent discussion in the paper on this issue.

[7] RUSSELL ON ARBITRATION 15 (D. Sutton et al eds., 23rd ed., 2007) [hereinafter RUSSELL ON ARBITRATION]; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 968 (2nd ed., 2014) [hereinafter G. BORN].

[8] S. Kachwaha, *Arbitration Guide: India,* IBA ARBITRATION COMMITTEE 6 (2013), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=1CF8C452-D4C3-4043-90F6-6F39B1B628B2.

[9] See the relevant legislations in Switzerland, Germany and United States.

[10] ARBITRATION IN ENGLAND 399 (J.D. M. Lew, et al eds., 2013).

[11] *Id.*; *See* Arbitration Act, 1996, c. 23, §9 (U.K.) [hereinafter UKAA, 1996].

[12] ICC Case 1110, *supra* note 2.

[13] *Per* Cockburn CJ & Williams J, Wallis & Anr. v. Hirsch & Ors., 140 E.R. 131 (U.K.). [hereinafter Wallis].

the crux of the dispute, would be more competently dealt with by a jury[14] as opposed to two brokers who, "*would naturally shrink from a charge of fraud made against a person in the market.*"[15] This case aptly evidences the prejudice that the judiciary harboured against arbitrators' ability to determine judicial issues in their stead.[16] *Wallis* thus evolved a general principle advocating the exercise of judicial discretion to refuse a reference.[17] Fortuitously, this principle was not applied indiscriminately – references were not mechanically refused in situations where the fraud alleged was tangential to the main dispute or not serious in nature.[18]

The judiciary was also concerned with the efficiency and efficacy of arbitration. Arbitration was considered to be a compromised form of dispute resolution for its inability to replicate the rigorous fact finding process of a judicial proceeding absent similar rules of procedure.[19] Thus, an arbitral tribunal was not considered an appropriate forum to decide serious allegations of fraud which would involve complex questions of evidence.[20]

A case against arbitrability of issues of fraud was made on grounds of propriety as well. In light of the gravity and reputational implications of an allegation of fraud, it is considered only appropriate to give such a party the right to vindicate his name in public, before an experienced judicial authority in the secure net of stringent procedure of evidence and fact taking as well as the right to appeal. All these factors together constituted a strong case against reference of such disputes to a mere private contractual arbitrator.[21] A case with utmost precedential value in this regard, is the ruling of Master of Rolls, Jessel ["MR Jessel"] of the Chancery Division in *Russell* v. *Russell*, dealing with allegations of fraud by one partner against the other in dissolving a partnership.[22] MR Jessel held that courts would refuse a reference to arbitration if the party charged with fraud desires a public inquiry.[23] The strength of this judgment is rooted not only in the concise exposition of this proposition but also MR Jessel's foresight in laying down the limitations to this rule. He noted *first*, there was no reason to hold that questions of misconduct and fraud would be beyond the purview of the arbitration clause as a matter of necessity.[24] *Second*, judicial discretion to refuse a reference should only be exercised as a "*matter of course*" when the party against whom fraud is alleged requests the same. Moreover, the court must satisfy itself that there exists prime facie evidence of serious allegations of fraud and that mere allegations are not employed as a tactic to avoid arbitration.[25] It is pertinent to note that the aforementioned case of *Wallis v. Hirsch* did not deal with a situation wherein the party charged with fraud had opposed a stay yet the matter was not referred to arbitration.[26] Therefore, *Russell* did beget a decisive change in the law and seemed to create a general rule in favour of arbitration. While the decision was a step towards a pro-arbitration stance, the exception the court carved out was still indicative of the status of arbitration as a disparate alternative to courts. Nevertheless, it is heartening to note that the dictum found consistent application in its restrictive terms[27] despite the uncertainty created by the insertion of Section 14 in the Arbitration Act of 1934.

B. ARBITRABILITY OF FRAUD POST THE ARBITRATION ACT, 1934

[14] *Id., Per* Crowder J and Wiles J, Wallis.
[15] *Id., Per* Wiles J and Cockburn J., Wallis.
[16] Stavros L. Brekoulakis, *On Arbitrability: Persisting Misconceptions and New Areas of Concern*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES (Loukas A. Mistelis and Stavros L. Brekoulakis eds., 2009).
[17] *See* Hirsch & Ors. v. John Conrad im Thurn, (1858) 27 L. J. C. P. 254 (U.K.); Willesford v. Watson, (1873) 8 Ch App 473 (U.K.).
[18] *See* Minifie v. Railway Passengers Assurance Co., (1881) 44 L.T. 552 (U.K.); Hirsch v. I.M. Thurn, (1858) 27 L.J.C.P. 254 (U.K,); Alexander v. Mendl, (1870) 22 L.T. (N.S.) 609 (U.K.); R. D. Thomas, *The Judicial Supervision of Arbitral References Involving an Allegation of Fraud*, 9 CIV. JUST. Q., 381, 398 (1990) [hereinafter R.D. Thomas].
[19] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (U.S.A.).
[20] Hoch v. Boor, (1880) 43 L.T. 425 (U.K.).
[21] R. D. Thomas, *supra* note 18 at 381.
[22] Russell v. Russell, (1880) 14 Ch. D. 471 (U.K.) [hereinafter Russell].
[23] *Id.* at 476.
[24] *Id.* at 476.
[25] *Id.* at 477.
[26] R.D. Thomas, *supra* note 18 at 381.
[27] Minifie v. Railway Passengers' Assurance Co., (1881) 44 LT 552 at p. 554 (U.K.).

Section 14 of the erstwhile Arbitration Act, 1934 conferred on courts the specific power in disputes involving questions of fraud, to order that the agreement shall cease to have effect and have the issue determined by the court. In light of this provision, it was opined that the court would be less inclined to grant a stay.[28] Nevertheless, despite the retention of this provision[29] coupled with a general power of the court to stay proceedings in the 1950 Act for *any sufficient reason*,[30] *Russell* v. *Russell* continued to hold the field.[31]

However, confusion persisted for some time, over an aspect of the issue that was not directly dealt with by MR Jessel in *Russell* – over what would amount to a "sufficient reason" to refuse a reference when the party alleging fraud requests the stay. In the case of *Camilla Cotton Oil Co*. v. *Granadex SA and Tracomin SA etc*[32], Lord Wilberforce seemed to suggest that the dicta in *Russell* implied that a stay would never be granted if the party alleging fraud requested the stay.[33] Merely because MR Jessel did not throw light on the court's powers when the party alleging fraud opposes stay (the factual scenario in the case being the opposite), it cannot be concluded that a stay must automatically be granted in such a situation. In the case of *Cunningham-Reid & Anr.* v. *Buchanan-Jardine,* the House of Lords noted precisely this.[34] Strictly contextualising the dicta put forth by Lord Wilberforce, the court held that section 24(3) was not restricted to situations wherein only the party charged with fraud can oppose stay. In such a situation, a stay may well be granted provided there are additional features in the case that would render a court trial more appropriate, for instance, if the subject matter of the dispute were important in public interest.[35] This inquiry would entail an analysis of all the circumstances of the case. It is also interesting to note that in *Cunningham Reid* the court stayed proceedings despite noting that there existed serious allegations of fraud. Thus, it can be argued that the earlier stream of precedents advocating trials *solely* because there existed serious allegations of fraud was overruled in favour of increased trust in the competencies of private arbitrators.

C. THE ADVENT OF ARBITRATION ACT, 1996

English common law gradually began leaning towards a reverse bias in favour of enforcing arbitration agreements and awards, save in exceptional circumstances.[36] Contemporaneously, the legislative scope of discretion was also diluted over the years in order to give effect to the international obligations of England arising from the New York Convention of Enforcement of Foreign Arbitral Awards, 1958 [hereinafter "New York Convention"].[37]

For instance, Section 1 of Chapter 3 of the Arbitration Act, 1975, enjoined the court to stay proceedings, "*unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is*

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[28] RUSSELL ON ARBITRATION, *supra* note 7; *See also* Muthavarpu Venkateswara Rao v. N. Subbarao, A.I.R. 1984 A.P. 200 (India).

[29] *See* Arbitration Act, 1950, c. 27, 14 Geo 6, §24(2) (U.K.) [hereinafter Arbitration Act, 1950].

[30] "Any party to these legal proceedings may…apply to the court to stay the proceedings, and that a court or judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement... may make an order to stay proceedings", Arbitration Act, 1950, *supra* note 29 at §4(1).

[31] Radford v. Hair & Ors., [1971] Ch. 758 (U.K.).

[32] Camilla Cotton Oil Co. v. Granadex SA and Tracomin SA, [1976] 2 Lloyd's Rep. 10 H.L at p. 16 (U.K.).

[33] "Under section 24(3) of the Arbitration Act 1950, ... the fraud relied on must be fraud by the party opposing the stay, so that any alleged fraud by the appellants is irrelevant.." *Per* Wilberforce LJ, Camilla Cotton Oil Co. v. Granadex SA and Tracomin SA etc, [1976] 2 Lloyd's Rep. 10 H.L at p. 16 (U.K.).

[34] Cunningham-Reid & Anr. v. Buchanan-Jardine, [1988] 1 W.L.R. 678 (U.K.).

[35] "In my view there can be circumstances which would make a case unsuited to be the subject of a stay where the stay is being opposed by the party charging fraud, but this is not one of those cases. There is in particular no special public interest aspect arising from this charge of fraud which means that it is undesirable from the public's point of view that the matter should be dealt with by arbitration rather than in open court." *Per* Wool LJ, Cunningham-Reid and Anr v. Buchanan-Jardine, [1988] 1 W.L.R. 678 at p. 688 (U.K.).

[36] *See* Rew & Ors. v. Cox & Ors., [1996] C.L.C. 472 (U.K.) wherein proceedings were stayed not owing to the allegations of impropriety in the dispute but considerations such as avoiding multiplicity of proceedings.

[37] Fiona Trust & Holding Corporation & Ors v. Privalov & Ors, [2007] 1 C.L.C. 144 at p. 158 (U.K.); R. D. Thomas, *supra* note 18 at 389.

not in fact any dispute between the parties with regard to the matter agreed to be referred" in case of foreign seated arbitrations and specifically excluded the application of Section 4(1) of the Arbitration Act, 1950 to such proceedings. In fact, in *Paczy* v. *Haendler & Natermann G.M.B.H.*, Justice Withford referred to these provisions to infer that the court has no discretion to set aside a non-domestic arbitration agreement even if fraud were alleged.[38]

Similarly, in the Arbitration Act of 1996, which repealed the 1950 Act and the changes made thereto by the Arbitration Act of 1979, Section 9(4) provides that the court can only refuse stay if the agreement was found to be null and void, inoperative or incapable of being performed[39] as opposed to leaving it to the court to find a "*sufficient reason*" to refuse arbitration.[40] This change aligned the English Arbitration Act with the UNCITRAL Model Law and the New York Convention, which were intended to apply only to international commercial arbitrations.[41] An exception was carved out for domestic arbitrations in the form of Section 86 that excluded the application of Section 9(4) to domestic arbitrations and in turn provided that the court could also refuse a stay if there "*are other sufficient grounds for not requiring the parties to abide by the arbitration agreement.*"[42] However, this provision was never enforced for the fear of infringing European Community law by, in effect, treating English nationals differently.[43] Therefore, the discretion of the court was virtually nullified and it became mandatory for the court to refer parties alleging fraud.

D. WHO DECIDES THE VALIDITY OF AGREEMENTS ASSAILED FOR FRAUD?

In the cases discussed above, courts grappled with precisely defining the type of fraud that would remove the matter from the arbitrator's jurisdiction. While these cases have tried to delineate fraud from dishonesty, reputation and impropriety, a distinct stream of precedent has developed which deals with situations where fraud is invoked as a ground to avoid the contract and/or arbitration agreement. A different set of considerations, namely the principles of *kompetenz-kompetenz* and separability, has influenced courts in deciding whether the issue should be ceded to the Arbitrator. The principle of separability was not always graced with the amount of certainty it is today, and has gone through a gradual process of evolution and acceptance.

The 'orthodox view' dictates that, "*nothing can come from nothing*" – if the contract is repudiated or was void ab-initio, the arbitration clause contained therein would also be revoked or be void. The simple logic at play was that if the contract were void, it is obvious that a subordinate clause would also be void and as a result, a party could not claim the benefit of the arbitration clause.[44] Proceeding on this assumption, the court also went on to hold that, in effect, the arbitrator by ruling on the validity of the contract would be ruling on his own jurisdiction, which was impermissible.[45]

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[38] Paczy v. Haendler & Natermann G.M.B.H., [1979] F.S.R. 420 (U.K.). Admittedly, as an *arguendo* the court also noted that even if the court had any discretion, the question of its exercise would not arise in the case, as a prima facie case for fraud had not been made out.

[39] "On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.", UKAA, 1996, *supra* note UKAA, 1996, *supra* note 11 at §9(4).

[40] Arbitration Act, 1950, *supra* note 29 at §4(1).

[41] R. Goode, *Arbitration – Should Courts Get Involved?* 2(2) JUD. STUD. INST. J. 33, 36 (2002) [hereinafter R. Goode].

[42] UKAA, 1996, *supra* note 11 at §86(2)(b).

[43] R. Goode, *supra* note 41 at 36.

[44] Jureidini v. National British & Irish Millers Insurance Co. Ltd., [1915] AC 499 (U.K.); Hirji Mulji v. Cheong Yue Steamship Co. Ltd., [1926] A.C. 497 at p. 505 (U.K.).

[45] *Per* Bankes LJ, in Monro v. Bognor Urban District Council, [1915] 3 K.B. 167 at 172 (U.K.), "the essence of the claim is that the plaintiff is asserting that he was induced by fraud to enter into the contract, and that as a consequence the contract never was binding. If that is the nature of the claim, it seems to me plain that it does not come within the scope of the submission"; *Also see*, *Per* May LJ in Ashville Investments Ltd. v. Elmer Contractors Ltd., [1989] Q.B. 488 at 499 (U.K.), interpreting Monro, "In other words if the claim based on fraud had been left to the arbitrator he would have been asked in reality to adjudicate upon his own jurisdiction, which is never permissible."

Today, this problem could be tackled by the principle of *Kompetenz-Kompetenz*.[46] However, at that time, guidance in the form of the UNCITRAL Model law was not available.[47]

Gradually, the answer was found in the principle of separability, as per which, the arbitration agreement is treated as a separate agreement and would not be affected by defects related to the underlying contract.[48]

The orthodox view was debunked as "*false logic*" in *Heyman* v. *Darwins*.[49] In this case, the court dealt with a dispute between the manufacturers and distributors of steel where the manufacturers had repudiated the contract upon the creeping of differences. When the appellant distributors initiated legal proceedings, the respondents sought to stay proceedings and refer the matter to arbitration. The court held that the repudiation of an agreement on grounds of frustration would bring the contract to an end to the extent that parties are no longer contractually beholden to the other to perform obligations therein. However, the contract would still survive for certain purposes and the arbitration clause would survive to serve as a means of settlement.[50] Even though the House of Lords did not explicitly cast its *ratio* in terms of separability, the case came to be cited as prime authority for the proposition that the arbitration clause would be considered ancillary to the main contract.[51] However, a passing reference in the opinion of Lord Chancellor Viscount Simon ["LC Viscount Simon"] posed trouble. He drew a distinction between cases wherein parties contended that the contract was *void ab-initio* along with situations where the parties denied having entered into the contract at all and where the parties sought to repudiate a binding contract upon the creeping up of differences. He held that in the first two categories, the dispute could not be referred as the arbitration clause too would be void ab-initio or would not have come into existence respectively.[52] The implications of this opinion were tangentially considered in *Ashville*, wherein the court dealt with the question of the arbitrator's power to order rectification of an *admitted* contract. In this case, *Heyman* was cited to ground "*a principle of law that an arbitrator does not have jurisdiction, nor can the arbitration agreement be construed to give him jurisdiction to rule upon the initial existence of the contract.*"[53] Further, albeit as *obiter*, the court interpreted the opinions in *Heyman* and *Munro*[54] to hold that, "*if the claim based on fraud had been left to the arbitrator he would have been asked in reality to adjudicate upon his own jurisdiction, which is never permissible, as Heyman v. Darwins Ltd…makes clear.*"[55]

The *obiter* in *Heyman* with respect to reference of the question of the contract being *void ab-initio* or its initial invalidity, was squarely before the Court of Appeal in *Harbour Assurance Co. (U.K.) Ltd.* v.. *Kansa*

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[46]The Arbitration and Conciliation Act, No. 26 of 1996, §16, INDIA CODE (1996) [hereinafter Arbitration Act, 1996]; UNCITRAL Model Law on International Commercial Arbitration, Art. 16, Sales No.E.08.V.4 (1985) and UKAA, 1996, *supra* note 11 at §30.

[47] *See* Arbitration Act, 1950, *supra* note 29.

[48] G. Born, *supra* note 7 at 1072.

[49] Heyman v. Darwins Ltd., [1942] A.C. 356 (U.K.) [hereinafter Heyman]

[50] "What is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement." *Per* Macmillon LJ, Heyman at p. 374.

[51] Bremer Vulcan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd., [1981] A.C. 909 (U.K.); Paal Wilson & Co. A/s v. Partenreederei Hannah Blumenthal, [1983] 1 A.C. 854, 917 (U.K.); Harbour Assurance Co. (U.K.) Ltd. v Kansa General International Insurance Co. Ltd., [1993] 3 W.L.R. 42 (U.K.) [hereinafter Harbour].

[52] Per Viscount Simon LC, Heyman at p. 366. *See also,* "a claim to set aside a contract on such grounds as fraud, duress or essential error cannot be the subject-matter of a reference under an arbitration clause in the contract sought to be set aside." Per Macmillon LJ, Heyman at p. 371.

[53] Ashville Investments Ltd. v. Elmer Contractors Ltd., [1989] Q.B. 488 (U.K.) [hereinafter Ashville].

[54] *See supra* note 45.

[55] However, it is pertinent to note here that in Bankes LJ's opinion in *Munro* which has been relied upon to make this statement, Bankes LJ held that a party alleging inducement by fraud was in fact alleging that the contract was never binding in the first place. However, Bingham LJ in his separate concurring opinion did not agree with the reasoning of Bankes LJ and further went on to hold that *had* fraud been an issue in the present case, "*I would have thought it preferable… to be decided by the arbitrator.*" Ashville at p. 518.

General International Insurance Co. Ltd.,[56] In this case, it was contended that certain insurance policies were void for non-disclosure and misrepresentation of material facts. While arguing that the issue of *initial illegality* cannot be referred to arbitration, the orthodox view that nothing comes from nothing was once again aired out. However, the bench unequivocally debunked this 'logical argument' for being an oversimplification.[57]

Lord Hoffman's opinion best explains the complex issues in this case – first, even if the arbitration agreement is a clause in an agreement, it cannot be said that it is necessarily a *part of that agreement* as it was permissible for parties to include multiple agreements in the same document. Secondly, LC Viscount's *obiter* with respect to initial illegality of a contract could not be treated as a sweeping proposition. There would be certain situations wherein the initial illegality would render the arbitration clause invalid. These include cases where the existence of the contract is denied as *non est factum*, or for mistake or want of authority.[58] However, such examples are limited. Lord Hoffman then put forth a more appropriate test: "*the logical question is not whether the issue goes to the validity of the contract but whether it goes to the validity of the arbitration clause. The one may entail the other but, as we have seen, it may not.*"[59] He was also quick to point out that deciding whether the arbitration clause would survive the invalidity of a contract, would not be a blanket test based on the type of invalidity but dependent on the policy and facts. As a result, one could not generalise and hold that all cases of, say, initial illegality could not be referred to arbitration.[60] Moreover, in a great feat for arbitration, Lord Hoffman then proposed the need to take into account purely *commercial reasons* in favour of a reference as long as the policy of the rule of illegality is not offended.[61] These reasons include deference to the parties' wishes, the benefit of a one-stop adjudication, etc.[62]

This issue of validity of agreements on grounds of fraud finally came up in context of the new Act. The enactment of the Arbitration Act, 1996 remedied two defects that implicated the opinions in *Harbour* - the removal of the provision of discretion under Section 24(2) and recognition of the principle of *Kompetenz Kompetenz*.[63]

E. THE ARBITRATION ACT, 1996 AND *FIONA TRUST*

An opportunity for clarification arose in *Fiona Trust & Holding Corporation* v. *Privalov*.[64] In this case, eight companies belonging to the Sovcomflot group of companies owned by the Russian State entered into eight charter-party contracts with eight other companies. However, it was later discovered, that in procuring these contracts, the charterers had bribed senior officials of the Sovcomflot group. The owners, i.e. Sovcomflot Group, brought court proceedings for damages and to rescind the contract on grounds of bribery. The charterers brought an application to stay these proceedings under section 9 of the Arbitration Act, 1996. The question before the court was framed as, "*whether the disputes should be arbitrated rather than litigated.*"[65] The Court sought to answer this question in terms of the construction of the

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[56] Harbour, *supra* note 51.
[57] *Per* Hoffman LJ, Harbour, *supra* note 51 at 721.
[58] *Per* Hoffman LJ, Harbour, *supra* note 51 at 721-726.
[59] *Per* Hoffman LJ, Harbour, *supra* note 51 at 724.
[60] *Per* Hoffman LJ, Harbour, *supra* note 51 at 724-5.
[61] *Id*; A. Berg, *Arbitration Under a Contract Alleged not to Exist*, 123 L.Q. REV. 352, 355 (2007).
[62] *Per* Hoffman LJ, Harbour, *supra* note 51 at 725.
[63] Harbour, *supra* note 51 at 722, Hoffman LJ noted that, "It is common ground that in English law an arbitrator cannot bind the parties by a ruling on his own jurisdiction, and therefore the validity of the arbitration clause is not an arbitrable issue."
[64] Fiona Trust & Holding Corporation & Ors. v. Privalov & Ors., [2007] 1 C.L.C. 144 (U.K.) [hereinafter Fiona CA] *affirmed in* Fili Shipping Co. Ltd. & Ors. v. Premium Nafta Products Ltd. & Ors. (U.K.) on appeal from Fiona Trust and Holding Corporation & Ors. v. Privalov & Ors., [2007] Bus. L.R. 1719 (U.K.) [hereinafter Fiona HL].
[65] Fiona Trust & Holding Corporation & Ors v. Yuri Privalov & Ors, [2006] EWHC (Comm) 2583 (U.K.); Lord Hoffman, writing his judgment for the House of Lords, framed the issue as "whether, as a matter of construction, the arbitration clause is apt to cover the question of whether the contract was procured by bribery and secondly, whether it is possible for a party to be bound by submission to arbitration when he alleges that, but for the bribery, he would never have entered into the contract containing the arbitration clause."

arbitration clause and separability, against the backdrop of the changing perceptions of arbitration and expectations of commercial businessmen. In a noteworthy departure from established jurisprudence, the court shied away from a pedantic reading of each word in the arbitration clause – "*In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal...unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction*."[66] This judicial shift echoes the legislative change brought about with the enactment of the Arbitration Act of 1996. In particular, section 7 of the Act now acknowledges that the principle of separability is "*intended to enable the courts to give effect to the reasonable commercial expectations of the parties about the questions which they intended to be decided by arbitration*" and its purpose should not be defeated by a restrictive construction of arbitration clauses.

The changes brought about by section 7 also served as a guiding factor whether the arbitration clause would continue to be binding when the contract was rescinded for bribery. The court held that, in light of section 7, an arbitration agreement would not be considered invalid unless there was *direct impeachment* of the arbitration clause.[67] In holding so, the court distinguished this situation from situations wherein it was claimed that the contract was *non est* for forgery or for complete want of authority of the purported agent.[68] It was simply not enough to say that the officer was bribed into entering into the contract and was, thus, also bribed into entering into the arbitration agreement contained therein. Section 7 creates a legal fiction by treating the arbitration clause and contract as separately concluded and prevents situations where one falls with the other. Instead, direct impeachment requires an *exacting test, on facts, which are specific to the arbitration agreement.*[69] The decision of Lord Justice Longmore ["LJ Longmore"] in the Court of Appeal was unequivocally affirmed and extensively referred to by the House of Lords. LJ Longmore was careful to add value to the precedent he was creating by specifying that an identical conclusion would be reached in respect of the allegations of fraud made by the parties (which were not as substantial as the allegations of bribery in this case). As a result, the dictum of LJ Longmore is considered to have settled the question of arbitrability of issues of fraud.

It is interesting to note that apart from framing the issue as one of arbitrability, arbitrability is not explicitly addressed in the judgment. In fact, it has been argued that the case was only based on the issue of separability and/or the scope of the arbitration agreement.[70] This issue is relevant as many scholars have spent time and space in trying to decipher conceptual differences between arbitrability and validity of arbitration agreements. However, these discussions are only limited to clarifying that, holding a matter to be inarbitrable does not imply that the arbitration agreement is invalid. Instead, in the present case, parties sought to void the agreement on grounds of fraud. The question in terms of arbitrability may be framed as, "whether the issue of invalidity of a contract or arbitration agreement on grounds of fraud should be decided by the arbitrator?" The question thus becomes different from *whether the agreement is invalid* to *whether the arbitral tribunal should decide the issue of invalidity of the agreement*. The court chose to answer this question by applying the principle of separability to hold that the arbitration agreement would be separable from the underlying contract and that parties generally intend for questions of validity of the general contract to be arbitrable. In the opinion of the author, another instinctive answer can be found in the principle of *kompetenz-kompetenz* i.e. arbitrators can decide questions of their own jurisdiction.[71]

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[66] *Per* Hoffman L., Fiona HL, *supra* note 64 at 1726.

[67] "The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid", *Per* Hoffman L., Fiona HL, *supra* note 64 at 1726.

[68] Fiona CA, *supra* note 64 at 155.

[69] *Per* Lord Hope of Craighead, Fiona HL, *supra* note 64 at 1731.

[70] *See* RUSSELL ON ARBITRATION, *supra* note 7 at 15; T.D. Grant, *International Arbitration and English Courts* 56(4) INT'L & COMP. L.Q., 871, 879 (2007) [hereinafter T.D. Grant].

[71] "It is common ground that in English law an arbitrator cannot bind the parties by a ruling on his own jurisdiction, and therefore the validity of the arbitration clause is not an arbitrable issue." *Per* Hoffman LJ, Harbour, *supra* note 51 at 720.

Indeed, both separability and *kompetenz-kompetenz* may not reflect traditional factors to decide arbitrability for those who cast arbitrability as a matter of public policy. Therefore, one may question whether the issue was ever that of arbitrability in *Fiona*. Such viewpoints may be put at ease, when the negative answer is sought i.e. claims largely involving the question of invalidation of arbitration agreement (direct impeachment) should not be arbitrated as it would not be proper to subject a party to costly arbitration proceedings only to hold that the arbitrator lacks jurisdiction owing to an invalid arbitration agreement despite the principle of *kompetenz-kompetenz*.[72] Thus, separability and *kompetenz-kompetenz* can be cast as factors in favour of arbitrability. Indeed, authority also suggests that questions of validity of arbitration agreements and contracts could fall within the scope of arbitrability when the term is used in its broadest sense.[73] Finally, that arbitrability of fraud was at issue in *Fiona* is best explained by arriving at the converse of the *ratio* of *Fiona* all claims of fraud except fraud that directly impeaches the arbitration agreement can be decided by the tribunal.[74] As a result, it may be argued that the stream of precedent originating from *Russell* v. *Russell*, is no longer good law under English law such that claims of fraud are generally arbitrable.[75] Against this backdrop, the next section will compare and contrast the evolution of the issue in the Indian context.

III. ARBITRABILITY OF FRAUD IN INDIA – TOO LITTLE TOO LATE?

The development of Indian precedent on the issue is not easy to map out and analyse. The influence of English law, though rife, was not always justified and contextualised.

In an old decision of *Majet Subbahiah and Co.* v. *Tetley and Whitley*, the court while deciding whether questions of breach of contract and damages could be referred to arbitration, enumerated cases wherein such references would be refused. "*Those are cases where, either by reason of the fact that there are charges of fraud, or by reason of the Court coming to the conclusion that in arbitration complete justice cannot be obtained between the parties..*"[76] At this stage, the court's refusal stemmed from the distrust in arbitration and its ability to deal with complicated questions of fact and evidence.[77] Indeed, it was considered a general proposition that matters of fraud should not be arbitrated but be decided in open court so that the party charged with fraud has the right to appeal complicated questions of fact.[78] In 1934, the Madras High Court followed the decision of *Russell* to hold that the party charged with fraud had the right to ask the court to have the matter tried in open court.[79] However, certain decisions failed to notice this tempered view and simply held that a prima facie case of fraud would be sufficient to oust the jurisdiction of the arbitrator and refuse reference.[80]

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[72] *See generally* discussion in Fiona CA, *supra* note 64. *See also*, discussion on these considerations in S.B.P. & Co. v. Patel Engineering, A.I.R. 2006 S.C. 450 at ¶25 (India).

[73] ARBITRATION IN ENGLAND 399 (J.D. M. Lew, et al eds., 2013), *see* footnote 4 therein.

[74] T.D. Grant, *supra* note 70 at 877; it is safe to assume that such a conclusion is not arrived at by a classic mistake based on syllogisms, for the same is held in the judgment in positive terms. For instance, "The judge had already said (page 91) in relation to fraud and duress that Lord Macmillan's statement in Heyman v. Darwins Ltd. that a claim to set aside the contract on the ground of fraud or duress was not arbitrable was no longer the law." *Per* Longmore LJ, Fiona, CA, *supra* note 64.

[75] *See* Deutsche Bank AG & Ors v. Asia Pacific Broadband Wireless Communications Inc. & Anr., [2008] 2 C.L.C. 520 at pg 530 (U.K.); Amr Amin Hamza EL Nasharty v. J. Sainsbury Plc, [2007] EWHC 2618 (Comm) at 226 (U.K.). However, some exceptions to the rule do exist *See*, Excalibur Ventures LLC v. Texas Keystone Inc & Ors., [2011] 2 C.L.C. 338 at ¶ 83 (U.K.).

[76] Majet Subbahiah & Co. v. Tetley & Whitley, A.I.R. 1923 Mad 693 (India). It is pertinent to note that Wallis v. Hirsch, 1 C.B.N.S. 316 (U.K.) was cited to the court and distinguished by Ramesam J.

[77] Johurmull Parasram v. Louis Dreyfus & Co. Ltd., A.I.R. 1949 Cal 179 (India).

[78] The Union of India through the Secretary Ministry of Food Government of India v. Firm Vishydha Ghee Vyopar Mandal, A.I.R. 1951 All 541 (India); Sudhangsu Bhattacharjee v. Ruplekha Pictures, A.I.R. 1954 Cal 28 (India).

[79] Laldas Lakshmi Das & Anr. v. J.D. Italia, A.I.R. 1938 Mad 918 (India); *See also*, Firm Jowahir Singh Sundar Singh v. Fleming Shaw & Co. Ltd. (37) A.I.R. 1937 Lah. 851 (India) *followed in* The Eastern Steam Navigation Co. Ltd. v. The Indian Coastal Navigation Co. Ltd., A.I.R. 1943 Cal 238 at ¶6 (India).

[80] Pramada Prasad Mukherjee v. Sagarmal Agarwalla, A.I.R. 1952 Pat 352 (India); Narsingh Prasad Boobna v. Dhanrai Mills, I.L.R. 21 Pat 544 (India).

The question of the right of a party to be charged with fraud was considered by the Apex Court in *Printers (Mys) Pvt. Ltd.* v. *P. Joseph*[81] and *Kadir Shamsuddin Bubere* v. *Madhav Prabhakar Oak and another*.[82] *Printers Mysore* dealt with a termination dispute between Deccan Herald and one of its editors, P. Joseph, who claimed profits under the employment contract and the Working Journalists Act. While the appellant sought a stay of suit in favour of arbitration proceedings, P. Joseph, sought to oppose the same on grounds that his character had been impeached. Exploring the discretionary scope of the court's powers under Section 34 of the Arbitration Act, 1940,[83] the court cautioned that a party should not take advantage of this discretion so as to renege from the agreement. The court noted that a party charged with fraud should be given the option to vindicate his character in open court. This was not considered a *right* of the party but as a *factor relevant* in evaluating the grant of a stay.[84] On fact, the court refrained from differing with the discretion of the trial court, which, in granting the stay had considered all relevant facts and circumstances, as the matter was at an appellate stage under special leave.

The decision in *Madhav Prabhakar* serves as a more exacting precedent. From a complex quandary of facts and agreements with respect to forest land and produce between the appellants and respondents, the respondents applied for a stay of the suit filed by the appellants invoking the arbitration clause in one of the multiple partnership agreements between the parties involved. Apart from questions of construction and privity, the appellant also used allegations of fraud to oppose the application for stay. While dealing with these allegations, the court referred to section 20(4) of the Arbitration Act, 1940. Modelled on section 4(1) of the English Arbitration Act of 1934, section 20(4) mandates references to arbitration absent any *sufficient reason* to not do so. Reading this to be a grant of discretion, the court held that it should be exercised based on the facts and circumstances of each case. The counsel for the appellants directed the court's attention to the dictum of *Russell* v. *Russell*, with which the court agreed, and held that the party charged with fraud "*may successfully resist arbitration*"[85] as the same would serve "*as sufficient cause for the court …not to make the reference*."[86] Moreover, the court was careful to further refine this proposition to prevent its unreasonable expansion to hold that "*only in cases of allegations of fraud of a serious nature that the court will refuse as decided in Russell's case*."[87] The court refused stay as it did not deign the facts on hand to constitute serious allegations of fraud but mere questions of accuracy of accounts.[88] This decision has been extensively followed by lower courts[89] and has been interpreted responsibly such that only serious allegations of fraud that would in fact form a part of the reference[90] are not stayed. However, the

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[81] Printers (Mys) Private Ltd. v. P. Joseph, [1960] 3 S.C.R. 713 (India).

[82] Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak and another, [1962] 3 S.C.R. 702 (India) [hereinafter Madhav Prabhakar].

[83] "Where any party to an arbitration agreement…commences any legal proceedings against any other party to the agreement… any party to such legal proceedings may apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceed", Arbitration Act, 1940, No. 10 of 1940, §34, INDIA CODE (1940).

[84] Madhav Prabhakar, *supra* note 84 at ¶ 8.

[85] Madhav Prabhakar, *supra* note 84 at ¶ 10.

[86] Madhav Prabhakar, *supra* note 84 at ¶ 13.

[87] Madhav Prabhakar, *supra* note 84 at ¶ 14 also referring to the case of Minifie v. The Railway Passengers Assurance Company, (1881) 44 L. T. 552 (U.K.).

[88] "It seems to us that every allegation tending to suggest or imply moral dishonesty or moral misconduct in the matter of keeping accounts would not amount to such serious allegation of fraud as would impel a court to refuse to order the arbitration agreement to be filed and refuse to make a reference." Madhav Prabhakar, *supra* note 84 at ¶15.

[89] Bengal Jute Mill Co. Ltd. v. Lalchand Dugar, A.I.R. 1963 Cal 405 at ¶9 (India); The Oriental Fire and General Insurance Co. Ltd. v. Sm. Usharani Kar & Ors., A.I.R. 1978 Cal 206 at ¶8 (India).

[90] Rawalpindi Theatres (P.) Ltd v. Patanjal & Anr, A.I.R. 1967 P&H 241 (India). In this case, mere fact of allegations of fraud made in an earlier complaint did not have a bearing on the matter sought to be referred to the arbitrator; Indian Oil Corporation Ltd. v. S. Ravindran & V. Krishnan, CRP. Nos. 4375 & 4494 of 1981 (India), mere allegations of *malafide* not considered sufficient; West Bengal Comprehensive Area Development Corporation & Anr. v. Sasanka Sekhar Banerjee, A.I.R. 1985 Cal 290 at ¶43 (India), & Pragati Engineering (P.) Ltd. v. Tamil Nadu Water Supply & Drainage Boardstay, A.I.R. 1992 Cal. 139 (India) wherein stay was not refused as the allegation of fraud was unconnected to the real issue which the arbitrator would not be required to go into it; Sushanta Kumar Nayak v. Dilip Kumar Mohanty & Ors., A.I.R. 1988 Ori 186 (India), stay not granted for want of serious allegations

shortcoming of the decision in *Russell* that was revealed through the case of *Camilla Cotton Oil*, [91] with respect to the right of the party charging fraud and the nature of discretion of the court, in such a situation became apparent in the case of the Calcutta High Court in *Raymond Engineering* v. *Union of India*.[92] The Court noted that the Indian Arbitration Act did not house a provision corresponding to section 24(2) and (3) so as to grant the court a general discretion to refuse enforcement of arbitration agreements when fraud is alleged, and thus, the position that prevailed in England prior to the enactment of the 1950 act would prevail in India. In light of the same, the court held that since only the party charging fraud desired trial, no *sufficient cause* existed in this case.[93] However, this case omitted to notice that '*sufficient cause*' in section 20(4) in and of itself could be considered the source of discretion for the court. Indeed, the same court remedied this in the case of *General Enterprises and Ors.* v. *Jardine Handerson Ltd.*,[94] wherein the court held, "*In my opinion the fact that there are allegations of fraud is a factor which the Court should take into consideration in considering the exercise of discretion. The nature and type of the allegations are also relevant factors. If a party charged with fraud wants public trial stay should, subject to the above factors, be always refused. But even if the party charged with fraud does not want public trial but the party charging the fraud so wants there in appropriate cases the Court should refuse to grant stay.*"[95] Such an appropriate case would arise when a prima facie case of serious allegations of fraud is made out[96] or if the case involves serious and complicated questions of law, which call for a decision of the court.[97] Thus, the stance taken by the Indian courts is not as staunch and restrictive as English courts, which had created an exception only in favour of cases where sufficient public interest is involved.

Trouble and confusion spewed yet again when the interpretation of the issue came up in 1990 before the Madras High Court in *Meru Engineers (P) Ltd. and Ors.* v. *The Electric Control Equipment Company and Ors*, wherein the court held that *Madhav Prabhakar* could not be considered authority for the proposition that a reference would only be refused when the defendant against whom the allegations of fraud are, opposes stay of proceedings – "*if there are serious allegations of fraud which can be effectively tried only by a court of law and not by an arbitrator, it is certainly a sufficient reason for rejecting the application. It does not matter whether the allegations are made by the plaintiff or by the defendant.*"[98] Therefore, it became clear that the interpretation of the precise ratio and limits of the judgment in *Madhav Prabhakar* merited clarification from the apex court.

A. THE INDIAN ARBITRATION ACT 1996 – INTEGRATING THE MODEL LAW

The enactment of the Arbitration Act, 1996 only added to the judicial uncertainty on this point. The judiciary had to grapple with the changing contours of the scope of discretion brought about by a host of new provisions.[99] Much like the English Arbitration Act of 1996, the objective of the Indian act was to

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of fraud; Mustt. Musarrat Jahan, A.I.R. 1994 Cal 5 at ¶12 (India), stay not refused when the most essential documents relied on were alleged to forged; Bharat Lal & Anr. v. Haryana Chit Pvt. Ltd. & Anr., 74 (1998) DLT 766 at ¶20 (India), since the allegations are of serious criminal nature and relate to fraud and forging of valuable documents, the defendants are certainly entitled to have the matter decided by the Civil Court to vindicate their conduct in regular trial; Subhash Chander Kathuria v. Ashoka Alloys Steels Pvt. Ltd. & Ors., 59 (1995) D.L.T. 355 at ¶18-19 (India).

[91] Camilla Cotton Oil Co. v. Granadex SA & Tracomin SA, [1976] 2 Lloyd's Rep. 10 H.L (U.K.).

[92] Raymond Engineering v. Union of India, A.I.R. 1972 Cal 281 (India).

[93] *Id.* at ¶19.

[94] General Enterprises & Ors. v.Jardine Handerson Ltd., A.I.R. 1978 Cal 407 (India) [hereinafter Jardine Handerson].

[95] *Id.* at ¶16.

[96] *Id.*; C. D. Gopinath v. Gordon Woodroffe & Co., ILR (1980) Mad 184 (India); Chandra Mohan v. Manju Devi, (1995) I.L.R. 1 Cal 497 (India) *following* Jardine Handerson, *supra* note 94, wherein stay was refused as a prima facie case of fraud existed even though it was not clear which party had committed the fraud at that stage (¶28).

[97] C.D. Gopinath v. Gordon Woodroffe and Company (Madras) Pvt. Ltd., (1980) I.L.R. 1 Mad 184 at ¶8 (India).

[98] Meru Engineers (P.) Ltd. & Ors. v. The Electric Control Equipment Company & Ors, (1991) IIMLJ 257 (India); *See also* Bani Rani De & Ors. v. Minati Rani De & Ors., 85 C.W.N. 921 (India) and Nitya Kumar Chatterjee v. Sukhendu Chandra, A.I.R. 1977 Cal 130 (India) where stay was refused only because serious allegations of fraud were involved and arbitration was not considered a suitable forum to try such allegation.

[99] Arbitration Act, 1996, *supra* note 46 at §8, §16, §45, §54.

ensure compliance with the UNCITRAL Model law and the New York Convention.[100] In this regard, the provision corresponding to section 20 of 1940 Act, section 8, does not provide the court the opportunity to evaluate as to whether there exist *sufficient reasons* to not refer the parties to arbitration but rather mandates it.[101] Even so, the scope of discretion has undergone significant judicial debate. The question of the applicability of the decisions under the 1940 Act has arisen time and again[102] on this point as well.[103] At the time of the commencement of the new act, the judiciary fell folly to the idea of a clean slate. For instance, in the case of *H. G. Oomor*, the Madras High Court held that despite the scope of discretion being narrow under Section 8, one must examine the issue from the standpoint of the shortcomings of an arbitration proceeding such as summary rules of procedure and evidence and non judicial adjudicators, and on this basis, the court held that serious questions of fraud involving complex evidence should not be referred to arbitration.[104] The question of which party was opposing stay did not find mention as a relevant factor. The Madras High Court followed suit in *M/s GDR Financial Services*.[105] Indeed, authority exists to the contrary - courts have held that in light of Section 16 of the new Act all claims of fraud can be looked into by the arbitrator,[106] or have continued to follow the decision of *Madhav Prabhakar*.[107]

However, the uncertainty of precedent became even more acute when the issue finally came up before the Supreme Court in *N. Radhakrishnan* v. *Maestro Engineers*.[108] Dealing with yet another partnership dispute, this case involved the appellant alleging that the respondents (other partners in the firm) had colluded to siphon off money of the firm and had misstated the amount invested in the firm by the appellant. The respondent, replying to a notice sent by the appellant filed a suit for declaration that the appellant was no longer a partner in the firm as the firm had been reconstituted upon his retirement. The appellant filed an application under Section 8 of the Arbitration & Conciliation Act, 1996. This application was dismissed at all levels of litigation and was now before the Supreme Court by way of a special leave petition. While the Court did not agree with the contention of the respondents that the dispute did not fall within the terms of the arbitration clause of the partnership agreement, it accepted that the arbitrator would not have jurisdiction to decide such a dispute – "*since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation cannot be properly gone into by the Arbitrator*."[109] Despite the Apex court decision in *Pink City* being brought to the court's notice by the appellant's counsel, which supported a peremptory reading of section 8, the court seemed to find support in numbers and relied on the respondent's reading of *Madhav Prabhakar, India Household*,[110] and *H. Oomor Sait*, referred above.[111]

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[100] Konkan Railway Corporation ltd. & Anr. v. Rani Construction Pvt. Ltd., [2002] 1 S.C.R. 728 (India) [hereinafter Konkan]; Reliance Industries Ltd. v. Union of India, (2014) 7 S.C.C. 603, at ¶42 (India).

[101] "A judicial authority before which an action is brought in a matter, which is the subject of an arbitration agreement, shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.", Arbitration Act, 1996, *supra* note 46 at §8(1).

[102] Konkan, *supra* note 100; Shin-Etsu Chemicals Co. v. Aksh Optifibre Ltd., (2005) 7 S.C.C. 234 (India) [hereinafter Shin-Etsu].

[103] (2010) 4 Comp. L.J. 345 (Mad) at ¶21 (India).

[104] H.G. Oomor Sait & Anr. v. Aslam Sait, (2001) 2 M.L.J. 672 at ¶28 and 29 (India) [hereinafter Oomor Sait], "I do not think that the present Act had done anything to remove the said inadequacies and deficiencies which are inherent in an arbitration proceeding…Assuming that the grounds of challenge of an arbitration award as provided under the New Act has been narrowed down compared to the old Act, that would be all the more reason why the jurisdiction of the Civil Court to go into such contentions issues like substantial questions of law or serious allegation of fraud etc., requiring detailed evidence, should be properly reserved for a Civil Court to go into and decide" *followed in* Radha, N. v. M/s. Deepa Restaurant & Ors., I.L.R. 2014 (1) Kerala 568 ¶37 (India); Baburaj v. Faizal, I.L.R. 2014 (2) Kerala 453 (India).

[105] M/s GDR Financial Services v. M/S. Allsec Securities Ltd., [2003] 115 Comp. Cas. 529 (Mad) (India).

[106] Madras Refineries Ltd. v. Southern Petrochemicals Industries Corporation Ltd., (decided on 11.03.1996 in A.No.571 of 1996 in C.S.No.67 of 1996) (India); NIIT Ltd. v. Ashish Deb & Anr., 2004 (2) ARB. L.R. 133 (Madras) (India)*;* Shukaran Devi v. Om Prakash Jain & Anr,, (2006) 133 D.L.T. 297 (India).

[107] Maruti Coal & Power Ltd. v. Kolahai Infotech Pvt. Ltd., I.L.R. (2010) Supp. (5) Delhi 491 at ¶48 (India).

[108] N. Radhakrishnan v. Maestro Engineers & Ors., (2010) 1 S.C.C. 72 (India) [hereinafter N. Radhakrishnan].

[109] *Id.,* at ¶7.

[110] India Household & Healthcare Ltd. v. LG Household & Healthcare Ltd., A.I.R. 2007 S.C. 1376 (India) [hereinafter India Household].

However, it failed to note that *Madhav Prabhakar* was a decision based on section 20(4), Indian Arbitration Act, 1940, which is distinct from section 8 of the Act, especially with respect to the scope of discretion therein. Similarly, the decision of *India Household* was based on an interpretation of section 45 and the court itself noted the difference between the wordings of section 8 and section 45. Moreover, the court missed a significant opportunity in seriously considering and analysing the differences that would have come about as a result of the new circumspect provisions of the Arbitration Act, 1996.

Moreover, despite quoting directly from *Madhav Prabhakar*, the court failed to distinguish between cases where the party charged with fraud opposes stay from when the party charging fraud opposes stay. Instead, the court seemed to regress to an attitude of mistrust towards arbitration and tried to justify its decision based on the inadequacy of the tribunal to handle such complex questions of law and fact. It is pertinent to note that this decision was delivered in 2009 and was completely divorced from the changing realities and respect accorded to arbitration proceedings the world over. The precedential implications of this judgment could be summarised as follows: *First*, the court no longer differentiates based on the party opposing the stay. *Secondly,* the court may not require the making of a prima facie case of fraud and would withhold a reference on *mere allegations* of fraud; and *finally,* the court has conflated mere falsification of records to an allegation of fraud thereby compromising on the need for serious allegations of fraud.

B. LIFE AFTER N. RADHAKRISHNAN

Admittedly, in *N. Radhakrishnan*, the party charged with fraud was also opposing arbitration. Perhaps this is why, the court did not feel the need to explain the ratio in *Madhav Prabhakar* and implicitly adopted the same. High courts have interpreted the judgment in both ways. For instance, in *Maruti Clean Coal*, the Delhi High Court was quick to maintain this distinction[112] and the Karnataka High Court stayed proceedings when the allegations of fraud were vague and did not relate to the main issue.[113] The Bombay High Court, in fact, retained the test of the need to establish a prima facie proof of fraud and not just bald pleas of fraud to preserve the efficacy of arbitration as an alternate method of dispute resolution.[114] However, several decisions have deferred to the Supreme Court in holding that serious allegations of fraud should fall outside the domain of arbitrators.[115]

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[111] Oomar Sait, *supra* note 104.

[112] Maruti Coal & Power Ltd. v. Kolahai Infotech Pvt. Ltd., I.L.R. (2010) Supp. (5) Delhi 491 at ¶48 (India); *See also,* Consulting Engineering Services [I] Pvt. Ltd. v. Government of West Bengal, (2014) 2 CAL.LT. 402 (HC) at ¶24 (India) (invocation of bank guarantee).

[113] Sri. C.S. Ravishankar v. Dr. C.K. Ravishankar, 2011 (6) Kar. L.J. 417 at ¶7 (India); *See also* National Council of Y.M.C. of India & Anr. v. Sudhir Chandra Datt, I.L.R. [2012] M.P. 3076 at ¶10 (India), the dispute was not considered to be so technical or complex in nature so as to merit a refusal of reference; Ivory Properties & Hotels Pvt. Ltd. v. Nusli Neville Wadia, 2011 (2) Bom. C.R. 559 at ¶16 (India); *See also*, Hughes Communications India Ltd. & Ors v. East West Traders & Anr., 2013 (3) ARB. L.R. 283 (P&H) at ¶10 (India). The court held that the ratio of Radhakrishnan would not apply as the parties are corporate entities and the reference to fraud and deception that could be inferred from the pleadings refer to the legal effect to the instrument and not on any particular vitiating circumstances that prevail on one party at the instance of the another. The matter before the arbitrator has to simply conclude on the enforceability of a clause for sale contained in an unregistered instrument and the equities obtaining by the conduct of either of parties that would find a merit or otherwise for the enforceability of agreement.

[114] Bharat Kantilal Bussa & Rita Bharat Bussa v. Sanjana Cryogenic Storage Ltd., Arbitration Application No. 156/2012, Bombay High Court, at ¶20, *available at* http://indiankanoon.org/doc/109218897/; Bharat Infrastructure and Engineering Pvt. Ltd. v. Park Darshan CHS Ltd. & Ors., Arbitration Petition No.199 of 2013, Bombay High Court (Decided on Mar. 18, 2013), at ¶26 (India); Maharashtra Film Stage & Cultural Development Corporation Ltd. v. Multi Screen Media Pvt. Ltd., Appeal No.96 of 2013 In Arbitration Petition No. 574 of 2008 With Notice of Motion (L) No.881 of 2013 (India).

[115] M/s R.S. Builders & Engineers Ltd. v. Bumi Hiway (M) Sdn Bhd., CRP 128/2004 and CM No. 85/2012 (India), *available at* http://indiankanoon.org/doc/120173756/; Kapil Chopra (Partner SKN) & Ors. v. Satish Chopra (Partner SKN) & Ors., Arbitration Petition No. 455/2012, Delhi High Court, at ¶20, *available at* http://indiankanoon.org/doc/26888912/ (India); Kantilal Ambalal Patel & Anr. v. Jalaram Land Developers & Ors. 2014 (2) Arb. L.R. 192 (Gujarat) at ¶13 (India); Satish, & Ors. v. Gujrat Tale Links Pvt. Ltd., Bombay High Court (Decided on Jul. 26, 2013), *available at* http://indiankanoon.org/doc/29819920/; Subhash Vishwanath Bante

The precedent in *N. Radhakrishnan* could negatively affect the landscape of commercial arbitration in India in two other ways. *First*, the applicability of this decision to foreign-seated arbitrations and *secondly*, the scope of intervention of courts under Section 8. Both of these issues are explored in subsequent sections.

C. ARBITRABILITY & FOREIGN SEATED ARBITRATIONS IN THE INDIAN CONTEXT

The principle of minimal interference of judiciary forms the bedrock of the UNCITRAL Model Law and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It is for this reason that the decision of *Fiona Trust* in England is followed with more certitude in cases involving foreign-seated arbitrations.[116]

In India, the demise of the *Bhatia* Era serves as the strongest signal sent to mark the dawn of pro-arbitration judiciary.[117] However, owing to its prospective overruling, the issue is not completely behind us even in the context of arbitrability. Most recently, in *Reliance* v. *Union of India*, a section 34 application was filed to set aside a final partial award with respect to arbitrability of claims made in respect of cess, service tax and CAG audit under two production sharing contracts between Reliance Industries and ONGC. It was contended that questions of payment of taxes, royalties and rentals were not arbitrable under *Indian law*.[118] However, the court was quick to characterise the question as one of jurisdiction as in the pre *Bhatia* era, (as the agreement was entered into before 6th September, 2012)[119] to hold that the parties had excluded the provisions of Part I of the Indian Arbitration Act, 1996.[120] Therefore, the question of whether the claims were arbitrable and under what law were they arbitrable would not have to be considered unless the award was brought for enforcement. However, the court made some ancillary comments on the law governing arbitrability. Generally, the law applied to govern arbitrability depends on the stage at which the court has been approached. At the referral stage, *lex fori* should apply only if the forum has exclusive natural jurisdiction over the dispute. In any other case, national courts should cede the issue to arbitral tribunals, which would apply either the law of the seat or the law of the place of enforcement.[121] Further, at the post award stage, it is likely that the court will apply the *lex fori*.[122] Justice Nijjar, on the other hand, noted that since Indian Law was the substantive law governing the contract, the issue of arbitrability even in England would have to apply Indian law to decide the issue of arbitrability.[123] Indeed, the position of what law should govern arbitrability is dependent on other factors referred above, but the substantive law governing the contract has been explicitly rejected as an option.[124] To think English Courts would apply the law in *Radhakrishnan* in international commercial arbitrations merely because Indian law was somehow a factor is unsettling. It is hoped that this *obiter* of the decision would soon be clarified.

Nonetheless, this year began on an extremely promising note. The Bombay High Court considered the position of Indian law on arbitrability of fraud as *obiter* in *HSBC Holding* to hold that the decision of

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& Smt. Madhabilata Param Shivhare, 2014 (1) A.B.R. 27 (India); M/s. Master Stores & Ors. v. Ramchandra Parolia, 2014 (1) C.H.N. (CAL) 252 (India).

[116] *See* Amr Amin Hamza EL Nasharty v J. Sainsbury Plcm, [2007] EWHC 2618 (Comm) at 226 (U.K.).

[117] Bhatia International v. Bulk Trading S.A., (2002) 4 S.C.C. 105 (India) [hereinafter Bhatia], permitted the application of Part I of the Act to foreign seated arbitrations provided Part I was not explicitly or implicitly excluded in the agreement of the parties. This decision was prospectively overruled in BALCO v. Kaiser Aluminum Technical Services Inc., (2012) 9 S.C.C. 552 (India) [hereinafter BALCO].

[118] Reliance Industries Ltd. v. Union of India, 2014 S.C.C. Online SC 411 at ¶21 (India). [hereinafter Reliance Industries].

[119] *See Generally* BALCO, *supra* note 117.

[120] Reliance Industries, *supra* note 118.

[121] Stavros L. Brekoulakis, *Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori* in ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 103-4 (Loukas A. Mistelis and Stavros L. Brekoulakis eds., 2009) [hereinafter Stavros].

[122] *Id* at p.107.

[123] Reliance Industries, *supra* note 118 at ¶74.

[124] Stavros, *supra* note 121 at 11-112.

Radhakrishnan could not be treated as a general prohibition on referral of matters involving allegations of fraud. Instead the issue must be decided on the facts of each case.[125]

Two days after *HSBC*, the Supreme Court delivered an important precedent in *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*[126] Here, a dispute arose over media rights for broadcasting the Indian Premier League, from the Board of Cricket Control of India ("BCCI") between World Sport Group India ("WSG India") and MSM Satellite under a facilitation deed. When the question of balance payment arose, the respondent, MSM Satellite sought to rescind the contract on grounds of fraud. While the appellant commenced arbitral proceedings seated in Singapore, the respondent filed a suit for declaration that the deed stood rescinded and that the appellant was not entitled to invoke arbitration as well as interim relief in India. The issue came before the Supreme Court on appeal against a grant of injunction. As per its wording, section 45 should come into operation whenever the court is seized of *an* action in a matter in respect of an agreement that provides for foreign seated arbitrations. Therefore, Mr. K.K. Venugopal, counsel for the appellant, contended that the court should refer the entire matter including the question of fraud to the arbitrator. The respondents however, came armed with the decisions of *N. Radhakrishnan* and *Madhav Prabhakar* and stressed on the *seriousness* of the allegations of fraud.[127] Apart from re-emphasising the minimal scope for judicial intervention owing to the construction of Section 45 so as to hold that allegations of fraud and misrepresentation would not render the agreement "*inoperative or incapable of being performed*", the court pointed out that both, *N. Radhakrishnan* and *Madhav Prabhakar*, were decisions rendered in domestic arbitrations and would not be applicable in this case. In turn, the court deferred to the scope of intervention as per the New York Convention.[128] The court's circumspection was appreciated the world over.[129] Interestingly, the court in *World Sport Group* dealt with the question of validity of contract on grounds of fraud. As noted above, in England, a different stream of precedent has developed on the question of arbitrability of validity of agreements. Something similar happened even in the context of India, though owing to different considerations. This brings us to the next negative implication of the decision of *Radhakrishnan* i.e. the power of the court or tribunal to determine validity of contracts and the arbitration clause therein.

D. WHO DECIDES THE VALIDITY OF AN AGREEMENT ASSAILED FOR FRAUD? – THE INDIAN CONTEXT

As discussed above, in England, the question of who decides validity of arbitration agreements or the contract can be characterised as an issue of arbitrability. In India, the issue has gone through a similar evolution but is still significant steps behind England.

Tracing back to *Ruby General Insurance Co. Ltd.* v. *Pearey Lal Kumar*, the Supreme Court held that if the dispute is whether the contract that contains the clause has been entered into at all, the dispute could not go to arbitration.[130] In *Union of India* v. *Kishorilal Gupta*, it was held that the arbitration agreement though collateral to, is an integral part of the contract and perishes with the contract if the contract is held to be

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[125] HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd. , Arbitration Petition No.1062 of 2012, Bombay High Court, ¶82-83 (India), *available at* http://bombayhighcourt.nic.in/generatenewauth.php?auth=cGF0aD0uL2RhdGEvanVkZ2VtZW50cy8yMDE0LyZmbmFtZT1PU0FSQlAxMDM2MTIucGRmJnNtZmxhZz1O [hereinafter HSBC] affirmed in Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., Arb. P. No.1062 OF 2012, Appeal No. 196 of 2014 decided on July 31, 2014 (India).

[126] World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd., A.I.R. 2014 S.C. 968 (India) [hereinafter World Sport Group].

[127] *Id.,* at ¶18.

[128] *Id.,* at ¶29.

[129] N. Peacock & V. Mahendra, *Indian Supreme Court Upholds Ability Of Arbitrators To Decide Issues of Fraud*, *available at* http://www.lexology.com/library/detail.aspx?g=1516bdb1-e903-4515-bdae-566cc391d817; *The Indian Supreme Court decision in World Sport Group: fraud allegations referred to arbitration*, ARBFLASH 2014, *available at* http://www.ashurst.com/publication-item.aspx?id_Content=10289.

[130] Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar, [1952] 1 S.C.R. 501 (India).

non est or void ab initio but exists for all other purposes.[131] A decade after *Ruby General*, the Supreme Court in *Kardah Company* v. *Raymon & Co.*,[132] while dealing with a dispute regarding a contract for jute delivery wherein one of the parties contended that the contract was illegal for contravention of a Central Government Notification, actively followed the *obiter* of the decision in *Heyman* v. *Darwins* and held that questions of a contract being *void ab-initio* cannot be gone into by the arbitral tribunal. Invalidity on ground of fraud was considered more specifically in the case of *Bilasrai & Co.* v. *Tolaram Nathmall.*[133] The court noted that it should not stay proceedings, as the jurisdiction of the arbitrator would then be ousted. Over time, taking strength from the aforementioned decisions of the Supreme Court, High Courts have held that if the contract is voided on grounds of fraud or was obtained by fraud, the matter could not be referred to arbitration.[134] Therefore, India too fell prey to the '*false logic*' that once plagued English Jurisprudence.

With the advent of the new Act and the restrictive scope of section 8, it was only reasonable to expect that the codification of the principle of separability would prevent the persistence of this precedent. Indeed, the decisions of *Pinkcity* and *P. Anand Gajapathi Raju* v. *P.V.G. Raju* seemed to serve this expectation. In *P. Anand,* the court noted that a reference under Section 8 was peremptory in nature. [135] As long as "(1) *there is an arbitration agreement; (2) a party to the agreement brings an action in the Court against the other party; (3) subject matter of the action is the same as the subject matter of the arbitration agreement; (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute*.", it is obligatory to refer the matter to arbitration and nothing is left to be decided in the original suit.[136] In light of this ratio, it may be argued that the court is precluded from judging arbitrability per se including the invalidity of the agreement on any ground (void ab initio, non est, or voidable). In *Pinkcity*, the Court held that the civil court was not correct in going into the question of applicability of the facts to the arbitration clause. The Court, in turn, cited section 16 of the Act to hold that it is appropriate for "*the Arbitral Tribunal to rule on its own jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement*."[137] The case of *Shin-Etsu* reached the same conclusion in light of the difference in the wording of section 8 and section 45 to hold that the judicial authority under section 8 has not been conferred the power to go into the question of the validity of the agreement; the matter is best referred to the arbitral tribunal.[138]

However, the decision of a constitutional bench in *Patel Engineering* is a cause for concern. While dealing with the scope of the power of Chief Justice to appoint arbitrators under a section 11 application, the court, with respect to section 8, noted, "*It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration.*"[139] Even though this opinion would comprise the *obiter* of the decision, it has been argued that the position laid out in *Pinkcity* has changed in light of this decision and that the question of arbitrability and validity of agreements should be decided by the court when seized of a matter under section 8.[140] In fact, the Supreme Court in *Arasmeta* upheld this reasoning in Patel Engineering by holding

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[131] Union of India v. Kishorilal Gupta, A.I.R. 1959 S.C. 1362 (India); *See also* Shiva Jute Baling Ltd. v. Hindley & Company Ltd., A.I.R. 1959 S.C. 1357, ¶10 (India); Hussain Kasam Dada v. Vijayanagaram Commercial Association, (1960) 1 S.C.R. 569 (India).

[132] Kardah Company v. Raymon & Co, A.I.R. 1962 SC 1810 (India).

[133] Bilasrai & Co. v. Tolaram Nathmall, (1948) 52 Cal. W.N. 858 (India).

[134] Champa Pictures v. Md. Ibrahim, A.I.R. 1981 Cal 89 (India); Elsen Und Metall Aktiengesells & Ors. v. Jayant Mulchand Shah, A.I.R. 1998 Guj 271 (India).

[135] P. Anand Gajapathi Raju v. P.V.G. Raju, [2000] 2 S.C.R. 684 (India).

[136] *Id.*

[137] Hindustan Petroleum Corporation. Ltd. v. Pinkcity Midway Petroleums, A.I.R. 2003 S.C. 2881 at ¶16 (India). *See* NIIT Ltd. v. Ashish Deb & Anr., 2004-2-L.W.244 (India); Lexicon Finance Ltd. v. Union of India & Ors., 2002 (3) ARB. L.R. 60 (Karnataka) (DB) (India).

[138] Shin-Etsu, *supra* note 102 at ¶12; *See also*, Kalpana Kothari v. Sudha Yadav, (2002) 1 S.C.C. 203 (India). *Also see*, the discussion in Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 S.C.C. 641 (India) on this point.

[139] S.B.P. & Co. v. Patel Engineering, A.I.R. 2006 S.C. 450 at ¶18 (India).

[140] Booz Allen & Hamiltion Inc. v. SBI Home Finance Ltd. & Ors., (2011) 5 S.C.C. 532 at ¶20 (India), However this case may be distinguished on grounds that it dealt with rights in rem; Satish, Rajesh & Ors. v. Gujrat Tale Links Pvt.

that the court could go into questions of arbitrability in an application under Section but not under an application in Section 11.[141] However, as we have discussed above, the question of validity of an agreement may not always come within the fold of arbitrability. In fact, the decision of *Chloro Controls*, which was affirmed in *Arasmeta*, held that Section 16 did not preclude the Court from ruling on the jurisdiction of the tribunal and the principle of finality under Section 11(7) will apply when such a determination is made under Section 8 and 45.[142] Therefore, to the extent that arbitrability means the question of validity of an agreement, it may be possible for the party to agitate this question before the court at all these stages.

In fact, the Supreme Court in *India Household and Healthcare Ltd.* v. *LG Household and Healthcare Ltd.*,[143] in context of an application under section 45, specifically singled out questions of fraud so as to state that the arbitration agreement would not be saved by the principle of separability, for fraud vitiates all solemn acts.[144] The court noted that section 8 and section 45 did not enjoin it from citing and following the decision in *Radhakrishnan*. On the other hand, the Madras High Court has adopted a wiser approach – in *Sundaram Brake Linings*, Justice V. Ramasubramanian undertook a thorough review of all decisions regarding arbitrability, of both general allegations of fraud as well as validity of agreements on grounds of fraud, to note the extreme positions taken by the Court. He was quick to distinguish *India Household* on the ground that the permissible language of section 45 dictates the power of the judicial authority.[145] Moreover, the court held that the decision of *Patel Engineering*, which was premised on the complementarity between section 8 and section 11, had to be reconciled with the differences that exist between section 8 and section 45 to hold that, "*despite the general proposition of law that fraud vitiates the entire contract, the Arbitration and Conciliation Act, 1996 permits in express terms, an enquiry into the question of nullity and voidity of the agreement, only under Section 45 and not under Section 8*."[146] A contrary interpretation holding that issues of validity, owing to fraud, could not be arbitrated, would effectively amount to importing the rider in Section 45 into Section 8.[147] Admittedly, this interpretation with respect to Section 8 seems to be at odds with the interpretation in *Chloro Controls*, however, the same comprises *obiter* in *Chloro Controls* as the case dealt with a Section 45 petition. Indeed, guidance from the Apex Court directly on this point is essential.

Justice V. Ramasubramanian, in recognising the principle of separability, also elaborated that under section 19, contracts vitiated were voidable i.e. they could be enforced at the option of the defrauded party and as a result, the premise that fraud vitiates all could not be generalised to all contracts.[148] This judgment must be lauded for the nuanced distinctions it utilised to distinguish and not follow the judgment of *N. Radhakrishnan*. This decision is significant for it clarifies conceptual fallacies plaguing previous judgments that have held that fraud vitiates the entire contract,[149] or renders the entire contract void-ab-initio or not est.[150]

Even so, the judgment seems to fall one step short for not highlighting that there can be situations wherein fraud alleged could directly impeach the arbitration agreement to prevent a reference. In light of this clear but reticent dissent from the judgment of the Supreme Court by the high courts, it again became necessary to turn to the Supreme Court for guidance.

Ltd., 2014 (1) A.B.R. 27 at ¶7 (India); JUSTICE R S BACHAWAT'S LAW OF ARBITRATION & CONCILIATION (A. Wadhwa & A. Krishnan eds., 5th ed., 2010).

[141] Arasmeta Captive Power Co. Pvt. v. Lafarge India P. Ltd., A.I.R. 2014 S.C. 525, ¶40-42 (India).

[142] Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification, (2013) 1 S.C.C. 641 at ¶128-130 (India).

[143] India Household, *supra* note 110 at ¶12-14.

[144] *Id.,* at ¶10.

[145] Sundaram Brake Linings v. Kotak Mahindra Ltd., (2010) 4 Comp. L.J. 345 (Mad) at ¶26 (India).

[146] *Id.,* at ¶29.

[147] M/s. SBQ Steels Ltd. v. M/s. Goyal Gases Pvt. Ltd. , 2014 (3) C.T.C. 586 at ¶ 67.

[148] *Id.,* at ¶72; *See also*, Essar Steel India Ltd. v. The New India Assurance Co. Ltd., Arbitration Appeal No. 18 of 2013, at ¶29 (India).

[149] India Household, *supra* note 110.

[150] *See* Vinod Shantilal Gosalia& Anr.. v. Anil Vassudev Salgaocar, (1996) Supp. ARB. L.R.380, at ¶9 (India); Mohd. Akhta v. Suman Jain & Ors., 2013 VII AD (Delhi) 486, at ¶13-14 (India).

The opportunity could have arisen in 2012 in *Nussili (Switzerland Ltd.),* wherein the court, under a section 9 petition, had to deal with the arbitrability of serious matters regarding corruption in the organisation of the Commonwealth that were pending before the CBI, which, if proven would result in the invalidation of the agreement *ab-initio*.[151] However, the parties by consensus decided that the matters could simultaneously be referred to the arbitrator. As a result, no general proposition of law can seemingly arise from this case. The question of corruption and the Commonwealth games arose again under an application under sections 11(4) and 11(6) of the Arbitration Act in the case of *Swiss Timing Limited* v. *Organising Committee*, *Commonwealth Games 2010*.[152]

In this case, the petitioners had contracted with the organising committee for providing scoring, timing and results systems/services. A dispute arose when the respondent withheld the last leg of the payment for non-performance of the contract. They also contended that the contract was *void ab-initio* in view of clause 34 of the contract, which permitted the respondent to terminate the contract if the petitioner breached the mutual warranty to not indulge in any corrupt practices enshrined in clause 29. The respondent, against the larger backdrop of the corruption identified with the Commonwealth Games, contended that the petitioner breached clause 29 by manipulating the grant of the contract in their favour. Therefore, the issue before the court was 'whether the question of the contract being *void ab-initio* could be referred to arbitration?'

To answer this question in the affirmative, the court relied on multiple prongs. First, relying on the principle of *kompetenz-kompetenz* as codified under section 16 and the principle of separability, the court held that the arbitral tribunal could rule on its own jurisdiction, including the validity of the arbitration agreement. In holding so, Justice Nijjar tried to draw a distinction between, situations wherein contracts are void and voidable. With respect to voidable contracts, he held that, since, to prove the absence of vitiation of consent (in cases such as fraud), evidence would have to be adduced, arbitration should not be avoided. Whereas with respect to void contracts, if a determination as to its invalidity can be made without adducing any evidence, the court should refrain from referring the matter to arbitration. Contracts entered into by minors, or by mutual mistake, and wagering contracts were cited as examples for the latter category. Indeed, the policy at play in this regard is similar to what played out in *Fiona Trust* – a party should not be subject to the costly procedure of arbitration when it is obvious that the arbitration agreement is void. However, in English law, the distinction has not been made between contracts that are patently void and those that are not. In fact, issues of illegality and mutual mistake can be referred to arbitration. Instead, the arbitration agreement must be directly impeached by the illegality, mistake or fraud. Indeed, it is possible to argue against this narrow exception owing to the principle of *kompetenz-kompetenz* in that the arbitrator can also decide the issue of validity of arbitration agreement itself. However, the consideration of not wasting the time of parties in cases of obvious invalidity arguably outweighs and creates a limited exception to the principle of *kompetenz-kompetenz*. This issue can be cast in terms of arbitrability – where the principle of *kompetenz-kompetenz* acts as a positive contention, and the issue of expedience in preserving time and expense of parties serves as a negative one. Therefore, English courts have found the sweet spot that balances these competing interests.

However, attention must be drawn to the decision of Justice Lightman in *Albon* where the court considered referring the issue of invalidity of the joint venture agreement (which also housed an arbitration clause) on grounds of forgery to the Arbitral Tribunal.[153] The Court adopted a route similar to that in *Swiss Timing*. It was conceded that the issue would require detailed examination of oral evidence. While the principle of *Kompetenz-Kompetenz* was instinctively cited, Lightman J, held that the situation would be different if, on the evidence available before the court, the court is equipped to decide the issue.[154] However, this decision was based on a situation wherein the contract was alleged to not exist at

[151] Nussli (Switzerland) Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 S.C.C. 697 (India).
[152] Swiss Timing Ltd. v. Organising Committee, Commonwealth Games 2010, (2014) 6 S.C.C. 677 (India).
[153] Albon (t/a NA Carriage Co) v. Naza Motor Trading, [2007] EWHC 665 (Ch), Lightman J, ¶13-15 (U.K.) [hereinafter Albon].
[154] *Id.*; T.D. Grant, *supra* note 70 at 872.

all as opposed to the contract being voidable and is in any case considered at odds with *Fiona Trust,* delivered subsequently.[155]

Nevertheless, the decision in *Swiss Timing* should be considered a positive step. It may be possible that the earlier decisions of the court, which have held issues of contracts being void ab-initio to be inarbitrable, played on the minds of the Court. In any case, since the issue before the court was on the voidability of the contract (admittedly this cannot be conclusively established since the content of the relevant clause of the contract were not mentioned in the judgment), the *ratio* of the case seems to suggest that questions of voidability of contract should be referred to the arbitrator. In other words, questions of voidability of contract are arbitrable. Unlike *Fiona*, the issue was not voidability on grounds of fraud, but voidability on the basis of a clause in the contract. Therefore, whether this decision can be said to be an authority for the proposition that claims of fraud in *general* are arbitrable is doubtful. Moreover, the decision of *N. Radhakrishnan* was by a two-judge bench, and *Swiss trading*, was a single judge decision. Even so, the decision of *N. Radhakrishnan* came up in *Swiss Trading* in the most interesting manner. The court framed the issue as whether the issue of contracts being *void ab-initio* could be referred to arbitration. In order to convince the court against deciding this issue in the affirmative, the counsel for the respondent cited the decision of *N. Radhakrishnan.*[156] The court could have distinguished the dictum on grounds that it did not deal with the issue of validity of contracts but general allegations of fraud in the conduct of parties in pursuance of an agreement. Instead, the court held that the decision of *N. Radhakrishnan* was *per incuriam* for it disregarded the decisions of *Pinkcity* and *P. Ananda Raju* as well as section 16 of the Act. Two important issues arise from this case. *First*, it is unclear as to which aspect of the decision of *Radhakrishnan* is considered *per incuriam*. The decision of *Pinkcity* and section 16 may also be interpreted to mean that the arbitrator should decide questions of jurisdiction, which includes arbitrability. The question then becomes 'Who is the arbiter of arbitrability?' as opposed to 'What is arbitrable?'. The former question has been especially relevant in the context of the United States, where cases have held that the question of arbitrability would be for arbitrators to decide unless otherwise indicated by the parties.[157] Therefore, it may be possible to argue that the decision of *Radhakrishnan* to the extent that it cedes the decision of arbitrability to Courts is incorrect. However, if and when the decision falls before the tribunal, the tribunal would arguably have to judge arbitrability as per Indian law on which *Radhakrishnan* would continue to be authority. Indeed, it is ambitious to expect this distinction to be appreciated in Court. However, even if it is considered that Nijjar J. was referring to the question of arbitrability of fraud, it is suspect that the decision would be considered *per incuriam* in light of the dicta in *Patel Engineering. Secondly,* a decision is considered *per incuriam*, if the court fails to consider a judgment of the same court or superior court on the same issue[158] or ignores an inconsistent statutory provision.[159] It is submitted that in the issue of arbitrability, section 16 and the decision of *Pinkcity* can be classed as one of the *factors* that the court should consider in judging the viability of referring the matter to arbitration. Therefore, it may be possible to argue that the decision of *Pinkcity* was not based on the same issue or section 16 is an inconsistent statutory provision but merely a factor. Nevertheless, it is inarguable that the decision of *N. Radhakrishnan*, does not fall on the right side of policy prevailing globally. It is hoped that the decision in *Swiss Trading* will prompt the Supreme Court to reconsider the issue at the right time. An important case in the Bombay High Court has already cited this decision with authority in context of a section 45 application to hold that the decision of *N. Radhakrishnan* could not be followed in light of it being held *per incuriam* in *Swiss Trading.*[160]

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[155] P. Shine, *Establishing jurisdiction in commercial disputes: arbitral autonomy and the principle of kompetenz-kompetenz,* 3 J. BUS. L. 202, 212-212 (2008).

[156] It is not clear whether the parties clearly ever contended that claims of fraud are generally not arbitrable.

[157] Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 US 395 (1967) (U.S.). Even in the Indian Context decisions such as Haryana Telecom Ltd. v. Sterlite Industries (India), A.I.R. 1999 S.C. 2354 (¶4) (India) & India Household v. LG Household & Healthcare Ltd., A.I.R. 2007 S.C. 1376 (India) have held the opposite and ceded this power to the court.

[158] Government of Andhra Pradesh v. B. Satyanarayana Rao, (2000) 4 S.C.C. 262 at ¶8 (India).

[159] K.S. Panduranga v. State of Karnataka, (2013) 3 S.C.C. 721 (India).

[160] Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., Appeal No. 196 of 2014 in Arbitration Petition No. 1062 of 2012, Bombay High Court (Decided on July 31, 2014) at ¶34 (India), *available at*

In the context of section 45 applications, it is pertinent to note that the decision of *Mulheim Pipecoatings GmbH* v. *Welspun Fintrade Limited & Anr.*,[161] drew a similar distinction of direct impeachment as in *Fiona*. However, a separate consideration also arises in context of section 45 applications – whether the court can evaluate the question of voidability of contract on grounds of fraud and misrepresentation, since, section 45 allows the court to examine if the agreement is null and void, inoperable or incapable of being performed?

In the case of *Enercon*, wherein it was contended that the court cannot refer the question of whether the contract was entered into at all, the court held that the phrase, "*null and void, inoperable and incapable of being performed*" did not include situations as to whether the contract had been entered into at all but issues such as violation of Sections 14-20A of the Indian Contract Act, which included voidability on grounds of fraud.[162] This interpretation is at odds with the observations in *World Sport Group*, wherein the court held that allegations of fraud do not render the agreement inoperative or incapable of being performed.[163] It is hoped that *World Sport Group* will be treated as good law on the point.

IV. CONCLUSION

From the above discussion, it is apparent that the court's position on arbitrability of fraud stemmed from a strong prejudice against, and distrust, in arbitration as a mode of dispute resolution. This manifested in confusion over the line of reasoning that the court wanted to maintain as a justification. The heralding of the *BALCO* era has marked a gradual change in the court's attitude, judgment by judgment. However, a consolidation of these judgments still does not paint a crystal clear picture of the issue. In particular, it is still unclear whether *Radhakrishnan* is no longer good law, for this point has not been re-considered directly in a Section 8 application. Indeed, confusion can be attributed to the fact that the intention of the court to reform policy isn't necessarily accompanied by unimpeachable legal reasoning. The decision in *Swiss Timing* and the attendant confusion with the distinction between reference of void and voidable contracts best exemplifies this point. Even so, given the robust attitude recently acquired by the Supreme Court, it is safe to be optimistic and expect a turnaround from the court soon. Lastly, the need for legislative changes cannot be over-emphasised. The 246th Law Commission Report released recently has recommended relevant changes to section 8 and section 16 and it must serve as a guiding framework.[164]

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http://bombayhighcourt.nic.in/generatenewauth.php?auth=cGF0aD0uL2RhdGEvanVkZ2VtZW50cy8yMDE0LyZmbmFtZT1PU0FQUDI1MDE0LnBkZiZzbWZsYWc9Tg==.

[161] Mulheim Pipecoatings GmbH v. Welspun Fintrade Limited & Anr., Appeal (L) No.206 of 2013, Bombay High Court, (India), *available at* http://indiankanoon.org/doc/129045691/.

[162] Enercon GMBH & Anr. v. Enercon (India) Ltd. & Ors, (2014) 5 S.C.C. 1 at ¶74 (India).

[163] World Sport Group, *supra* note 126, at ¶29, *See also* the decision in Bharat Rasiklal v. Gautam Rasiklal, (2012) 2 S.C.C. 144 (India) wherein in a §11 application the court hinted towards the need for the arbitration agreement to be directly impeached for the court to consider the question of validity at para 10.

[164] Arbitration Act, 1996, *supra* note 46 at §16(7). This has been inserted to state "The arbitral tribunal shall have the power to make an award or give a ruling notwithstanding that the dispute before it involves a serious question of law, complicated questions of fact or allegations of fraud, corruption etc."; *Amendments to the Arbitration & Conciliation Act, 1996*, Report No. 246, Law Commission of India (Aug. 2014), at 50, *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf.