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GIVING THE AWARD DEBTOR A "CHOICE OF REMEDIES" IN DOMESTIC INTERNATIONAL ARBITRATIONS: SHOULD INDIA GO THE SINGAPORE WAY?

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I. INTRODUCTION

Claims that the 21st Century is that of the Asians- the "Asian Century"- have been rife since the early 1980's.[1] Further, the Chief Justice of Singapore, Justice Sundaresh Menon, in a talk at the Supreme Court of Singapore on December 6, 2012 referred to the 21st Century as the "Asian age of arbitration".[2] It has been widely reported that Singapore has been making ample strides towards its aim to remain a favoured arbitration hub.[3] India too is believed to have begun its "pro-arbitration" stance[4] and has started paving its own way towards becoming an ideal seat for arbitration. This is particularly so in light of the Apex Court's decision in *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Service, Inc.*[5] These efforts have seen further concretisation in the form of the 246th Report of the Law Commission of India on "Amendments to the Arbitration and Conciliation Act, 1996"[6] in August 2014. The Report has been described as one having suggested "*key amendments required to make the law more relevant and help India become a preferred hub of arbitrations*".[7]

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[1] David P. Fidler, *The Asian Century: Implications For International Law*, 9 SG. YB. INT'L. L. 19, (2005), ("Analysis on the 21st century being the Asian century appears to have gained prominence first in the late 1980s and continued into the 1990s.") More recently, the concept found favour with Xi Jinping, the President of the People's Republic of China, on his three day visit to India in September, 2014 - "... the Asian century of prosperity and renewal will surely arrive at an early date..." *in* Xi Jinping, *Towards an Asian century of prosperity*, THE HINDU (Sept. 17, 2014), http://www.thehindu.com/todays-paper/tp-opinion/towards-an-asian-century-of-prosperity/article6417277.ece.

[2] *Singapore's Chief Justice Wants Asian Lawyers To Pull Their Finger Out On Arbitration Front*, SINGAPORE LAW WATCH, (Dec. 13, 2012), http://www.singaporelawwatch.sg/slw/headlinesnews/17813-asian-lawyers-urged-to-compete-with-west.html. ("We have journeyed far, from back in the mid-1980s to a point where we now speak in terms of an 'Asian' age of arbitration.")

[3] Linette Lim, *How Singapore became an arbitration hub*, CHANNEL NEWS ASIA (Sept. 03, 2014), http://www.channelnewsasia.com/news/business/singapore/how-singapore-became-an/1344660.html; Michael Pryles, *Singapore: The Hub of Arbitration in Asia*, SINGAPORE INTERNATIONAL ARBITRATION CENTRE – SIAC, http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/198-singapore-the-hub-of-arbitration-in-asia ((Last visited Sept. 30, 2014)).

[4] Ben Giaretta & Akshay Kishore, The *renewal of arbitration in India: BALCO -v- Kaiser Aluminium*, ASHURST INTERNATIONAL ARBITRATION GROUP, INTERNATIONAL ARBITRATION BRIEFING (Sept. 2012), http://www.ashurst.com/doc.aspx?id_Content=8246; Vivekananda N, *Lessons from the BALCO dicta of the Supreme Court*, SINGAPORE INTERNATIONAL ARBITRATION CENTRE, http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/196-lessons-from-the-balco-dicta-of-the-indian-supreme-court (Last visited Sept. 30, 2014); Arpinder Singh & Yogen Vaidya, *Column: Taking a pro-arbitration turn,* THE FINANCIAL EXPRESS *(*May 15, 2014), http://m.financialexpress.com/news/column-taking-a-proarbitration-turn/1250892.

[5] Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc., (2012) 9 S.C.C. 552 (India). [hereinafter BALCO].

[6] LAW COMMISSION OF INDIA, *Amendments to the Arbitration and Conciliation Act, 1996*, *246th Report* (August 2014), http://lawcommissionofindi.nic.in/reports/Report246.pdf. [hereinafter Report 246].

[7] *Roadmap ready to make India a 'hub for arbitration'*, THE TIMES OF INDIA, (Aug. 6, 2014), http://timesofindia.indiatimes.com/india/Roadmap-ready-to-make-India-a-hub-for-arbitration/articleshow/39718624.cms.

However, India still has a long way to go before becoming a chosen seat for arbitration for both its own enterprises[8] as well as its foreign investors, in other words, *à la* Singapore. A major difference between the Indian and Singaporean arbitration regimes, which this paper highlights and discusses, is with respect to what the Singaporean Court of Appeals termed as availability of a "*choice of remedies*"[9] for locally seated, *"international"* arbitral awards (or "domestic international awards"). This difference in acceptance of the existence of "choice" is the result of divergent interpretations and varied adoptions of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") into national legislations. Neither has "*choice of remedies*" been expressly available in the Indian adoption of the Model Law nor has it ever been enunciated by the courts. Thus, this paper brings out the reasons for this varied interpretation and looks at why it may be beneficial for India to adopt the Singaporean approach with respect to availability of remedies against the award.

Section I highlights the difference between the "challenge" and "enforcement" related provisions in both the Model Law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("The NYC, 1958"). Section II discusses the findings of the Singapore Court of Appeals in *Astro* and the legal position with respect to setting aside and enforcing awards. Section III offers an analysis of the relevant issue and builds a case in favour of the Singaporean approach and its desirability in India.

II. SECTION I. MODEL LAW AND NYC, 1958 - RECOURSES AGAINST AN ARBITRAL AWARD AND PERCEIVED EMPHASIS ON THE "SEAT" OF ARBITRATION.

The Model Law by the United Nation Commission on International Trade Law [Hereinafter, "UNCITRAL"] is one of the best results of an attempt at harmonizing arbitration laws. Scholars argue that its success can be attributed to its flexibility.[10] Thus, it is different from the NYC, 1958, which is a "take it or leave it" package.[11]

Article 34 of the Model Law provides for the option applying for *setting aside as the* ***exclusive recourse*** *against arbitral awards*,[12] i.e. Article 34 was intended to specify the exclusive and exhaustive list of grounds for annulment of an award. Under Article 34(2), an award may be annulled "only if" the party challenging the award establishes one of the six specific grounds set forth in the paragraphs,[13] ("*the active remedy route*" highlighted in the *Astro* decision, as discussed later in this paper). However, interestingly, the Article does not bar a party from seeking court interference against the award by way of defence in enforcement proceedings under Articles 35 and 36,[14] ("*the passive remedy route*"). It is further important to note that, the grounds for setting aside as laid out in Article 34(2) are almost identical to those for refusing recognition or enforcement as provided in Article 36(1). Nonetheless, an application for setting aside under Article 34 (2) may ***only be made to a court in the State where the award was made*** ["*the territoriality principle*"] whereas an application for enforcement might be made ***in a court in any***

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[8] Kian Ganz, *SIAC Mumbai Founder Vivekananda N Joins Allen Gledhill After 300% India-Singapore Arbitration Boom*, LEGALLY INDIA (Aug. 22, 2014), http://www.legallyindia.com/201408224987/Law-firms/siac-mumbai-founder-vivekananda-n-joins-allen-gledhill-after-300-arbitration-boom. ("India...the single largest source of cases for the Singaporean arbitration body...2013 saw a record 259 cases before SIAC, of which 85 involved Indian parties. This had grown from 49 Indian cases out of 235 in 2012, 33 out of 188 in 2011, 36 out of 198 in 2010, and 24 Indian cases in 2009....").

[9] PT First Media TBK v. Astro Nusantara International BV & Ors., [2013] SGCA 57 [hereinafter Astro].

[10] Richard *Garnet*, *International Arbitration Law*: *Progress. Towards Harmonisation*, 3 MELB. J. INT'L. L., 400 (2002); John Hannold, *The United Nations Commission on International Trade law: Mission and Methods*, 27 AM. J. COMP. L. 201 (1979).

[11] Gerold Herrmann, *The UNCITRAL Arbitration Law: A Good Model of a Model Law*, UNIF. L. REV. 483 (1998).

[12] Article 34, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006*. Application for setting aside as exclusive recourse against arbitral award
(1) Recourse to a court against an arbitral award may be made only by an application
for setting aside in accordance with paragraphs (2) and (3) of this article.
(2) An arbitral award may be set aside by the court specified in article 6 only if:....

[13] GARY B. BORN , INTERNATIONAL COMMERCIAL ARBITRATION, 3175 (2nd ed. 2014)

[14] UNCITRAL, 2012 DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985, WITH AMENDMENTS AS ADOPTED IN 2006), 134 (U. N. Publication, 2012) [hereinafter Digest 2012].

State.[15] The UNCITRAL Digest further explains that while the Model law may observe the *territoriality* principle for *purely domestic* awards, it does not distinguish the process available for domestically rendered international awards and foreign awards in the same manner.[16] Thus, the remedies under Articles 35 and 36 are available equally to both domestic international awards and foreign awards. This is touted as the "seat neutral" philosophy of the Model Law.[17] Thus, "*under Article 35(1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35(2) and of article 36 (the latter of which sets forth the grounds on which recognition or enforcement may be refused)*".[18]

On the other hand, the NYC, 1958 determines its scope of application by adopting a different kind of "territorial criterion". It applies to arbitral awards made in a State, other than the State in which enforcement is sought.[19] However, to protect, what is described as the Convention's "pro-enforcement" bias,[20] the territorial criterion has been further qualified and State signatories are given the leeway to determine which awards are not considered "domestic" within their jurisdiction,[21] such that States remain free to apply the provisions of the NYC to international awards rendered domestically.[22]

III. THE APPROACH TOWARDS REMEDIES IN SINGAPORE *VIS-A-VIS* THE INDIAN ADOPTION OF THE MODEL LAW

The flexibility which is inherent in the Model Law has resulted in its varied adaptation across different jurisdictions and divergent interpretation by courts. One such aspect, highlighted in this section is the approach adopted by India and Singapore towards the relevance of *seat* with special emphasis on recognition and enforcement. Singapore has adopted the Model Law specifically into its International Arbitration Act, with the exception of Chapter VIII, which incorporates the "seat neutral" provisions on enforcement in Articles 35 and 36.[23] However, Singapore has through its recent judgment,[24] tried to incorporate the Model Law's "seat neutral" philosophy,[25] which is to de-emphasize the importance of the arbitral seat.[26] This has been done keeping in mind that, its neighbour and "regional competitor"[27] - Hong

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[15] *Id.* at ¶ 2.

[16] Digest 2012, *supra* note 14 at p.167. "By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law distinguishes between "international" and "non international" awards instead of relying on the traditional distinction between "foreign" and "domestic" awards. This new line is based on substantive grounds rather than territorial borders. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration legally takes place. Consequently, the recognition and enforcement of "international" awards, whether "foreign" or "domestic", should be governed by the same provisions."

[17] Corey Whiting & Constantin Klein, *Singapore Court of Appeal Clarifies Right to Challenge Tribunal's Decision on Jurisdiction at the Enforcement Stage*, 4,6 ARB. Q. - Debevoise & Plimpton LLP, (Dec. 2013) at 5, 7.

[18] Digest 2012, *supra* note 14, at 168.

[19] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art. I(1), 10 June 1958, 330 U.N.T.S 338; *See also*, Loukas Mistelis & Domenico Di Petro, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention , 1958) in* CONCISE INTERNATIONAL ARBITRATION, 3, 1-32 (Loukas Mistelis ed., Kluwer Law International, 2010) [hereinafter Mistelis & Di Petro].

[20] *Id.*

[21] *See supra* note 19. ("..It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought")

[22] Mistelis & Di Petro, *supra* note 19.

[23] *See* Singapore International Arbitration Act 1994, § 3. Model Law to have force of law. 3 (1) Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.
(2) In the Model Law — "State" means Singapore and any country other than Singapore; "this State" means Singapore."

[24] Astro, *Supra* note 9

[25] *Supra* note 17.

[26] Nakul Dewan, *To Seat or Not to Seat: Art Thou Relevant!*, SINGAPORE INTERNATIONAL ARBITRATION CENTRE - SIAC, http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/326-to-seat-or-not-to-seat-art-thou-relevant. (Last visited Sept. 30, 2014) [hereinafter Dewan].

Kong, has explicitly incorporated the 'seat neutral' philosophy in its national legislation, in its own bid towards becoming a sought after arbitration venue. [28]

Indian courts have placed emphasis on the *territoriality principle* upon which the Indian arbitration act was enacted.[29] This is in keeping with the specific differences in Parts I and II of the Arbitration and Conciliation Act, 1996 ("A&C Act, 1996") and the Indian adaptation of the Model Law. Part I defines "international commercial arbitration" in Section 2(1)(f) and Section 2(7) goes on to provide that any award made under that part would be a domestic award, thus, identifying all awards rendered in arbitrations with their "place of arbitration in India," as domestic awards.[30] These awards can only be challenged "actively" by pursuing setting aside proceedings under Section 34. The "passive" route of resisting the enforcement of the award is available only against foreign awards,[31] i.e., awards made in a reciprocating territory of the NYC, 1958 under Section 48 of Part II of the Act.[32]

The primary difference between the approaches of the two jurisdictions can be identified through the factual differences that prevail in the *BALCO* and *Astro* decisions. However, this paper attempts to take it a step further and analyse two questions. *First*, to what extent are the two approaches in line with the philosophy of the Model Law? *Second*, what are the implications of these decisions towards fulfilling the Model Law's aim of harmonization? Thus, the piece undertakes both, a normative *and* descriptive analysis of the two positions.

A. THE SINGAPOREAN APPROACH IN *ASTRO*

The dispute arose out of a joint venture between Lippo Group [an Indonesian Conglomerate] and a Malaysian media group [The Astro Group]. The terms of the joint venture were contained in a subscription and shareholders agreement [hereinafter, "SSA"] dated 11 March, 2005. The terms of the conditions precedent were not fulfilled and by August 2007, it became fairly obvious to the parties that the joint venture would not eventually materialise. Nonetheless, Astro All Asia Networks PLC (the 6th Respondent), and All Asia Multimedia Networks FZ-LLC (the 8th Respondent), both Astro Group Companies, continued to provide funds and services. Lippo Group commenced court proceedings in Indonesia against entities that were both parties and non-parties to the SSA. Astro Group commenced arbitration against FM, Ayunda and DV [Lippo Group] and made an application to join other members

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[27] Ben Jolley, *Astro v. Lippo: Singapore Court of Appeal Confirms Passive Remedies to Enforcement Available for Domestic International Awards*, KLUWER ARBITRATION BLOG, (Nov. 29, 2013), http://kluwerarbitrationblog.com/blog/2013/11/29/astro-v-lippo-singapore-court-of-appeal-confirms-passive-remedies-to-enforcement-available-for-domestic-international-awards/.

[28] Section 86(2)(c) - *" (2) Enforcement of an award referred to in section 85 may also be refused if....*
(c) for any other reason the court considers it just to do so."
See also Dylan McKimmie & Meriel Steadman, *Parties choose your remedies: the Singapore Court of Appeal has spoken,* NORTON ROSE FULLBRIGHT, (Dec. 2013), http://www.nortonrosefulbright.com/knowledge/publications/109738/parties-choose-your-remedies-the-singapore-court-of-appeal-has-spoken.

[29] BALCO, *supra* note 5; *Shri Lal Mahal Ltd. v. Progetto Grano* Spa, Civil Appeal No. 5085 of 2013 (India) [hereinafter Lal Mahal].

[30] *See* Arbitration & Conciliation Act, 1996 § 2(2), (India) "This Part shall apply where the place of arbitration is in India".

[31] *Supra* note 29, Part II Enforcement Of Certain Foreign Awards, Chapter I, New York Convention Awards, § 44 In this Chapter, unless the context otherwise requires, **"foreign award**" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-
a. in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
b. in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette. Declare to be territories to which the said Convention applies".

[32] *See supra* note 29, § 48. "Conditions for enforcement of foreign awards.
1. Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that..."

of Astro group to the arbitration as well. The Tribunal assumed jurisdiction under Rule 24(b) of the SIAC Rules and this was not challenged by Lippo under Article 16(3) of the Model law. However, a jurisdictional challenge was raised after Astro tried to enforce the award passed in its favour.

The first question to be considered was whether the jurisdictional challenge was valid, considering Lippo had not challenged it under Article 16(3) which would be the "active remedy" here. The main contention of Astro was that Article 16(3) was the exclusive route to challenge the jurisdiction of the Tribunal. On the other hand, Lippo's principal submission was that there is a clear and indelible distinction between active and passive remedies which are encapsulated in the Model Law's policy of choice of remedies. The Court accepted Lippo's argument and held that even though the time for bringing a challenge under Article 16(3) or an application to set aside had elapsed [Active remedy], court review for recognition and enforcement was still valid [Passive remedy]. The Court relied upon documents from the UNCITRAL Working Group on International Contract Practices [The Working Group], practical reasons like protecting legitimate interests of parties not to antagonise the arbitrators from the outset and various scholarly interpretations of the Model Law and its Singapore adoption.[33] The Court noted that choice of remedies is not confined to foreign awards and extends to domestic awards as well. Furthermore, the Court surveyed the Sixth Session of the Working Group which had decided to consolidate separate Sections relating to recognition and enforcement of foreign and domestic awards into what became the present Article 35 of the Model Law.[34] The Court noted an observation in the Sixth Session to the effect that the rationale behind non-consolidation was that there were no cogent reasons for providing different rules for domestic awards and foreign awards.[35] With regard to the facts in the arbitration, the Court held that Tribunal had erred in assuming jurisdiction. However, the aspect that is relevant to this paper is the approach of the Court in allowing parties to challenge even a domestic award at the stage of enforcement, thus impliedly rejecting the seat theory. The Court saw this as an imperative of the Model Law to reduce emphasis on seat of arbitration.[36] In fact, the court even went a step ahead to accept the argument that, the Model Law's "seat neutrality" was so strong that in order to deny a party the choice of remedies, Parliament would have had to expressly legislate out of it.[37]

IV. RECAPITULATION OF THE INDIAN APPROACH AND MAKING A CASE FOR THE "CHOICE OF REMEDIES" APPROACH IN INDIA

There have been various Indian cases dealing with the relevance of the seat in arbitration. However, this paper discusses its relevance with regard to interim measures [*BALCO*] and scope of enforcement and recognition [*Lal Mahal*]. In *BALCO,* the decision came about in the context of a request for interim relief under Section 9 of the A&C Act, 1996 made by a party to an ICC arbitration seated in Paris.[38] The Supreme Court of India held that the omission of the word "only" did not mean that the Parliament intended to make Part I applicable to foreign-seated arbitrations.[39] The Court arrived at this conclusion based on the meetings of the drafters of Model Law,[40] *territoriality principl*e adopted in the Indian statute[41] and other sub-sections under section 2 of the A&C Act, 1996.[42]

Mr. Nakul Dewan in his article, succinctly points out the difference between *BALCO* and *Astro* to be factual; the former relates to the determination by the supervisory court and the latter to the choice of remedies.[43] While we do agree with the author on this point, we *disagree* with the observation that the

[33] Astro, *supra* note 9 at ¶ 23.
[34] Astro, *supra* note 9 at ¶ 58.
[35] Astro, *supra* note 9 at ¶ 59.
[36] Astro, *supra* note 9 at ¶ 22.
[37] Astro, *supra* note 9 at ¶ 23.
[38] Vivekananda N, *supra* note 4.
[39] BALCO, *supra* note 5 at ¶75
[40] BALCO, *supra* note 5 at ¶ 71.
[41] BALCO, *supra* note 5 at ¶ 89.
[42] BALCO, *supra* note 5 at ¶¶ 91-93.
[43] Dewan, *supra* note 26.

decision in *Astro* would have been different had they gone by the over-reaching seat theory in *BALCO*. The basis for our argument is not merely their factual differences but the underlying philosophy of the Model Law and the flexibilities it provides.

First, this paper identifies the implications *Astro* could potentially have on the Indian approach. In India, it is established that a domestic award is either recognized as final, binding and not set aside or it is not recognized as being final, binding and set aside. Thus, there is no scope for resisting enforcement of a domestic award. However, as elaborated earlier, *Astro* perused the *travaux preparatoires* of the Model Law to hold that a passive remedy in the form of enforcement is inherent in its scheme.[44] This was based on the Model Law's aim towards de-emphasizing the seat of arbitration. The argument that follows, when placing this conceptualisation in the Indian context, is that the over-reaching "seat theory" precludes a choice of remedies in domestic arbitration in India. Here, it is highlighted that the Apex Court in *BALCO* quoted the Holtzmann Guide[45] and highlighted that UNCITRAL in fact, had not adopted the "autonomy criterion" of the NYC, 1958.[46] Thus, it is important to note that the interpretation of Section 2(7) in *BALCO*, where the court held that an award from an international commercial arbitration in India is *not* a foreign award,[47] is the correct interpretation of the Model Law's transposition into the Indian A&C Act, 1996. However, the underlying philosophy of the Model Law as elaborated in *Astro* clearly provides (as noted above) that there is no need for differentiation between domestic international awards and foreign awards when it comes to the availability of a choice of remedies.

It also becomes pertinent here to highlight the difference in the approach towards the scope of "enforcement and recognition" of a foreign award taken in these two jurisdictions. In *Astro*, the Court refers to choice of remedies as *double control* which according to the court, is what *Lord Mace JSC* described in Dallal as "ordinary judicial determination" in the court of enforcement.[48] It means that it is for the enforcing court to determine for itself what weight and significance should be ascribed to the omission, progress or success of an active challenge in the court of the seat. However, the Court warns that this does not mean limitless powers to enforce. At paragraph 77, Sundaresh Menon CJ observes,

> *"The refusal to enforce awards* which have *not been set aside* at the seat may therefore constitute one of the *outer-limits of "double control.*"

Further, he observes that even the most extended form of double control cannot include enforcing an award that has been set aside, unlike France, which is a non-Model Law country.[49] This is very similar to the Indian court's interpretation of the scope of enforcement in *Lal Mahal.* Thus, in case of enforcement of foreign awards, the courts have stuck to a completely territorial approach.

Thus, it can be conclusively said that in all cases there is no deviation from the main philosophy of the Model Law which is to a great extent uniform in this matter:

[A] Delocalised approach in case of choice of remedies with respect to domestic awards - be they purely domestic, or domestic "international awards", and [B] Completely territorial approach in case of enforcement of foreign awards. Varying interpretations have only been due to the flexibility provided in the Model Law where it has remained seat neutral in certain cases.

What is therefore desirable in the Indian context is the adoption of this *seat neutral* approach with respect to domestic international awards. It is interesting to note that in both these jurisdictions, the aims for the law, as well as its judicial interpretation, remain the same, i.e., increased favourability as a "seat" of

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[44] Astro, *supra* note 9 at ¶ 23.
[45] HOWARD M. HOLTZMANN & JOSEPH E. BEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, LEGISLATIVE HISTORY AND COMMENTARY (1995).
[46] BALCO, *supra* note 5 at ¶ 71.
[47] BALCO, *supra* note 5 at ¶ 88.
[48] Astro, *supra* note 9 at ¶ 75-76.
[49] Jean-Christophe Honlet, et al., *Commercial Arbitration FAQs - France*, GLOBAL ARBITRATION REVIEW, http://globalarbitrationreview.com/know-how/topics/61/jurisdictions/28/france/. (Last visited Nov. 23, 2014).

arbitration. However the outcomes of the interpretations, and the means adopted in furtherance of these objectives, have remained vastly different. The decision of the Court of Appeals in *Astro* was believed to have provided "*a welcome clarification to practitioners of the availability of passive remedies to the enforcement of domestic international awards under the IAA...*" as in doing so it reversed "*....a first instance decision which has been seen by some as detrimental to Singapore as a seat of arbitration*."[50] On the other hand, in India we continue to harp on the seat-centric approach and the limitation of the remedies - setting aside to Part I and refusal to recognise in Part II. This difference has been further solidified by the proposed amendments in the 246th Report, wherein clarifications have been issued with respect to the "public policy" ground under Sections 34 and 48. The only consolation is that some distinction between *purely* domestic and domestic *international* awards has been identified in the proposed amendment to Section 34,[51] such that the "patent illegality" ground is not available for setting aside of domestic international awards. Also, the difference in *purely domestic* and *domestic international* awards is highlighted to an extent, already in Part I of the A&C Act, 1996, under Section 28. The section provides for a clear difference in the powers of an arbitrator, in case the parties have failed to choose the substantive law. For *purely domestic* arbitrations, the arbitrator has no choice, but to apply "*substantive law for the time being in force in India*"; however, "*failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.*" It is thus proposed here that, if this difference is recognized for the present version of Section 28, and the proposed Section 34, it shouldn't be too far-fetched to argue for an *Astro*-like interpretation to the *BALCO* understanding of the differences between *purely domestic*, *domestic international* and *foreign awards* is plausible. It is also prudent that India start recognising the "practical ramifications" and "potentially far-reaching implications on the practice and flourishing of arbitration..."[52] as were identified by the Court in *Astro* for arbitration in Singapore, if the parties in international arbitrations seated in India are precluded from raising passive challenges in enforcement proceedings and are compelled to follow the active route.

V. CONCLUDING REMARKS

Mr. Ben Jolly of Herbert Smith Freehills correctly pointed out the impact of the *Astro* decision– "*Although the decision is fairly unique to the interpretation of the IAA and may find limited direct application, the Court's detailed and through analysis of the travaux of the Model Law may be of use to practitioners in other jurisdictions should similar questions arise as to the "choice of remedies" in other Model Law jurisdictions.*"[53] Till date, a similar scenario of an award debtor from a domestic international arbitration in India seeking to resist enforcement has not come up for adjudication in India, but the findings in *Astro* have surely opened up the possibility of a beneficial interpretation to the Model Law in India. Further, with the new Bhartiya Janta Party government and its invitation to foreign enterprises to "Make in India",[54] international transactions and contractual relationships are bound to increase. And with arbitration being seen as the preferred method of contractual dispute resolution, and in keeping with the recent spate of "pro-arbitration" moves [judgments[55] and prospective legislative action[56]] undertaken in India, it is but a necessity that India be

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[50] Jolley, *supra* note 27.

[51] Report 246, *supra* note 6, at 55. "After the Explanation in sub-section (2), insert sub-section "(2A) An arbitral **award arising out of arbitrations other than international commercial arbitrations,** may also be set aside by the Court if the Court finds that the award is vitiated by patent illegality appearing on the face of the award.
Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence".

[52] Astro, *supra* note 9 at ¶ 90.

[53] Jolley, *supra* note 27.

[54] IANS, *PM Narendra Modi launches 'Make in India' campaign with portal, logo*, BUSINESS TODAY (Sept. 25, 2014), http://businesstoday.intoday.in/story/pm-narendra-modi-launches-make-in-india-campaign-portal-logo/1/210765.html.

[55] Reliance Industries Ltd. & Anr. v. Union of India, Civil Appeal No. 5765 of 2014, May 28, 2014 (India); Enercon (India) Ltd. v. Enercon GMBH, Civil Appeal No. 2006 of 2014, February 14, 2014 (India); World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte Ltd., Civil Appeal No.895 of 2014, January 24, 2014 (India); Arasmeta Captive Power Co. v. Lafarge India, Civil Appeal No.11003 of 2013, December 12, 2013 (India).

[56] Report 246, *supra* note 6.

more facilitative to international arbitrations within the country. Further, providing parties to such international commercial contracts, with the option of both active and passive remedies against arbitral awards, will surely act as a big step towards sealing India's future as an arbitration hub.

MAKING THE CASE FOR POST-AWARD INTERIM RELIEF FOR AWARD-DEBTOR

*Kartikey Mahajan**

ABSTRACT

Various aspects associated with the right to interim relief under section 9 of the Arbitration and Conciliation Act, 1996 have been the subject of diverse interpretations by the courts in India. This has created uncertainty about the contours and scope of section 9 proceedings. One such aspect has been the availability of the right to interim relief to an award debtor (i.e. the losing party in the arbitration proceedings) post the award. While the Bombay High Court has held that such a right is available only to the award-creditor, the Delhi High Court has recently held that such a right is equally available to an award-debtor as well. The author through the present article tries to make a case for the availability of section 9 relief to the award-debtor by critically analysing the judgments of the Bombay and the Delhi High Courts. In the process the author would try to highlight the possible options available to a party until there is a final determination of the issue by the Supreme Court.

I. INTRODUCTION

Indian jurisprudence reflected through judicial pronouncements relating to arbitration has undergone a paradigm shift in the recent past. After pronouncing a number of judgments which dented India's image as an arbitration friendly jurisdiction[1], the Supreme Court of India (hereinafter 'the Supreme Court') has of late pronounced a few judgments favouring foreign arbitrations and international commercial arbitrations in the post-Balco era.[2] This pro-arbitration approach has included among others, judgments narrowing the scope of public policy as a ground for challenge of foreign awards[3], as well as referring non-signatories to the arbitration agreement for arbitration[4]. The underlying theme of the above pro-arbitration judgments has been to make India an arbitration-friendly jurisdiction.

In order to make India an arbitration friendly jurisdiction, it is essential to have clarity with respect to one of the most crucial sections of the arbitration proceedings – the right to interim relief under section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter 'Act'). The author by way of the present article tries to highlight one aspect of proceedings under section 9 where there is a need for final word from the Supreme Court due to inconsistent judgments of the Delhi High Court and the Bombay High Court. This section pertains to the availability of interim measures to the party who loses in the arbitration proceedings, i.e. the award-debtor. This protection becomes important, as highlighted in the following parts, to ensure that the award debtor has a suitable security to protect his interests, in the event the arbitral award, after being set-aside, ultimately results in a favourable outcome for him.

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[1] Prominent amongst them were Bhatia International v. Bulk Trading Co., (2004) 2 S.C.C. 105 (India) [hereinafter Bhatia International] and Venture Global Engineering v. Satyam Computer Services Ltd. and another, (2008) 4 S.C.C. 190 (India) [hereinafter Venture Global]. By reading Bhatia International and Venture Global together, it emerged that Part 1 of the 1996 Act applied to arbitrations with a seat outside India, unless the parties expressly excluded the applicability of Part 1. This meant that a foreign award could be challenged and set aside under the grounds contained in Section 34 of the Act, which was intended to apply to domestic awards only.

[2] Post-Balco era refers to the period after the judgment of Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, (2012) 9 S.C.C. 552 (India) [hereinafter Bharat Aluminium]. The Supreme Court through the aforesaid case has embarked on a pro-arbitration jurisprudence wherein its ideology is centered on reducing judicial intervention in foreign arbitration. *See* Kartikey Mahajan & Mallika Anand, *Heralding a new dawn for arbitration in India: Is there reason to be circumspect anymore?*, 79(1) ARB. 28-36 (2013).

[3] *See* Kartikey Mahajan, *Reversing the clock on "public policy" for foreign awards*, 16 (6) INTL. ARB. L. REV. N43-N46 (2013), discussing the case of Shri Lal Mahal Ltd. v. Progettor Gana Spa, (2013) 8 S.C.A.L.E. 489 (India).

[4] *See* Kartikey Mahajan and Malak Bhatt, *Extension of Arbitration Agreement to Non-signatories,* 16 (3) INTL. ARB. L. REV. N25-N28 (2013) referring to the consequences of the decision of Chloro Controls (I) P. Ltd. v. Severn Trent Water, (2013) 1 S.C.C. 641 (India).

The inconsistent judgments, which have been rendered with respect to post-award interim orders, are that of the division bench of the Bombay High Court in *Maharashtra State Electricity Generation Company Ltd.* v. *Dirk India Pvt. Ltd.* [hereinafter as 'Dirk India']5 and that of the single judge bench of the *Organising Committee Commonwealth Games* v. *M/s Nussli (Switzerland) Ltd.* [hereinafter as 'Organising Committee']6.

After providing a brief background to the scheme of Section 9 of the Act in Part I of the article, the author highlights the judgment of *Dirk India* along with the relevant facts in Part II. The author critically analyses the said judgment of *Dirk India* in Part III of this article by expounding on the relevant principles which were not taken into account by the Bombay High Court. The said principles mainly relate to the rules of literal interpretation of the word 'party' under the Act, the legislative intent in introducing the possibility of post-award interim orders, and the relation of Section 9 with Section 34 of the Act which makes it possible for the Award-Debtor to apply for an interim relief, post the award until the filing of Section 34 applications. After analyzing the principles laid down in *Dirk India* and presenting a critique on the same, the author would then go on to elucidate in Part IV of the article, the recent single judge bench judgment of *Organising Committee,* which has not accepted the interpretation provided by the Bombay High Court. The author would finally analyze as to how the *Organising Committee* case, though a welcome step in holding that post-award interim orders are available to an award-debtor under Section 9, has not relied on the relevant legal principles that it ought to have relied upon, making it possible for it to be overturned in appeal.

II. BACKGROUND OF SECTION 9 OF THE ACT

Section 97 of the Act was enacted to ensure that, given the pendency, initiation or conclusion of arbitration proceedings before an Arbitral Tribunal, a party should not be prevented from protecting his interests, which otherwise cannot be protected or safeguarded by the Arbitral Tribunal.8 The reliefs which the Court may allow to a party under Section 9 have been held, "*to flow from the power vesting in the Court exercisable by reference to contemplated, pending or completed arbitral proceedings, the Court being conferred with the same power for making specified orders as it has for the purpose of and in relation to any proceedings before it*".9 This reasoning gets cemented by the fact that the Supreme Court in *Bharat Aluminium*10 held that there was no power vested upon the Indian courts to issue interim orders to foreign seated arbitrations under New York or the Geneva Convention, as Indian courts do not have any power to interfere with such foreign proceedings.

The power contemplated under this section is not intended to frustrate arbitration proceedings; neither is it envisaged to prejudice the powers vested in the arbitrator such that he is rendered incapable of

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5 Appeal No. 114 of 2013 in Arbitration Petition No. 355 of 2011 and Appeal No. 30 of 2013 in Arbitration Petition No. 355 of 2011 (India) [hereinafter Dirk India].

6 OMP 1300/2013 (India) [hereinafter Organizing Committee].

7 **Interim measures, etc. by Court**: A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court:-
(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
(ii) for an interim measure of protection in respect of any of the following matters, namely:—
(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
(b) securing the amount in dispute in the arbitration;
(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
(d) interim injunction or the appointment of a receiver;
(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

8 Olex Focas Pvt. Ltd. v. Skodaexport Co. Ltd., (2000) A.I.R. Del. 161 (India).

9 Firm Ashok Traders v. Gurumukh Das Saluja, (2004) 3 S.C.C. 155 (India) [hereinafter Firm Ashok Traders].

10 Bharat Aluminum, *supra* note 2 at ¶159.

resolving the dispute between the parties. The focal point of Section 9 is to preserve the various pursuits and rights of the parties to the arbitration. It is in this light that every appraisal of Section 9 must be carried out. In doing so, it is submitted that the Court ought to consider two postulates - first, the Court must ponder over the intention of the legislature while codifying this provision. Second, the section must also be read in conjunction with Section 34 of the Act that deals with challenges to the arbitral award, especially because Section 9 is also concerned with protecting the subject matter of the arbitral proceedings.

Although there is a paucity of authority expounding on the principles laid down under Section 9 of the Act with respect to issuance of post-award interim orders, there also exists a conflict in the way the Bombay High Court and the Delhi High Court have sought to interpret it. This divergent interpretation has affected the rights of parties seeking interim relief to protect their rights, thus, leading to an incongruity in its construal. The following parts of this article would highlight these different approaches taken while construing Section 9 of the Act.

III. DIRK INDIA- POST AWARD INTERIM RELIEF ONLY FOR AWARD CREDITORS

A. FACTS

An agreement containing an arbitration clause was entered into between Maharashtra State Electricity Board [hereinafter as "MSEB"] and Dirk India Private Limited [hereinafter as "DIPL"]. The agreement envisaged that Pulverized Fly Ash [hereinafter as "PFA]" that was generated from MSEB's Thermal Power Station at Nasik would be transported to four hoppers, which were to be constructed by DIPL at site. DIPL was to utilize PFA in its PFA handling plant for the manufacture of concrete. Subsequently, a dispute arose between the parties that was referred to arbitration and the arbitral tribunal by its award came to the conclusion that DIPL had failed to discharge its contractual obligation of erecting the requisite hoppers and of transporting the agreed quantity of PFA to its PFA plant. The Tribunal came to the conclusion that the termination of the contract by MSEB was valid and lawful.

After the award, DIPL filed an application for interim protection under Section 9 of the Act. The learned Single Judge hearing the application gave limited interim protection, leaving the question of maintainability of the Section 9 application open. The matter came before the Division Bench through cross-appeals against this order.

B. JUDGMENT OF THE BOMBAY HIGH COURT

The Bombay High Court proceeded to discuss the scheme of Section 9 before disposing off the appeal. The Court noted that there are primarily two facets that are envisioned under the scheme of Section 9. First, the Bombay High Court rightly observed that there exists an immediate and proximate nexus between the interim measure of protection under Section 9 and securing the subject matter of dispute in the arbitral proceedings. In other words, the orders envisaged are intended to preclude the claim in the arbitration from being frustrated.

Secondly, the Bombay High Court held that there is proximate nexus between the interim order sought and the arbitration proceeding itself. As per the Court, when an interim measure of protection is sought before or during the arbitration proceedings, such a measure is a step in aid to the fruition of the arbitral proceedings. When sought after an arbitral award is made but before it is enforced, the measure of protection is intended to safeguard the fruit of the proceedings until the eventual enforcement of the award. The interim order post the award as per the Bombay High Court is intended to ensure that enforcement of the award results in a realizable claim and that the award is not rendered illusory.

The Bombay High Court in order to give support to its above reasoning, gave purposive interpretation to the words, *"at any time after the making of the arbitral award but before it is enforced in accordance with section 36"* occurring in Section 9 of the Act. Under Section 36 of the Act, an arbitral award can be enforced under

the Code of Civil Procedure, 1908[11] [hereinafter as "CPC]" in the same manner as if it were a decree of the court. As per Section 36, the arbitral award can be enforced where the time for making an application to set aside the arbitral award under Section 34 has expired or in the event of such an application having been made, it has been refused. As per the Court, the enforcement of an award accrues to the benefit of the party who has secured an award in the arbitral proceedings and that is why the enforceability of an award under Section 36 is juxtaposed in the context of above two time frames.[12] The Bombay High Court, therefore held that, "*contextually the scheme of Section 9 postulates an application for the grant of an interim measure of protection after the making of an arbitral award and before it is enforced for the benefit of the party which seeks enforcement of the award*".[13]

Thus, as is evident from the above italicized words, the Bombay High Court came to the conclusion that the object and purpose of an interim measure after the passing of the arbitral award but before it is enforced is to secure the property, goods or amount for the benefit of the party which seeks enforcement, i.e., the award creditor and is not available to an award-debtor.

IV. CRITICAL ANALYSIS OF DIRK INDIA

A. OVERLOOKING THE STATUTORY RIGHT OF A PARTY TO CHALLENGE UNDER SECTION 34

The reasoning given in the *Dirk India* case contemplates only two scenarios prevailing at the time of institution of a petition under Section 9, namely (a) challenge to the arbitral award has failed under Section 34 of the Act, pursuant to such challenge having been made within the stipulated time period; and (b) no application for setting aside the arbitral award has been made and the time for this purpose under Section 34(3) has expired. It is only on the occurrence of either of these scenarios that an arbitral award is ripe to be enforced under Section 36 of the Act. However, the *Dirk India* case fails to take into account alternate scenarios prevailing at the time of institution of a petition under Section 9 after the passing of the award such as:

i) When the time for challenge available under Section 34 of the Act has not expired and the challenge to award has not been instituted; and

ii) Situations where the award has been remanded back under Section 34(4) of the Act.[14]

In both the scenarios stated above, the rights and interests of the party aggrieved by the award would be irretrievably prejudiced in the construct adopted by the *Dirk India* case. The construct necessarily means that since the subject matter of the arbitration cannot be protected under Section 9 at the instance of the debtor under the award, then even if the debtor is successful in its challenge under Section 34, it may have irretrievably lost any rights in the subject matter of the arbitral dispute if that has been destroyed or alienated or otherwise rendered otiose. This becomes especially pertinent as the main purpose behind issuing a Section 9 interim order is to protect certain rights of the parties from getting irretrievably lost.

Consider the above principle in a situation of cross claims. When claims of one party are rejected in an arbitration, then in such a scenario, if the award is set aside under Section 34, the same party has a right to re-agitate its cross claim which it may not be successful in doing so due to the loss of assets because of the non-availability of Section 9 to such a party. This shows the severe prejudice, which can be caused to

[11] India's procedural code dealing with all issues starting from filing of a civil suit to execution of a decree.
[12] Dirk India, *supra* note 5 at ¶12.
[13] *Id.*
[14] Under Section 34(4) of the Act, the Court while deciding a challenge to an arbitral award, can either "adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award". This necessarily envisages the Court having to remit the matter to the Arbitral Tribunal. This is subject to the Court finding it appropriate to do so and a party requesting it to do so. This has been held in the case of Cybernetics Network Pvt. Ltd. v. Bisquare Technologies Pvt. Ltd., (2012) 188 D.L.T. 172 (India). Thus there are provisions, which allow the court to remit the matter back to arbitration although on limited grounds as envisaged under section 34(4) of the Act.

a party (due to the non-availability of Section 9 relief) if he loses in the arbitration proceedings, although his claims can be revived by way of a favourable setting aside order under Section 34 of the Act.

B. THE DIRK CASE OVERLOOKS THE SETTLED PRINCIPLE OF LAW THAT WHEN AN AWARD IS UNDER CHALLENGE UNDER SECTION 34, IT CANNOT BE ENFORCED UNDER SECTION 36.

The author through this point of critique would elaborate on the situation (i) mentioned above and highlight the fact that availability of Section 9 before the filing of Section 34 application is in line with the scheme of the Act and as well as that of CPC.

It is an established principle that filing of the application under Section 34 of the Act for setting aside an arbitral award within the limitation period operates as an automatic stay on the arbitral award.[15] Hence, enforcement would be postponed at least until the application to set aside the award is refused. This is in stark contrast to a decree in a civil suit where the Appellate Court will stay the execution of the decree upon sufficient cause only. This sufficient cause essentially enables the Court to stay the decree only on passing orders for deposit of the decretal amount in cases of first appeals. This principle has been provided in Rules 5(1)[16] and 5(3)[17] of Order 41 of the CPC.

Similarly, a party can only move an application for seeking stay on the execution proceedings under Order XXI, Rule 26 of the CPC. However, prior to granting any such stay, it is compulsory for the Court to require security or impose such conditions as it thinks fit, unless sufficient cause is shown to the contrary.

On the other hand, a combined reading of Sections 34 and 36 of the Act clearly and unambiguously mandates that an arbitral award cannot be enforced till such time that a challenge under Section 34 is not made within the period of 90 days or; when such a challenge is made and pending before the Court, till such time that the challenge is not adjudicated upon by the Court. Thus, when an Award-Debtor has not preferred a Section 34 application for setting aside the arbitral award and is within his limitation period to do so, Section 9 would definitely be available to such party as the arbitral award cannot be enforced and Section 9 will be the only remedy available to such a party for protection of his interests.

For example, a bank guarantee is due to expire on a date after the arbitral award but before the limitation period for filing Section 34 is due to expire. If the award debtor intends to file his Section 34 application, after the due expiration date of the bank guarantee, then in such a scenario, the only available remedy to the Award debtor is to file an application under Section 9 to keep the said bank guarantee alive.

The above interpretation is in line with the words, "*at any time after the making of the arbitral award but before it is enforced in accordance with section 36*" occurring in Section 9, as well as with the scheme of the Act which makes a clear departure from the scheme of the CPC.

C. NON-ADOPTION OF THE RULE OF LITERAL INTERPRETATION IN DIRK INDIA

1. Literal Construction is the foremost rule of interpretation

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[15] National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd., (2004) 1 S.C.C. 540 (India); Fiza Developers & Inter-Trade Pvt. Ltd. v. AMCI (I) Pvt. Ltd., (2009) 17 S.C.C. 796 (India).

[16] **Stay of proceedings and of execution 5. Stay by Appellate Court.-**
(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

[17] 5(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied-
(a) that substantial loss may result to the party applying for stay of execution unless the order is made;(b) that the application has been made without unreasonable delay; and
(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

The first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally, would nullify the very object of the statute.[18] Where the words of a statute are absolutely clear and unambiguous, recourse cannot be made to the principles of interpretation excepting the literal rule.[19]

Another aspect of the literal rule, which has been firmly established by judicial precedents is that the language employed in a statute is the determinative factor of the legislative intent.[20] The legislature is presumed to have made no mistake.[21] The presumption is that it intended to say what it has said.[22] Thus, the word 'party' occurring in Section 9 of the Act should be literally interpreted to mean any party to the arbitration agreement without there being any need to qualify the same with respect to the outcome of the arbitration proceedings (i.e. an Award-Debtor or an Award-Creditor).

2. Non-observance of past precedents with respect to meaning of term 'party'

Before arriving at its conclusion that Section 9 is not available to the Award-Debtor, the Bombay High Court noted the definition of 'party' in the Act but failed to appreciate the relevance of the same in Section 9 of the Act as per the Hon'ble Supreme Court's observation in the case of *Firm Ashok Traders*[23] which held as follows:"*"Party" is defined in Clause (h) of Sub-section (1) of Section 2 of A & C Act to mean a party to an arbitration agreement. So, the right conferred by Section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of Court under Section 9 can be (i) before, or (ii) during arbitral proceedings, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. ……For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the Court under Section 9 must possess is of being a "party' to an arbitration agreement. A person not party to an arbitration agreement cannot enter the Court for protection under Section 9. This has relevance only to his locus standi as an applicant…..*"[24]

Thus, as can be seen from the observation of the Supreme Court in *Firm Ashok Traders* case, there appears to be no reason as to why Section 9 of the Act should not be literally construed.[25] It is in this context that the application of any contextual interpretation by the Bombay High Court in *Dirk India* seems incomprehensible. Section 2(1)(h) of the Act defines the term 'party' to mean, "*a party to an arbitration agreement*". Thus, the only precondition for seeking relief under Section 9 of the Act is for ***a party*** to be ***a party to an arbitration agreement***.[26]

3**. Specific Instances where only one party has a right under the Act**

The meaning ascribed to the term 'Party' cannot be contextually modulated on the basis of whether a party has succeeded or failed, as done in the *Dirk India* Case. This postulate is further buttressed by the fact that the legislators have specifically highlighted as to which party can apply to the court for specific recourse. For example, in the case of disputes being referred to arbitration under section 8: for requesting the Chief Justice to appoint an arbitrator under Section 11(4), (5) and (6); for challenging appointment

[18] Swedish Match AB v. Securities and Exchange Board of India, A.I.R. 2004 S.C. 4219 (India).
[19] *Id.*
[20] Prakash Nath Khanna v. C.I.T., 2004 (9) S.C.C. 686 (India).
[21] Delhi Financial Corporation v. Rajiv Anand, 2004 (11) S.C.C. 625 (India).
[22] *Id.*
[23] Firm Ashok Traders, *supra* note 9.
[24] The ratio of Firm Ashok Traders, *supra* note 9, was also relied upon by the Delhi High Court in the case of NHAI v. China Coal Construction Group Corpn, A.I.R. 2006 Delhi 134 (India).
[25] Sundaram Finance Ltd. v. NEPC India Ltd., 1999 (2) S.C.C. 479 (India).
[26] Also see Steel Authority of India Ltd. v. AMCI Pty Ltd. and Anr., 2011 (3) ARB. L.R. 502 (Delhi) (India) and I. Sudershan Rao v. Evershine Builders Pvt. Ltd. Mumbai, 2013(2) ARB. L.R. 52 (AP) (DB) (India). In the both these case, the respective High Courts observed that the any party to the arbitration agreement can file a petition under Section 9 after the arbitral award is passed.

procedure under Section 12(4) and 13(5); for challenging the award of the tribunal under Section 16(6) on the grounds mentioned under Section 16; for setting aside of an award under Section 34 etc.

As can be seen from the above examples, the legislature has clearly specified the circumstances in which the power has been bestowed upon a specific party to take recourse to setting aside of the award or challenging the appointment of the arbitrator. It can be easily concluded that the legislature intended the party who has lost in the arbitration to be given the same right of interim protection from the court under Section 9 as the party which has got the award in its favour. This is the reason for the legislature to use the word 'a party' under Section 9. The interpretation provided in the *Dirk India* case to the term 'party' as being the 'successful party' is beyond the scope of the Act and legislature's intention, and therefore is bad in law.

D. Non-availability of section 9 to a third party

On a plain reading of the judgment in *Dirk India*, it is evident that the Bombay High Court did not consider a situation where an arbitral award affects the rights of the third party. Consider a situation where an arbitration agreement is between three parties and dispute arises between two parties, which ultimately results in an arbitral award affecting the rights and interests of the third party. As per Section 9 of the Act, the third party has the right to file an application under Section 9 to safeguard his right and interest after the award has been passed. Whereas, applying the interpretation given by the Bombay High Court, only a party in whose favour the award has been passed can approach the court for interim relief, which basically means that such third party would not be entitled to any protection under Section 9 of the Act. This will make it plainly inequitable for the third party to be not provided with a right to protect its interests under Section 9 of the Act even when it was not a party to the arbitration proceedings.

Thus, it is respectfully submitted that the interpretation by the Bombay High Court is not only against the spirit of Section 9 and the legislative intention behind it, but is also highly inequitable and impractical with respect to third parties.

V. ORGANISING COMMITTEE- RELIEF FOR AWARD-DEBTORS

A. FACTS

The Delhi High Court has elucidated the rationale behind allowing Section 9 for Award-Debtors in the *Organising Committee* case[27]. In 2010, the Respondent was awarded a turnkey contract by the Petitioner for providing overlays on rental basis for the Commonwealth Games, 2010 ("Games"). In order to secure the contract's performance, the Respondent was required to furnish a 'performance bank guarantee' ("PBG") equivalent to the 10% of the contract value (which Respondent furnished).[28] Following the conclusion of the Games, disputes arose between the parties and the matter was referred to arbitration. From time to time, the Respondent was restrained to encash PBG; first, as a result of a Section 9 petition filed by the Petitioner and then because of a direction issued by the Arbitral Tribunal.[29] The Petitioner's claims in the arbitration were rejected by the tribunal and thus, the Petitioner was the losing party in the arbitration proceedings. The Petitioner in the *Organising Committee* had not yet filed its objections to the award under Section 34 of the Act and had petitioned the court under Section 9 to stay the discharge issued by a bank at the behest of the respondent, and to seek a direction to the respondent to keep the bank guarantee alive till the conclusion of proceedings under Section 34 of the Act.[30]

Interestingly, the respondent placed reliance on the judgment of the Bombay High Court in *Dirk India* to negate the stance of the petitioner. Thus, the respondent contended that since Section 9(ii) of the Act is intended to protect the fruits of successful arbitration proceedings, a party whose claim has been rejected

[27] Organising Committee, *supra* note 6.
[28] Abhinav Shrivastava, *Delhi High Court provides 'Interim Measure' (Arbitration) in Post-Award Stage*, February 28, 2014, *available at* http://legaljunction.blogspot.in/2014/02/delhi-high-court-provides-interim.html.
[29] *Id.*
[30] Organising Committee, *supra* note 6 at ¶1.

during the course of the arbitration cannot have the arbitral award enforced in accordance with Section 36 and can, therefore, not seek any interim relief under Section 9 of the Act.

B. JUDGMENT

Justice Sanghi in *Organising Committee* held that the case of *Dirk India* cannot be relied upon by the Respondent as it was rendered in an entirely different factual context. In *Dirk India* case, DIPL was seeking an interim measure for continuing to perform the contract even after the termination of the agreement had been held to be valid by the arbitral Tribunal. The Division Bench of the Bombay High Court, in that context, held that DIPL could not maintain a petition under Section 9 of the Act as the Award was not in its favour, and could not seek enforcement of the Award.[31] The Delhi High Court rightly pointed out that the Bombay High Court was not concerned with a situation like the one present before it, wherein the Respondent was a foreign corporation having no assets or presence in India.[32] The Respondent being a foreign corporation, was a significant factor in this case, as, if the PGB of the foreign corporation would not have been kept alive, then the Petitioner would not have had any possible remedy to secure his future claims in case of successful pursuit of setting-aside proceedings under Section 34 of the Act.

The Delhi High Court also took liberal assistance from the provision of Order XXV, Rule 1 of the CPC although clarifying that the said provision is not squarely applicable to the facts present before it.[33] Order XXV, Rule 1 of CPC provides that where the plaintiff is a foreign party, i.e. residing outside India, and does not possess sufficient immovable property within India, he would be required to furnish security for costs.[34]

Another important principle which found reason with the Delhi High Court was that the counter claim of the petitioner had been partially allowed, leaving the scope for the Petitioner to assail the arbitral award within the statutory period of limitation. In case the Petitioner succeeded in its objections that may be preferred by it, it would be entitled to re-pursue its counter claim in appropriate proceedings.[35] As per Justice Sanghi, the said right of the petitioner would be defeated by permitting the respondent to allow the PBG to lapse in the meantime[36] Thus, it appears that the Delhi High Court took equitable considerations[37] into account while delivering its judgment in the case of *Organising Committee.*

VI. CONCLUSION

The Delhi High Court seems to have come to the right conclusion that Section 9 is not only available to an Award-Creditor but also to an Award-Debtor. The Delhi High rightly relied on the principle that the factual situation before it was different from that before the Bombay High Court and that *Dirk India's* ratio is pertinent with respect to its own peculiar facts. This is because it is an established principle in Indian jurisprudence that a decision is a precedent with respect to its own facts and the words used by the judges in their judgments are not to be interpreted like the words of an act of the Parliament.[38]

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[31] Organising Committee, *supra* note 6 at ¶22.
[32] *Id.*
[33] Organising Committee, *supra* note 6 at ¶26.
[34] This position has been crystallized by a number of judgments. For more insight on the applicability of Order XXV Rule 1 of CPC, *see* Revlon Inc. & Ors.. v. Kemco Chemicals & Ors., A.I.R. 1987 Cal. 285 (India).
[35] The counter-claim in *Organising Committee* was founded upon the petitioner's case that a fraud had been committed in the process of the contract being entered into between the parties. The said issue was a serious one, which according to the Delhi High Court needed examination under Section 34 of the Act.
[36] Organizing Committee, *supra* note 6 at ¶27.
[37] The said equitable considerations while providing interim relief to Award-Debtors was:
1) The Award-Creditor was a foreign party which made it difficult to secure the interests of Award-Debtor, and
2) Incase of possibility of re-agitating counter-claims, the lapse of PBG would be considered inequitable.
[38] *See* State of Orissa v. Sudhansu Sekhar Misra, A.I.R. 1968 S.C. 647 (India); Union of India & Ors. v. Dhanwanti Devi & Ors., 1996 (6) S.C.C. 44 (India).

Although, the Delhi High Court also relied on the fact that the counter-claim of the petitioner was partially allowed in the facts before it, it fell short of distinguishing the *Dirk India* case on the tenable legal principles like that of literal construction, intention of the legislature, instances of remitting back the award under section 34(4) of the Act or of non-filing of challenge under section 34 by the Award debtor.[39]

Thus, even though the *Organising Committee* case is still subject to the possibility of two rounds of appeal before the Delhi High Court and Supreme Court respectively, and the *Dirk India* case is *sub-judice* in Supreme Court, it seems plausible that the Section 9 interim relief is available even to Award-Debtors in certain situations which are considered equitable. The author believes that such relief being available to the Award-Debtors is in line with the intention of the legislature and also with the scheme of the Act which specifically deviated from the Model Law[40] while providing for post-award reliefs. So the circumstances by which such a relief should not be provided to an Award-Debtor before filing the challenge to award under Section 34 should be only limited to those circumstances which a court may consider inequitable. An authoritative pronouncement by the Supreme Court is certainly required as the final word on this issue to elaborate on the circumstances wherein a post-award interim order is available or is not available to an Award-Debtor.

However, it must be emphasized that the Award-Debtor should try and immediately file its objections to the award under Section 34 of the Act at the first instance as such filing of objections would operate as immediate stay on the award and would obviate the need for filing an additional application by way of Section 9.

[39] All of these have been discussed at length in Part III of the article.

[40] Although Part I of the Act is based on the UNCITRAL Model law on International Commercial Arbitration (UNCITRAL Model Law), Section 9 in the Act varies from Article 9 of the UNCITRAL Model Law. Article 9 of the UNCITRAL Model Law, unlike Section 9 of the Act, does not contemplate interim measure after the arbitral award is passed. Article 9 of the UNCITRAL Model Law reads as follows:
Article 9. Arbitration agreement and interim measures by court
It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

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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[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

[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.

REVIEW OF THE INDUS WATERS KISHENGANGA ARBITRATION (FINAL AWARD) 2013:

AN ECOLOGICAL PERSPECTIVE

*Durgeshree Raman**

ABSTRACT

Damming and infrastructural development in international river basins is increasing worldwide. It is usually undertaken for economic gains, often overlooking environmental impact considerations. This occurs even when such developments are regulated through a treaty. The Indus river basin, which is governed by a little more than half a century old Indus Waters Treaty, is no exception. Whilst the Treaty has prescribed the Parties' rights and obligations with regard to dams and hydro-electric development, it has failed to ensure that such developments are balanced against environmental protection of the river basin. Thus, as India tries to increase its hydro-electric generation capacity, damming and infrastructural development-related disputes between India and Pakistan are increasing.

In view of the recent Indus Waters Kishenganga Arbitration (Final Award) 2013, this article seeks to close some of the gaps pertaining to the rights and obligations of both Parties regarding damming and infrastructural development under the Indus Waters Treaty. The proposed treaty amendments will provide for: (1) Ecological/environmental flows; (2) Environmental impact assessments and audits of all damming and infrastructural development projects prior, during and post implementation; and (3) Quality assurance of hydrological data. It is hoped that strengthening the treaty provisions will not only help reduce the existing list of damming and infrastructural development-related disputes between India and Pakistan but prevent them in the future as well.

I. INTRODUCTION

Given the shortage of electricity in the country, against the drive for economic growth, India has a number of hydroelectric projects on the Western Rivers of the Indus basin, in the pipeline. These rivers have been allocated to Pakistan under the Indus Waters Treaty ('the Treaty'), with certain exceptional uses to India as well. However, India's building of hydro-electric plants has accumulated in an inventory of disputes between her and Pakistan. The recently resolved *Kishenganga Arbitration* is just one of the many. This article looks at damming and infrastructural development in the Indus river basin ('the Basin') and explores the relevant provisions under the Treaty. It then illustrates the extent of damming and infrastructural development-related disputes between India and Pakistan and lists the key points from the *Indus Waters Kishenganga Arbitration (Final Award)* 2013 ('the *Final Award*'). This is followed by recommendations for changes to the Treaty in light of the *Final Award* in the hope that this will not only reduce the number of disputes between India and Pakistan, but also reduce future damming and infrastructural development-related disputes.

II. DAMMING AND INFRASTRUCTURAL DEVELOPMENT IN THE INDUS RIVER BASIN

Damming and infrastructural development of river basins is often undertaken for economic gains as well as for protection from extremes in their flow variations, resulting in floods or droughts. The Indus Basin Project, implemented by Pakistan in the Basin in the 1960s, to replace the irrigation supplies from tributaries allocated to India under the Treaty,[1] consisted of the construction of two major dams in Pakistan - the Mangla Dam and the Tarbela Dam (largest on the Basin).[2] It formed part of a larger set of

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[1] SAIYID ALI NAQVI, INDUS WATERS AND SOCIAL CHANGE: THE EVOLUTION AND TRANSITION OF AGRARIAN SOCIETY IN PAKISTAN 8 (2013).

[2] SHRIPAD DHARMADHIKARY, MOUNTAINS OF CONCRETE: DAM BUILDING IN THE HIMALAYAS 6 (2008) [hereinafter DHARMADHIKARY].

infrastructure projects to further develop the existing Indus Basin Irrigation System ('the IBIS').[3] The following table lists the major reservoirs and hydroelectric projects in the Basin constructed post the coming into force of the Treaty, ranked by the amount of reservoir storage.[4]

Table 1: Major Dams and Developments in the Indus river basin

Dam	***Year***	***Country***	***River***	***Storage (km³)***	***Power (MW)***
Tarbela	1977	Pakistan	Indus	14.3 (has shrunk from 11.6 to 8.5 MAF due to sedimentation)	3, 478
Bkakra-Nangal[5]	1963	India	Sutlej	9.62	1, 000
Pong	1974	India	Beas	8.57	396
Mangla	1967	Pakistan	Jhelum	5.86 (from 7.25 due to sedimentation)	1, 000
Nathpa-Jhakri	2004	India	Sutlej	run of the river	1, 530
Ghazi Barotha	2004	Pakistan	Indus	run of the river	1, 450
Total					***8, 854***

The combined effect of the existing storage and diversion projects on the rivers has already seriously impacted the Indus delta in Pakistan.[6] According to a study by the International Union for Conservation of Nature, the flow in the lower Indus river decreased from 105,000 million cubic metres ('MCM') in 1932 to 43,000 MCM in 1970 as a result of the number of projects on the Indus and its tributaries.[7] In the 1990s, the flow further reduced to 12,000 MCM.[8] This led to a sharp reduction in the area of mangrove forests, decline in fish production, degradation of water quality and severe encroachment of the sea into the delta area with a resultant loss of 4,856 km² of farmland.[9] Due to the 22 dams upstream, the Indus flows today seldom cover 25 percent of its historic floodplain.[10] Thus, the Basin is already physically water scarce.[11] In fact, it is one of the most depleted river basins in the world "with near zero

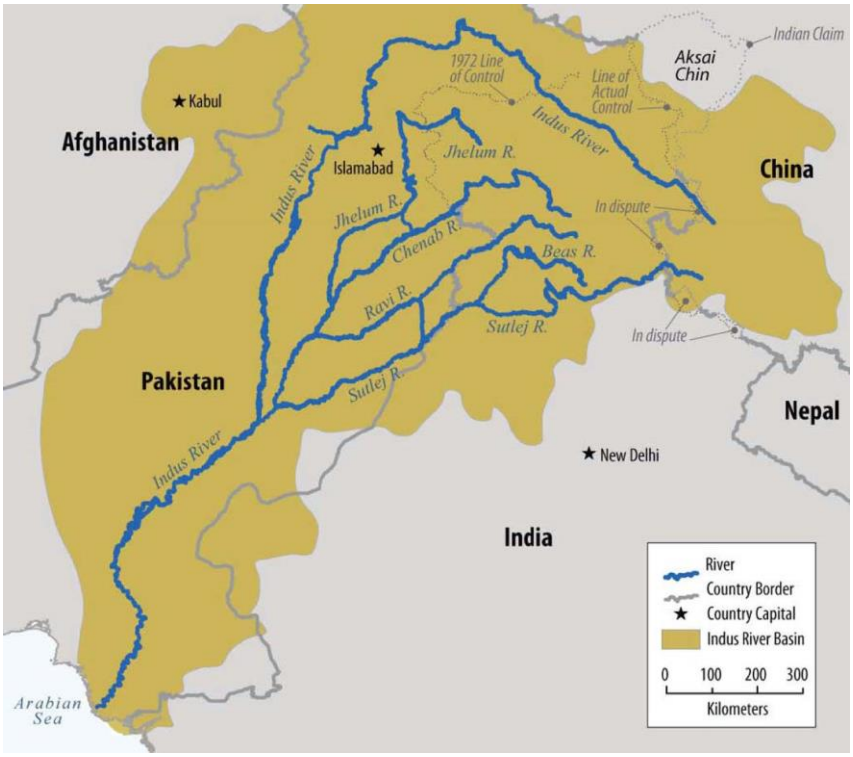
[3] The IBIS constitutes an extensive system of diversion structures and canals on the Indus River Basin with a total length of 56,000 kilometres. DANIEL HILLEL, OUT OF THE EARTH 146 (1991).
[4] DANIEL SELIGMAN, WORLD'S MAJOR RIVERS: AN INTRODUCTION TO INTERNATIONAL WATER LAW WITH CASE STUDIES 52 (2008).
[5] DHARMADHIKARY, *supra* note 2.
[6] *Id,* at 25.
[7] WATER AND NATURE INITIATIVE IUCN (THE WORLD CONSERVATION UNION), THE LOWER INDUS RIVER: BALANCING DEVELOPMENT AND MAINTENANCE OF WETLAND ECOSYSTEMS AND DEPENDENT LIVELIHOODS (2003) [hereinafter IUCN (THE WORLD CONSERVATION UNION)].
[8] DHARMADHIKARY, *supra* note 2 at 25.
[9] IUCN (THE WORLD CONSERVATION UNION), *supra* note 7; *see also* THAYER SCUDDER, GLOBAL THREATS, GLOBAL FUTURES (2010) [hereinafter SCUDDER]; NOBUO MIMURA, ASIA-PACIFIC COASTS AND THEIR MANAGEMENT (2008).
[10] *See* SCUDDER, *supra* note 9, at 84.
[11] Upali A Amarasinghe, Tushaar Shah & B.K. Anand, *India's Water Supply and Demand to 2025-2050: Business-As-Usual Scenario and Issues, in* STRATEGIC ANALYSES OF THE NATIONAL RIVER LINKING PROJECT (NRLP) OF INDIA SERIES 2: PROCEEDINGS OF THE WORKSHOP ON ANALYSES OF HYDROLOGICAL, SOCIAL AND ECOLOGICAL ISSUES OF THE NRLP 23 (2008).

environmental flows in most years."[12] This is mainly due to over-extraction for agriculture.[13] As such, the Basin is already experiencing basin closure.[14] Additional dams will only aggravate such problems in the deltaic regions.

III. THE INDUS WATERS TREATY

The Treaty between India and Pakistan was signed on 19 September 1960.[15] It is, purely, a water sharing agreement which deals with matters only ancillary to it, including provisions for damming and infrastructural development.

In terms of apportionment of the common waters of the Basin between India and Pakistan, the Treaty has allocated the 3 Eastern Rivers of the Indus: the Sutlej, the Beas and the Ravi, to India[16] and the 3 western rivers: the Indus, the Jhelum and the Chenab, to Pakistan.[17] See map below.[18]



The Treaty provides that: "All the waters of the Eastern Rivers shall be available for the unrestricted use of India."[19] It similarly provides that: "Pakistan shall receive for unrestricted use all those waters of the

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[12] Bharat Sharma et al, *The Indus and the Ganges: River Basins under Extreme Pressure* 35 WATER INT'L. 493, 494 (2010). Some definitions of basin closure (see definition in footnote 14) include environmental flow in calculating use. The phrase "with near zero environmental flows" means that human use have cut into what has been calculated as the minimum environmental flows in the particular basin. *See* SHIMON C. ANISFELD, WATER RESOURCES 84 (2010).

[13] *The Threat of Climate Change to the Indus*, W.W.F. GLOBAL, http://wwf.panda.org/about_our_earth/about_freshwater/freshwater_problems/river_decline/10_rivers_risk/indus/indus_threats/.

[14] Basin closure has been defined as "no utilizable outflow of water." CHENNAT GOPALAKRISHNAN, CECILIA TORTAJADA & ASIT K BISWAS, WATER INSTITUTIONS: POLICIES, PERFORMANCE AND PROSPECTS 156 (2005); *See also* DAVID WILLIAM SECKLER, THE NEW ERA OF WATER RESOURCES MANAGEMENT: FROM "DRY" TO "WET" WATER SAVINGS 7-8 (1996) for a general discussion of basin closure.

[15] The Indus Waters Treaty, Sept. 19, 1960, 419 U.N.T.S. 126 [hereinafter The Indus Waters Treaty 1960].

[16] *Id.,* arts. I(5) & II(1).

[17] *Id.,* arts. I(6) & III(1).

[18] Reproduced in *Cooperating over Water, for the People of the Indus and Jordan River Basins (Source-U.S. Senate Report),* ECOPEACE - FRIENDS OF THE EARTH MIDDLE EAST, http://foeme.wordpress.com/2012/12/30/cooperating-over-water/map-of-the-indus-basin-source-us-senate-report/.

Western Rivers."[20] These allocations are however not absolute as both Parties have been allowed some uses in the Rivers allocated to the other, subject to certain qualifications. In juridical terms, it has been stated that it is the nature of the entitlement to the waters of the river system that is significant. In this instance, it is an entitlement to the exclusive use of waters in a specified location.[21] Thus, many commentators are of the opinion that the Treaty has successfully given effect to the "equitable apportionment" of the Indus waters by dividing the six tributaries equally between the two Parties.[22]

The object of the Treaty is that both India and Pakistan "being equally desirous of attaining the most complete and satisfactory utilization" of the Indus waters, recognized the need for "fixing and delimiting, in a spirit of goodwill and friendship, the rights and obligations of each in relation to the other concerning the use of these waters."[23] These include rights and obligations pertaining to damming and infrastructural development of the Basin.

A. RIGHT TO DEVELOPMENT

Under the Treaty, India, being the upper riparian, is under an obligation:

> "…to let flow all the waters of the Western Rivers, and shall not permit any interference with these waters, except for the following uses, restricted … in the case of each of the rivers, The Indus, The Jhelum and The Chenab, to the drainage basin thereof: (a) Domestic Use; (b) Non-Consumptive Use; (c) Agricultural Use, as set out in Annexure C; and (d) Generation of hydro-electric power, as set out in Annexure D."[24]

As for storage of water, the provision further provides that "Except as provided in Annexures D and E, India shall not store any water of, or construct any storage works on, the Western Rivers."[25] Only Pakistan, by virtue of being the lower riparian, has conceded by allowing India to generate hydro-electric power and to construct storage works on the Western Rivers. To this end, India has been permitted to construct *Run-of-River Plants*.[26] These are hydro-electric plants that develop power without Live Storage, for the purpose of generation of hydro-electric power. Such constructions have to be in conformity with the specified criteria contained under Annexure D of the Treaty.[27] India has also been permitted to construct storage works[28] with a total maximum storage capacity of 3.6 MAF (0.4 on the Indus, 1.5 on the Jhelum and 1.7 on the Chenab) for general, power and flood storages in accordance with Annexure E.[29] Hence, India's entitlements of water storages on the Western Rivers are fixed under the Treaty, even when flows are variable.

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[19] The Indus Waters Treaty 1960, *supra* note 15, art. II(1).
[20] The Indus Waters Treaty 1960, *supra* note 15, art. III(1).
[21] D.E. FISHER, THE LAW AND GOVERNANCE OF WATER RESOURCES: THE CHALLENGE OF SUSTAINABILITY 217 (2009).
[22] *See* Stephen C. McCaffrey, *Second Report on the Law of the Non-Navigational Uses of International Watercourses*, 2.2 Y.B. INT'L L. COMMISSION 109 (1986).
[23] The Indus Waters Treaty 1960, *supra* note 15, Preamble.
[24] The Indus Waters Treaty 1960, *supra* note 15, art. III(2). The term "interference with the waters" means any act of withdrawal or any man-made obstruction to the flow which cause a change in the volume of the daily flow of the waters excluding any insignificant and incidental change in the volume of the daily flow; Article 1(15). 'Domestic use' has been defined under Article 1(10) and which includes household, municipal and industrial purposes. 'Non-consumptive use' has been defined under Article 1(11) and which includes navigation, flood control, fishing and wildlife protection. Agricultural use has been defined under Article 1(9) to mean "the use of water for irrigation, except for irrigation of household gardens and public recreational gardens."
[25] The Indus Waters Treaty 1960, *supra* note 15, art. III(4).
[26] "Run-of-River Plant" means a hydro-electric plant that develops power without Live Storage as an integral part of the plant, except for Pondage and Surcharge Storage. The Indus Waters Treaty 1960, *supra* note 15, Annex. D, art. (2)(g).
[27] The Indus Waters Treaty 1960, *supra* note 15, Annex. D, art. 8.
[28] "Storage Work" means a work constructed for the purpose of impounding the waters of a stream, with exceptions. See The Indus Waters Treaty 1960, *supra* note 15, Annex. E, art. 2.
[29] The Indus Waters Treaty 1960, *supra* note 15, Annex. E, art. 7.

Apart from these specifications, both Parties are entitled to construct on their allocated Rivers so long as natural channels are maintained to the extent that there is no material damage to the other Party as a result:[30]

> "Each Party will use its best endeavours to maintain the natural channels of the Rivers … in such condition as will to avoid, as far as practicable, any obstruction to the flow in these channels likely to cause material damage to the other Party."

In order to decipher what this provision means, it has to be interpreted in light of current international standards. 'Best endeavours' is not defined, but is obligatory, and according to the Permanent Court of Arbitration ('PCA') "expresses a stronger commitment" as opposed to merely being "aspirational in nature."[31] This can be interpreted to being akin to the requirement that the Parties act with 'due diligence' and the duty of vigilance and prevention will apply. As for the obligation "to maintain the natural channels", the PCA has distinguished the "maintenance of the physical condition of the channels of the rivers [from] maintenance of the volume and timing of the flow of water in these channels" as the term "channel" was taken to "denote the bed of the river, which may or may not be filled with water."[32] In other words, the above-stated provision mandates preservation of the natural paths of the rivers in an effort to conserve the rivers' capacity to carry water,[33] but does not extend to minimum environmental flows especially that which India has to maintain upstream of Pakistan.[34]

The PCA further clarifies that Article IV(6) does not require the maintenance of the condition of the channels so as to avoid any type of riverbed degradation, but bears more precisely on the avoidance of any obstruction to the flow in these channels likely to cause material damage to the other Party.[35] While the term 'material damage' is not defined, according to Gulhati, "what might be material under one set of circumstances might not be so in a different set of conditions"[36] and is therefore open to interpretation in individual circumstances on a case by case basis.

One principle which has been invoked frequently is that "there should be nothing in the Treaty which would stand in the way of optimum utilisation of the water resources allocated to either party."[37] Added to this is that "nothing could be included in the Treaty which was against good and sound engineering practice."[38] This is in line with how the PCA has interpreted the overall provision:[39]

> "The general obligation upon both India and Pakistan covering all uses of the Western and the Eastern Rivers under Article IV(6) must yield to the specific Treaty rights of the Parties. The Court cannot accept that Article IV(6) debars the construction and operation of works specifically contemplated by the Treaty."

In other words, the provision has been interpreted with the right to develop the Indus waters to achieve optimum utilization but the phrase "likely to cause" indicating that the Parties must take a precautionary

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[30] The Indus Waters Treaty 1960, *supra* note 15, art. IV(6).,

[31] Indus Waters Kishenganga Arbitration (Pak. v. Ind.), Partial Award of Feb. 18, 2013, at 139, ¶372 (Perm. Ct. Arb.), http://www.pca-cpa.org/showfile.asp?fil_id=2101 [hereinafter Partial Award].

[32] *Id.* at ¶ 373.

[33] Id. at ¶ 373.

[34] This was one of the major considerations in the recent Kishenganga arbitration in which Pakistan requested the PCA to fix a minimum flow which India has to maintain downstream from its Kishenganga Hydroelectric project plant (details in the dispute resolution part of this section). See Indus Waters Kishenganga Arbitration (Pak. v. Ind.), Final Award of Dec. 20, 2013 (Perm. Ct. Arb.), www.pca-cpa.org/showfile.asp?fil_id=2471 [hereinafter Final Award].

[35] Partial Award, *supra* note 31, at 139, ¶ 374.

[36] NIRANJAN DAS GULHATI, INDUS WATERS TREATY: AN EXERCISE IN INTERNATIONAL MEDIATION 266 (1973).

[37] *See Id.*

[38] *See Id.*

[39] Partial Award, *supra* note 31, at 140, ¶ 375.

approach to such development (as was contended by Pakistan) was ignored in the *Kishenganga Arbitration*.[40] This is despite the ICJ in the *Pulp Mills* case stating that "a precautionary approach may be relevant in the interpretation and application of the provisions of the [1961 Treaty of Montevideo]."[41] Thus, the right to development in the Basin is only constrained to the extent restricted under the Treaty provisions.

B. OBLIGATION TO NOTIFY

The Treaty provides that if either Party plans to construct any engineering works which would cause interference with the waters of any of the Rivers and which, in its opinion, would affect the other Party materially, it is under an obligation to notify the other Party of its plans and supply such data relating to the work as may be available and as would enable the other Party to inform itself of: (1) the nature, (2) the magnitude and (3) the effect of the work.[42] Additionally, if an engineering work would cause interference with the waters of any of the Rivers but would not, in the opinion of the Party planning it, affect the other Party materially, then the Treaty provides that the Party planning the work is under an obligation to supply the other Party, *only if requested by it*, such data regarding the nature, magnitude and effect, if any, of the work as may be available.[43] Although notice to the other Party has to provide details about "the nature, magnitude and effect" of any of the planned projects, the Treaty does not expressly require that an environmental impact assessment (EIA) report, even if one is available, be shared with the other Party.[44] Hence, impediments of river flows downstream from planned projects are not considered for any planned measures under the provisions of the Treaty, which is evidenced by the number of unsettled disputes between the Parties. Nevertheless, it has been reported that so far India has maintained a good record in fulfilling the obligation of notification by providing Pakistan with all the details of each of the projects on the Basin, following which Pakistan was able to raise objections.[45] In fact, almost all the water disputes between India and Pakistan are over damming and infrastructural development projects.[46]

C. OBLIGATION TO CONSULT, NEGOTIATE AND RESOLVE

The governing body for Basin is the Permanent Indus Commission,[47] the general role of which is to implement the Treaty and to promote cooperation between the Parties in the development of the waters of the Rivers.[48] To this end, they are to serve as a "regular channel of communication" and for this are under an obligation to: (i) furnish or exchange information or data, (ii) give any notice or response to any notice[49] as well as to resolve any "questions" concerning the application or interpretation of the Treaty or the existence of any fact.[50] Hence, all notifications, consultations and negotiations are undertaken through the Commission. Failing resolution of "questions" by the Commission, by agreement between the Parties,[51] the matter is dealt with under the three dispute resolution mechanisms provided for under the Treaty, namely resolution by a Neutral Expert if it amounts to a "difference"[52], through State level talks[53]

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[40] Though this was raised by Pakistan as a customary principle of International law. Partial Award, *supra* note 31, at 77–78, ¶ 223.
[41] Pulp Mills on the River Uruguay (Argentina v. Uruguay), 2010 I.C.J. 14, ¶ 164 (Apr. 20) [hereinafter Pulp Mills case].
[42] The Indus Waters Treaty 1960, *supra* note 15, art. VII(2).
[43] *Id.*, art. VII(2).
[44] It follows that the Treaty also does not prescribe the minimum information that an EIA report must contain. As such, the Parties lack of experience and clarity with respect to compiling EIA reports was demonstrated in their submissions to the PCA in the *Final Award*. See discussion under heading 5.2.2(iii) – Downstream Environmental Impacts.
[45] *See* Zafar Iqbal Choudhary, *In Focus: 50 Years of Indus Water Treaty*, EPILOGUE, Feb. 2010, at 21.
[46] Nausheen Wasi, *Harnessing the Indus Perspectives from Pakistan*, EPILOGUE, Nov. 2009, at 34.
[47] The Indus Waters Treaty 1960, *supra* note 15, art. VIII(3).
[48] *Id.,* art. VIII(4).
[49] As per *Id.*, arts. VIII(1)(a) and (b), respectively.
[50] *Id.*, arts. VIII(4)(a) & IX(1).
[51] *Id.*, art. IX(1).
[52] *Id.*, art. IX(2).
[53] *Id.*, arts. VIII(1) and IX(4).

or Arbitration if it is deemed to be a "dispute".[54] For 45 years, the Parties had not resorted to dispute resolution by an external Party until 2005, when Pakistan sought from the World Bank an appointment of a Neutral Expert stating that a "difference" had arisen relating to India's Baglihar project, and the more recent Kishenganga Arbitration settled by the PCA. These are examples of the utility and effectiveness of the divergent avenues provided for under the Treaty.

D. MONITORING, ASSESSMENTS AND REPORTING

Apart from pollution control[55] and the maintenance of the natural channels,[56] the Treaty does not have any other provisions on environmental protection, preservation and management.[57] This is not surprising, given that there is no evidence that environmental considerations were taken into account preceding the Treaty. It does, however, provide for the monthly exchange of hydrological data collected daily regarding river flows, extractions for and releases from reservoirs, withdrawals, escapages (water flow from water infrastructures such as headworks, barrages or dams) and deliveries.[58] Furthermore, either Party can request for any additional data including hydrological data for the Rivers.[59] Whist this does promote exchange and coordination of hydrological data concerning: (1) aspects of the hydrological regime, that is the quantity and dynamics of water flow (though this has limitations in certain areas such as the Line of Control),[60] and (2) river continuity (though this too is limited to Pakistan's borders), it does not make any connection to groundwater bodies and morphological conditions such as structure and substrate of the river bed and structure of the riparian zone.[61] Thus, whilst the Parties are under an obligation to exchange hydrological data, because there is no obligation on either of the Parties to undertake monitoring, assessment and reporting of the impact of any of the development projects on the Basin, the concept of environmental flows is missing in this governance regime.

Although the Treaty has equitably allocated the 6 tributaries of the Indus Basin between India and Pakistan and has prescribed rights and obligations pertaining to damming and infrastructural development of the Basin, currently there is an inventory of damming and infrastructural development-related disputes between India and Pakistan.[62]

IV. DAMMING AND INFRASTRUCTURAL DEVELOPMENT-RELATED DISPUTES

Although water-related disputes between India and Pakistan over the Basin are not new, the recent dispute is especially due to India's construction of hydro-electric projects on the Western Rivers. Against the potential of 8,800 MW on the Western Rivers, so far India has only installed 1, 425 MW with construction of another 1, 290 MW under progress,[63] leaving a balance of 6,085 MW or 69 percent of the total allowed under the Treaty. The basic driver for hydropower in India is the growing demand for electricity to meet the 9 percent plus annual growth rate of the economy.[64] The overall peak power

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[54] *Id.*, art. IX(5).
[55] *Id.*, art. IV(10).
[56] *Id.*, art. IV(6).
[57] *See* Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M. 700 [hereinafter the UN Watercourses Convention].
[58] The Indus Waters Treaty 1960, *supra* note 15, art. VI(1)(a)-(e), respectively.
[59] *Id.*, art. VI(2).
[60] *See* Final Award, *supra* note 34, at ¶ 90.
[61] *See* The Indus Waters Treaty 1960, *supra* note 15, art. VI(1)(a)-(e).
[62] *See* Balraj K. Sidhu, *The Kishenganga Arbitration – Transboundary Water Resources Governance*, 43.3 ENVTL. POL'Y & L. 147 (2013) [hereinafter Sidhu].
[63] Chandrakant D. Tatte, *Indus Waters and the 1960 Treaty between India and Pakistan*, *in* MANAGEMENT OF TRANSBOUNDARY RIVERS AND LAKES 191 (O Varis, C Tortajada and A K Biswas eds. 2008).
[64] Iram Khalid, *Trans-Boundary Water Sharing Issues: A Case of South Asia,* 1.2 J. POL. STUD. 79, 81 (2010).

demand in the year 2007-08 was 108, 886 MW, which was met with a shortfall of 18,093 MW or 16.6 percent.[65] Hence, there is a strong push for large hydropower projects in India.

However, there have been reports of reduced flows to Pakistan. This is causing particular problems for Pakistan's agricultural sector which is the backbone of its economy.[66] Whilst it has been stated that no single completed or proposed Indian project on the Western Rivers of the Basin alone has the potential to significantly limit flows of water to Pakistan, the long list of proposed Indian projects on those rivers will, in the future give India a cumulative storage capacity to reduce substantively, water flows to Pakistan during the low-flow winter months.[67] Thus, currently the Basin has a long inventory of disputes, especially those pertaining to damming and infrastructural development.[68] These include the recently resolved Baglihar Hydro-Electric Project dispute and the Indus Waters Kishenganga Arbitration, but the still pending controversial projects include Dul Hasti, Uri II, Chutak, Nimoo-Bazgo, Dumkhar, Ratle and Sawlakote Project and the Wullar Barrage/Tulbul Navigation Project.[69] Additional damming and infrastructural development will only add to this list. It is therefore proposed that an analysis of the Kishenganga Arbitration can address some of the inherent shortcomings of the Treaty provisions, which have provided for the right to development but fallen short on environmental considerations.

V. THE KISHENGANGA ARBITRATION 2010

The Kishenganga dispute is not new in the sense that the basic issue dates back to the late 1980s when Pakistan first raised an objection to the Project.[70] In 2009, India began work on a 35.48-metre high (dropped from 75.48 metres)[71] dam on the Kishenganga River (also known as the Neelum River) in the Basin, from which a tunnel of 24 km was to divert the Kishenganga river into the Jhelum river through electricity-generating turbines.[72] These were to redirect the Kishenganga waters some 100 km to Wullar Lake to support the Tulbul navigation project.[73] On 17 May 2010, Pakistan instituted arbitral proceedings in the PCA against India[74] concerning the Kishenganga Hydro-Electric Project ('KHEP').[75] Pakistan had asked the PCA to determine two issues, one of which was whether India's proposed diversion of the river Kishenganga (Neelum) into another tributary breached Article III(2) (let flow all the waters of the Western Rivers and not permit any interference with those waters) and (2) Article IV(6) (maintenance of natural channels).[76]

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[65] Shaheen Akhtar, *Emerging Challenges to Indus Waters Treaty: Issues of Compliance and Transboundary Impacts of Indian Hydroprojects on the Western Rivers*, INSTITUTE OF REGIONAL STUDIES, at 9, *available at* http://www.irs.org.pk/f310.pdf [hereinafter Shaheen Akhtar].

[66] S. Ahmad, *Water Shortage and Future Agriculture in Pakistan – Challenges and Opportunities*, AGRICULTURE FOUNDATION OF PAKISTAN (Proceedings of the National Conference on 'Water Shortage and Future Agriculture in Pakistan – Challenges and Opportunities'), Aug. 26-27, 2008.

[67] Daanish Mustafa, *Hydropolitics in Pakistan's Indus Basin*, United States Institute of Peace, at 7 (Nov. 2010), *available at* http://www.usip.org/sites/default/files/SR261%20-%20Hydropolitics_in_Pakistan's%20_Indus_Basin.pdf [hereinafter Daanish Mustafa].

[68] *See* SHAISTA TABASSUM, RIVER WATER SHARING PROBLEM BETWEEN INDIA AND PAKISTAN: CASE STUDY OF THE INDUS WATER TREATY (2004) [hereinafter TABASSUM] and; Shaheen Akhtar, *supra* note 65.

[69] Shaheen Akhtar, *supra* note 65, at 2.

[70] *See* Sidhu, *supra* note 62.

[71] *Rajya Sabha, Unstarred Question No. 2506, to be Answered on 25.08.2011*, GOVERNMENT OF INDIA: MINISTRY OF EXTERNAL AFFAIRS (Aug. 25, 2011), http://archive.is/YLCZs.

[72] *See* TABASSUM, *supra* note 68, at 42–43.

[73] *Id.*

[74] Pursuant to The Indus Waters Treaty 1960, *supra* note 15, Annex. G, art. 2(b).

[75] *Indus Waters Kishenganga Arbitration (Pakistan v India)*, PERMANENT COURT OF ARBITRATION: COUR PERMANENTE D'ARBITRAGE, http://www.pca-cpa.org/showpage.asp?pag_id=1392. This was by agreement pursuant to The Indus Waters Treaty 1960, *supra* note 15, art. IX(4).

[76] Indus Waters Kishenganga Arbitration (Pak. v. Ind.), Order on the Interim Measures on Sept. 23, 2011, at 2 (Perm. Ct. Arb.), www.pca-cpa.org/showfile.asp?fil_id=1726.

A. THE PARTIAL AWARD

A detailed analysis of the Arbitration's *Partial Award* has been covered in last year's publication of this journal.[77] However, in summary, the full 7-member Court of Arbitration in a decision delivered on 18 February 2012 held that the obligation to maintain the natural channels does not extend to ensuring minimum flows[78] and that India's right to generate hydro-electric power (provided that such generation is conducted in accordance with Annexures D or E) is an express exception to India's obligation to let flow the waters of the Western Rivers.[79] Nevertheless, the right to generate hydro-electric power obliges India to operate those projects in such a way as to avoid adversely affecting Pakistan's not only "then existing" agricultural and hydro-electric uses but anticipated future uses as well.[80] In addition to the duty to avoid transboundary harm, the PCA also took into account contemporary customary international law to take environmental protection into consideration when planning and developing projects that may cause injury to a bordering State.[81] Thus, having regard to the priority accorded to India with regards to the KHEP Plant over that of Pakistan's planned project and principles of international environmental protection law, the PCA concluded that India is under an obligation to construct and operate the Kishenganga Hydro-Electric Plant in such a way as to *maintain a minimum flow of water* in the Kishenganga/ Neelum river at all times,[82] at the rate fixed by the PCA in its *Final Award*.

B. THE FINAL AWARD

On 20 December 2013, the PCA made a land mark Final Award on the *Kishenganga Arbitration*, the purpose of which was to fix the precise rate of minimum flow to be preserved downstream of the KHEP. In doing so, the PCA filled in an essential gap in the Treaty, which is a minimum flow that India has to maintain for Pakistan from the KHEP. The Court assessed, on the basis of the hydrological data submitted to it, the effects that the KHEP is likely to have on agricultural and hydro-electric uses by Pakistan and on the downstream environment from the KHEP. The Court then determined, taking into account these effects, the minimum flow. Finally, the Court also addressed Pakistan's request that the Court establish a monitoring regime in order to monitor India's compliance of maintenance of the prescribed minimum flow. All of these are addressed in turn.

Critique of Hydrological Data Collection and Exchange

Before turning to the place of agriculture, hydro-electric power and the environment in determining the minimum flow, the Court recalled the Parties' submissions on the hydrology of the Kishenganga/ Neelum, as these estimates of the river's flow under different conditions underpinned all other calculations. The PCA found that although the Parties submitted extensive evidence highlighting the differences in methodology between them, the Court found that their hydrologic estimates for water flows were actually very similar. The PCA found it important to comment on one aspect of the method of gathering hydrological data. The Parties had disagreed as to the appropriateness of using data exchanged monthly (and not later than within three months of measurement) under Article VI of the Treaty, or data subsequently subjected to statistical analysis and quality control. In the Court's view, there is no requirement that decisions by the Commission, the Neutral Expert, or Courts of Arbitration rendered in relation to the Treaty be based solely on data exchanged pursuant to Article VI(2) of the Treaty. Instead, the Court considered that "quality assurance, if done in a transparent manner, is consonant with best practices in the field of hydrology."[83] Given the lack of sharing of data collected by Pakistan with India, the Court commended to the Parties the practice of undertaking quality assurance on hydrologic data collected on tributaries of the Indus and of sharing such data (together with sufficient

[77] See Aardraa Upadhyay & Tamojit Chatterjee, *The Kishenganga Hydro-Electric Project Arbitration Dispute - Partial Award (Pakistan v India): An Analysis*, 2.2 INDIAN J. ARB. L. 190.
[78] See discussion under heading 6.1 - Incorporating Ecological Flows.
[79] Partial Award, *supra* note 31, at 140, ¶ 376.
[80] Final Award, *supra* note 34, ¶ 94.
[81] Partial Award, *supra* note 31, at 169, ¶ 449.
[82] *Id.* at 171, ¶ 453.
[83] Final Award, *supra* note 34, ¶ 91.

elaboration to explain variations from data exchanged under Article VI of the Treaty) through the mechanisms of the Permanent Indus Commission. Thus, while data exchange has been provided for under the Treaty through the Permanent Indus Commission, lack of transparency has been urged as a matter of quality assurance, not forgetting the principle of good faith present not only in the Treaty but also in international environmental law.[84]

The Downstream Effects of the KHEP

In order to fix a minimum flow, the PCA analysed Pakistan's agricultural, hydro-electric and environmental uses downstream from the KHEP. The Court adopted a two-step approach: first it considered the downstream effects of the KHEP and second, it decided how the Treaty, as interpreted in its *Partial Award*, was to be applied to these facts

(i) Pakistan's Agricultural Uses

The PCA had already decided in its *Partial Award* that no Pakistani agricultural use had been established at the time the KHEP crystallized and acquired priority over Pakistan's Neelum-Jhelum Hydro-Electric Project ('JHEP'). Nevertheless, Pakistan's treaty rights in this regard remained relevant to the continuing operation of the KHEP in conformity with treaty requirements,[85] which is, that any existing agricultural use by Pakistan would not be adversely affected. Though the provision only talks about existing agricultural use by Pakistan, in setting a fixed minimum flow, the Court clarified that any anticipated future agricultural use would also have ordinarily featured in the Court's determination. However, as Pakistan had not submitted any estimate of the likely scope of such development, the Court was unable to take account of such potential uses and had reached its determination of the minimum flow on the basis of hydro-electric and environmental factors alone. Having done so, the Court was nevertheless confident that the minimum flow it has prescribed on the basis of other factors will ensure sufficient water in the river so as to not curtail agricultural development in the Neelum valley and achieve the "equipoise" between Pakistan's right to the use of the waters of the Western Rivers and India's right to use the waters of those Rivers for hydroelectric generation once a plant complies with the provisions of Annexure D.[86]

(ii) Pakistan's Hydro-Electric Uses

On the basis of the data submitted by Pakistan, it was apparent to the PCA that the operation of the KHEP would reduce the potential energy generated by the NJHEP under nearly any minimum flow scenario. India objected to Pakistan's flow scenarios, arguing that each would substantially reduce power generation at the KHEP and undermine the priority accorded to the KHEP in the Court's *Partial Award*. With respect to the effects of the KHEP, the Court noted only that the NJHEP would be affected by any prescribed minimum flow given that the "relationship between flow and energy generation is direct and approximately linear."[87]

(iii) Downstream Environmental Impacts

In order to set a minimum flow downstream from the KHEP, the PCA requested both India and Pakistan, not just India, to provide an environmental impact assessment report of the project on the environment. The Parties submitted markedly different assessments of the environmental changes that

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[84] *See* UN Watercourses Convention, *supra* note 57, art. 8(1); Sources of the International Law Association Rules on Water Resources, art. 11, *available at* http://internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf [hereinafter Berlin Rules on Water Resources]*;* Pulp Mills case, *supra* note 41, ¶¶ 144-145; Case concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. Rep. 7, ¶ 112 (Sept. 5) [hereinafter Gabčíkovo-Nagymaros Project].

[85] The Indus Waters Treaty 1960, *supra* note 15, Annex. D, art. 15(iii) provides that: "where a Plant is located on a Tributary of The Jhelum on which Pakistan has any Agricultural use or hydro-electric use, the water released below the Plant may be delivered, if necessary, into another Tributary but only to the extent that the then existing Agricultural Use or hydro-electric use by Pakistan on the former Tributary would not be adversely affected."

[86] Partial Award, *supra* note 31, at 161, ¶ 433.

[87] Final Award, *supra* note 34, ¶ 96.

would occur downstream of the KHEP. On the one hand, Pakistan had undertaken a holistic assessment of the interaction of a range of environmental indicators and predicted moderate to serious changes in the ecosystem. Each differed with the degree of change dependent on the rate of flow in the river. Thus, Pakistan has undertaken a far more extensive environmental impact analysis, attempting to capture complex interactions within the river ecosystem. On the other hand, India had based its assessment on the anticipated water depth and its effect on three umbrella species of fish and concluded that there would be no effect on the aquatic environment with a flow of as low as 2 cumecs. Thus, in contrast, India had carried out a simpler assessment, drawing its conclusions essentially from a single indicator - the habitat available for selected fish species. Given the lack of environmental impact assessment requirements under the Treaty for activities such as those related to damming and infrastructural development, it is not surprising that both India and Pakistan submitted such divergent environmental impacts assessments of the KHEP.

However, the PCA viewed the differences between the Parties' assessments in light of the evolving science of predicting the environmental changes that would result from altered flow conditions. While the Court did not comment on the lack of environmental impact assessment requirements under the Treaty, the Court noted that "assessments [containing extensive analysis, attempting to capture complex interactions within the river ecosystem] are increasingly used by scientists and policymakers to bring a deeper understanding of ecology to bear on the management and development of river systems."[88] Furthermore, while there is no single "correct" approach to environmental assessments, the Court did indicate that for any given river or project, the correct approach will depend upon the following factors: (1) the existing state of the river, (2) the magnitude of anticipated changes, (3) the importance of the proposed project, (4) the availability of time, (5) the level of funding available and (6) the degree of local expertise.[89] Thus, for a project of the magnitude of the KHEP, the Court was of the view that an in-depth environmental impact assessment, which adequately highlights the complexity of the ecosystem in the Kishenganga/Neelum, is appropriate for estimating potential changes in the downstream environment.

The PCA clarified that what it was looking for was a "degree of certainty" as to the "results" and not any "attempt to apply contemporary international practices in a challenging setting."[90] Although the PCA worked with the impact assessment reports that had been submitted by both Parties, appreciating that more comprehensive and accurate information on the likely impacts of infrastructure projects can only benefit decision-making under the Treaty, the Court urged both Parties to take environmental considerations in other projects. In the PCA's view, such an approach was seen as "consistent with the acute need of both Parties for increased production of hydro-power."[91] The Court did express that its decision on the minimum flow was informed by a deep awareness of the critical importance (and shortage) of electricity in both India and Pakistan. However, the PCA stated that development of hydro-electricity need not be at odds with careful consideration of environmental effects based on an ecosystem approach, thereby balancing economic needs with that of the environment.

(iv) **Additional Factors for the Determination of Minimum Flow**

Assessing the effects of the KHEP downstream was the first step of the task facing the Court. Two additional factors had to be given effect in its determination of the minimum flow: (1) the *Partial Award* accorded priority to the KHEP over Pakistan's NJHEP, resulting in the former's priority in right over the latter with respect to the use of the waters of the Kishenganga/ Neelum for hydro-electric power

[88] *Id.* ¶ 98.
[89] *Id.* At 36, ¶ 99.
[90] *Id.* At 36, ¶ 100.
[91] *Id.* At 36, ¶ 101.

generation; and (2) the Treaty provides for consideration of international conventions and customary international law.[92]

While the Court held that the KHEP must be operated in such a manner that "[b]oth Parties' entitlements under the Treaty must be made effective so far as possible," it stated clearly that "[t]he requirement to avoid adverse effects on Pakistan's agricultural and hydroelectric uses of the waters of the Kishenganga/Neelum cannot, however, deprive India of its right to operate the KHEP ... effectively." Hence, in balancing India's right with the needs of the downstream environment, the Court also took account of environmental considerations.

The PCA recalled its *Partial Award* in which it noted with approval, the *Iron Rhine Arbitration*, which built on the judgment of the International Court of Justice in the *Case Concerning the Gabcikovo-Nagymaros Project* that:[93]

> "It is established that principles of international environmental law must be taken into account even when (unlike the present case) interpreting treaties concluded before the development of that body of law. … Similarly, the International Court of Justice in *Gabčíkovo-Nagymaros* ruled that, whenever necessary for the application of a treaty, "new norms have to be taken into consideration, and . . . new standards given proper weight."[94] It is therefore incumbent upon this Court to interpret and apply this 1960 Treaty in light of the customary international principles for the protection of the environment in force today."

In implementing this holding, the Court noted that the place of customary international law in the interpretation or application of the Treaty remained subject to Paragraph 29 of Annexure G. Unlike the treaty in *Iron Rhine*, the Treaty expressly limits the extent to which the Court may have recourse to and apply sources of law beyond the Treaty itself. The Court reiterated that: "States have 'a duty to prevent, or at least mitigate' significant harm to the environment"[95] and not just to the other Party when pursuing large-scale construction activities.

Unlike its adoption by international law and policy instruments,[96] the Treaty does not impose the obligation not to cause significant harm or to prevent or minimize harm, either generally, or when Parties are pursuing damming and infrastructural-related development of the Indus waters. Given its presence under customary international environmental law, this Court in the *Partial Award* had no difficulty concluding that environmental flow is necessary in the application of the Treaty. However, the Court was not prepared to adopt a precautionary approach in determining the balance between acceptable environmental changes or to permit environmental considerations to override the rights and obligations of Parties under the Treaty, especially the right of India to divert the waters of a tributary of the Jhelum.[97]

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[92] The Indus Waters Treaty 1960, *supra* note 15, Annex. G, art. 29 provides: "Except as the Parties may otherwise agree, the law to be applied by the Court shall be this Treaty and, whenever necessary for its interpretation or application, but only to the extent necessary for that purpose, the following in the order in which they are listed: (a) International conventions establishing rules which are expressly recognized by the Parties; and (b) Customary international law."

[93] Partial Award, *supra* note 31, at 171, ¶ 452.

[94] Gabčíkovo-Nagymaros Project, *supra* note 84, at 7, 78.

[95] Partial Award, *supra* note 31, at 170; ¶ 451.

[96] UN Watercourses Convention, *supra* note 57, art. 7; and Berlin Rules on Water Resources, *supra* note 84, art. 8.

[97] While the PCA in the *Partial Award* had no difficulty concluding that the requirement of an environmental flow is necessary in the application of the Indus Waters Treaty, at the same time, it did not consider it appropriate, and certainly not "necessary," for it to adopt a precautionary approach and assume the role of policymaker in determining the balance between acceptable environmental change and other priorities, or to permit environmental considerations to override the balance of other rights and obligations expressly identified in the Treaty—in particular the entitlement of India to divert the waters of a tributary of the Jhelum. The Court's authority, it considered, was more limited and extended only to mitigating significant harm. Beyond that point, prescription by the Court was prohibited by the Treaty. Echoing the Court's caution in the Partial Award, the prioritization of the environment above all other considerations would effectively "read the principles of Paragraph 15(iii) [of Annexure D] out of the Treaty." Which was not submitted under para 29 of Annexure G.

Thus, the Court in its *Final Award* restricted its authority only to mitigating significant harm as per Treaty interpretation, thereby fixing a minimum flow.[98]

Determination of the Minimum Flow

India and Pakistan did not disagree that the maintenance of a minimum flow downstream of the KHEP was required in response to considerations of environmental protection. The Parties differed, however, as to the quantity of water that would constitute an appropriate minimum. Thus, the PCA's task was to determine the precise amount of flow to be preserved that would mitigate adverse effects to Pakistan's agricultural and hydro-electric uses throughout the operation of the KHEP as well as the downstream environmental impact of KHEP, while preserving India's right to operate the KHEP and having due regard of customary international law requirements of avoiding or mitigating significant transboundary harm and of reconciling economic development with that of environmental protection. Thus, in balancing all of these matters and having analysed the data submissions made by both India and Pakistan, the Court fixed the minimum flow to be released downstream from the KHEP dam at 9 cumecs.

For avoidance of any doubt, if at any time, however, the flow in the Kishenganga/ Neelum immediately upstream of the KHEP dam falls below 9 cumecs, the PCA placed India under an obligation to release all of the inflow, until the flow upstream of the KHEP dam exceeds 9 cumecs again.[99]

Review of the Environmental Flow Regime

The PCA noted that a degree of uncertainty was inherent in any attempt to predict environmental responses to changing conditions in the Indus Basin. In addition, flows at the Line of Control are ungauged and therefore estimated data by India and Pakistan differ. Uncertainty is also present in attempts to predict future flow conditions and the Court was cognizant that flows in the Kishenganga/ Neelum may come to differ, perhaps significantly, from the historical record as a result of factors beyond the control of either Parties, including climate change and its impact on the Indus Basin.[100]

The Court recalled its statement in the *Partial Award* whereby it stated that "stability and predictability in the availability of the waters of the Kishenganga/ Neelum for each Party's use are vitally important for the effective utilization of rights accorded to each Party by the Treaty (including its incorporation of customary international environmental law)."[101] While the Court upheld this, it also considered it important not to permit the doctrine of *res judicata* to extend the life of the *Final Award* into circumstances in which its reasoning would no longer accord with reality along the Kishenganga/ Neelum.[102] Thus, given the future uncertainties associated with the flows, the fixed minimum is open to reconsideration.

In this regard, the Court urged that the KHEP should be completed in such a fashion as to accommodate possible future variations in the minimum flow requirements. For this reason, if within 7 years after the diversion of the Kishenganga/Neelum through the KHEP, either Party considers that reconsideration of the Court's determination of the minimum flow is necessary it will be entitled to seek such reconsideration through the Permanent Indus Commission and the mechanisms of the Treaty.

Monitoring of the Prescribed Minimum Flow

In addition to fixing an environmental flow, Pakistan had also requested the PCA to establish a monitoring regime to allow it to evaluate India's compliance with the fixed flow. According to India, the Permanent Indus Commission already serves the monitoring role that Pakistan sought. India noted that "[t]here is no reason to believe on the basis of the historical record that this 'communication within the Commission cannot be relied upon as a means for transmitting accurate data in a timely manner."[103] India

[98] As per The Indus Waters Treaty 1960, *supra* note 15, Annex. G, art. 29.
[99] Final Award, *supra* note 34, at 41, ¶ 116.
[100] *Id.* ¶ 117.
[101] *Id.* ¶ 118.
[102] *Id.*
[103] *Id,* at 28, ¶ 73.

maintained that the Parties' exchange of data on flows and water utilization through the Commission under Articles VI and VIII of the Treaty has proceeded regularly and smoothly since its inception. Thus, in India's view, an additional inspection regime was unwarranted and unnecessary.

The PCA agreed that the appropriate mechanism for the exchange of data and for the monitoring of the Parties' uses on tributaries of the Indus River was the Permanent Indus Commission. The Court recalled, in particular, that Article VI(1) of the Treaty already requires the Parties to exchange "(a) Daily (or as observed or estimated less frequently) gauge and discharge data relating to flow of the Rivers at all observation sites" and "(b) Daily extractions for or releases from reservoirs."[104] The Court was confident that the Parties would continue to exchange data and that India will include the necessary data relating to the KHEP. The Court further recalled that Article VIII(4) calls for the Commission to "undertake promptly, at the request of either Commissioner, a tour of inspection of such works or sites on the Rivers as may be considered necessary … for ascertaining the facts connected with those works or sites."[105] Thus, in light of these provisions, the Court concluded that it was neither necessary nor within the Court's purview to instruct the Commission or to mandate a special monitoring regime in the implementation of the *Final Award*.

This case highlights that whilst the Treaty, negotiated in 1960, may not be provisionally adequate to address current issues between India and Pakistan, it has the capacity to continue to provide the working relationship between India and Pakistan to allow them to continue to utilize the Indus waters in order to meet their economic needs while at the same time leave enough for the basin's ecological sustainability. However, while the PCA has fixed a minimum flow downstream from the KHEP, this would not solve the overall damming and infrastructural development-related problems in the Basin unless the following recommended modifications to the Treaty are implemented.

VI. TIME TO REVIEW THE TREATY

Judge Stephen M. Schwebel, Chairman of the PCA in the *Kishenganga Arbitration* observed that: "The Indus Waters Treaty was a great achievement of Pakistan and India and of the World Bank, and it remains so; … and these proceedings are an illustration of its continuing vitality."[106] However, the stacking up of the number of damming and infrastructural development-related disputes also indicates that the Treaty provisions are not apt to deal with environmental consideration assessments which are required before, during and after project planning and implementation. The Treaty already provides for modification of Treaty provisions: "The provisions of this Treaty may from time to time be modified by a duly ratified treaty concluded for that purpose between the two Governments"[107] but has not been modified since its inception in 1960.

A. INCORPORATING ECOLOGICAL FLOWS

The PCA has insisted in its *Final Award* that its fixing of a minimum flow should not be equated to an environmental flow. However, in fixing a minimum flow, the Court clarified the difference between 'minimum flow' and 'environmental flow' as follows:[108]

> "an environmental flow is not necessarily a fixed minimum, affecting only the dry season, but is rather the flow regime anticipated to maintain environmental change resulting from infrastructure and development within the range considered acceptable under the circumstances of the river in question. Environmental flows may therefore be higher or lower, depending on those circumstances, and may include requirements affecting the high flow seasons of a river that cannot reasonably be described as a 'minimum.'"

[104] *Id,* at 42, ¶ 121.
[105] *Id.*
[106] PCA Press Release, *Indus Waters Kishenganga Arbitration: Court of Arbitration Concludes Hearing on the Merits,* PERMANENT COURT OF ARBITRATION: COUR PERMANENTE D'ARBITRAGE, www.pca-cpa.org/showfile.asp?fil_id=1970.
[107] The Indus Waters Treaty 1960, *supra* note 15, art. XII(3).
[108] Final Award, *supra* note 34, at 35, fn. 151.

Thus, an environmental flow regime is a variable flow regime with a fixed minimum flow, which taking into account all phases of the discharge regime, allows the river basin's ecosystem to develop resilience to changing circumstances, be it due to climate change or such other factors, as well as to ensure that river basin development is environmentally sound.

In this instance, the PCA opined that "[U]nder other circumstances, in particular where the difficulties of cooperation between the multiple State bureaucracies are not present, the appropriate environmental flow could well involve a regime of variable releases."[109] Although Pakistan had proposed a percentage or variable release flow regime, which are examples of such environmental flows, the Court fixed a minimum flow. This is because the Court's ultimate flow determination is based not solely on the environment but balanced against India's right to hydro-electric power generation as provided for under the Treaty. Moreover, since the Parties' data indicated that the effect of the KHEP on dry-season flows was the principal determinant of ecological change, the Court saw no reason to consider a percentage or variable release regime. As such, the fixed minimum flow also serves as an environmental flow but without being synonymous with that term. However, environmental/ ecological flows are an ideal situation when taking an ecosystem approach to adaptive management of river basins. While undertaking an environmental impact assessment is useful using the initial stages of a planned project for its potential impact on the environment including minimum flows downstream from the planned project, an ecological flow will serve as a guideline to assess not only the post-implementation of planned projects but also enable other factors, such as climate change, impacting the flow regime to be accounted for. Thus, it is quite important to take a holistic view of river basin development rather than in isolation of certain environmental factors to the artificial exclusion of the others. It is thus proposed that the Treaty be amended to allow for ecological flows. While the 1991 Water Apportionment Accord of the Indus River System between the provinces in Pakistan recognised the need for a quantity of water to maintain the Indus delta's functioning, and the *Final Award* addresses flow concerns from the KHEP Plant, it does not fully address the issue of environmental flows in the entire river basin. India has already mandated its National Ganga River Basin Authority to "maintain minimum ecological flows" in the river Ganga with the aim of ensuring water quality and environmentally sustainable development. A rudimentary recognition of environmental needs is included in its hydropower development policy as well.[110] Whilst guidelines are scattered, the European Union is currently drafting a Guidelines on Ecological Flows for its water bodies due in October 2014, which may serve as a framework model for international river basins in other regions as well.[111]

As already iterated, Article IV of the Treaty provides that:[112]

> "Each Party will use its best endeavours to maintain the natural channels of the Rivers … in such condition as will to avoid, as far as practicable, any obstruction to the flow in these channels likely to cause material damage to the other Party."

As interpreted by the PCA, maintenance of natural channels does not extend to maintenance of environmental flows. Moreover, the expression "material damage" under Article IV only extends to the other Party and not harm to the environment of the river basin itself, which is consistent with the Treaty's lack of environmental considerations of the water sharing regime. Thus, it is recommended that this Article be revised to incorporate maintenance of the natural channels including environmental flows to the extent that it avoids any likelihood of material damage to the other Party or to the environment of any of the Eastern and Western Rivers.

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[109] *Id.* At 37, fn. 154.

[110] Tom Le Quesne, Eloise Kendy & Derek Weston, *The Implementation Challenge: Taking Stock of Government Policies to Protect and Restore Environmental Flows,* at 14, available at http://www.hydrology.nl/images/docs/alg/2010_The_Implementation_Challenge.pdf.

[111] See European Commission, *Working Group Ecological Flows*,https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp?FormPrincipal:_idcl=navigationLibrary&FormPrincipal_SUBMIT=1&org.apache.myfaces.trinidad.faces.STATE=DUMMY&id=764dcfed-6e09-4683-be61-951647df760a (Last visited Sept. 9, 2014).

[112] The Indus Waters Treaty 1960, *supra* note 15, art. IV(6).

B. ENVIRONMENTAL IMPACT ASSESSMENTS AND AUDITS

The PCA noted in its *Final Award* that EIAs comprising of extensive analysis, attempting to capture complex interactions within the river ecosystem in order to predict the environmental changes that would result from altered flow conditions are increasingly used by scientists and policymakers to bring a deeper understanding of ecology to bear on the management and development of river systems.[113] While the Court has said that there is no single "correct approach", listing instead, factors that determine whether or not an assessment would be required and if so, the appropriate level of assessment, the United Nations Economic Commission for Europe's Convention on Environmental Impact Assessment in a Transboundary Context ('Espoo (EIA) Convention')[114] has a list of content that an EIA document has to contain.[115]

Currently, the Permanent Indus Commission is under an obligation to: (i) furnish or exchange information or data.[116] However, this does not include any obligation to undertake and furnish any EIAs for the construction of any engineering works as envisaged under Article VII of the Treaty. Under the Espoo (EIA) Convention, while notification contains "Information on the proposed activity, including any available information on its possible transboundary impact", consultations pertaining to any proposed activity are only undertaken on the basis of the EIA documentation.[117] Whilst the obligation to notify under the Treaty talks about supplying such data relating to the work as may be available and as would enable the other Party to inform itself of: (1) the nature, (2) the magnitude and (3) the effect of the work,[118] it lacks the next stage which is consultations based on an EIA report. Given the number of development-related disputes between the Parties, and recent international cases and arbitrations, it is now "a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource."[119] Thus, not undertaking an environmental impact assessment should no longer be considered to be an option and a report must accompany notification. It is thus recommended that a separate article be included that not only mandates the undertaking of an EIA for any engineering works but also for any activity that may "cause any interference with the waters of any of the Rivers, and which, in the origin Party's opinion, would affect the other Party materially"[120] or affect the environment of any of the Rivers.

In terms of audits of damming and infrastructural development-related projects, the PCA in this instance held that Pakistan's agricultural and hydro-electric uses are relevant at two distinct times: first, at the time the KHEP crystallized; and, second, on an ongoing basis throughout the operation of India's Plant. This requirement is derived from the applicability of the principle of sustainable development which is also absent under the Treaty. The PCA in its *Partial Award* had referred to the principle of sustainable development and translated its applicability to large-scale planned projects in the following terms:

> "Applied to large-scale construction projects, the principle of sustainable development translates, as the International Court of Justice recently put it in *Pulp Mills*, into "a

[113] Final Award, *supra* note 34, ¶¶ 97-98.
[114] Convention on Environmental Impact Assessment in a Transboundary Context, Sept. 10, 1991, 30 I.L.M. 802 [hereinafter Espoo Convention].
[115] As a minimum, the list includes but is not limited to:[115] (a) A description of the proposed activity and its purpose; (b) A description of the environment likely to be significantly affected by the proposed activity; (c) A description of the potential environmental impact of the proposed activity and an estimation of its significance; (d) A description of mitigation measures to keep adverse environmental impact to a minimum; (e) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used; (f) An identification of gaps in knowledge and uncertainties encountered in compiling the required information; and (g) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis. Espoo Convention, *supra* note 114, art. 4(1), Append. II.
[116] The Indus Waters Treaty 1960, *supra* note 15, art. VIII(1)(a).
[117] Espoo Convention, *supra* note 114, art. 5.
[118] The Indus Waters Treaty 1960, *supra* note 15, art. VII(2).
[119] Partial Award, *supra* note 31, at 170, ¶ 450.
[120] Taken from the Indus Waters Treaty, *supra* note 15, art. VII(2).

> requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource." The International Court of Justice affirmed that "due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works."[121] Finally, the International Court of Justice emphasized that such duties of due diligence, vigilance and prevention continue "once operations have started and, where necessary, throughout the life of the project."[122]

The PCA thereby linked the principle of sustainable development, which seeks to strike a balance between economic development and environmental protection, with the *ongoing* duty to undertake an environmental impact assessment where there is a potential for risk to the quantity or quality of the international river waters from large-scale planned projects. Thus, the Court in this instance concluded that "hydro-electric projects (including Pakistan's projects) must be planned, built and operated with environmental sustainability in mind."[123] This gives rise to the Party's obligation to ensure that the other Party's rights to use of the waters allocated to them are not breached. This requires regular audits post implementation of any projects that have been executed. This idea of post-implementation audits has been present in the context of the Espoo (EIA) Convention as well as the recently formulated Nile River Basin Cooperative Framework Agreement 2010.[124] Thus, the EIA provision must provide for EIA's not only prior to and during formulation of a planned project but audits for post-implementation environmental impacts as well.

C. QUALITY ASSURANCE OF DATA EXCHANGED

The PCA, in terms of data sharing, has stated that "quality assurance, if done in a transparent manner, is consonant with best practices in the field of hydrology."[125] Whilst the PCA pointed out the lack of data sharing by Pakistan with India, a US study has criticized India in not being so forthcoming on flow data.[126] Currently, Article VI of the Treaty on Exchange of Data does provide for data exchange but as it is apparent, this is not being done effectively and transparently. Thus, Article VI ought to be revised so that data related to environmental flows at various points can also be disseminated between the Parties. To this end, the Parties may even consider establishing a Technical Advisory Committee (akin to the one envisaged under the Nile River Basin Cooperative Framework Agreement), as an organ of the Permanent Indus Commission, to oversee not only data collection and verification but also entrusted with the task of dealing with the technical matters in an EIA report. However, the onus of data collection and verification does not need to stop at India but should extend to Pakistan as well, to deal with the ecology of the entire part of the Basin governed by the Treaty. Environmental flows (or water requirements) is a compromise or balance between water resources development and maintenance of a river in an ecologically acceptable or agreed condition.[127] For this purpose, it is important to work out the ecological status first, which focuses on the main aquatic features and problems within the river basin.[128] Once this is worked out, the Parties can then work towards maintaining a target of environmental flows, in a variable regime depending on its needs as circumstances change over time.

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[121] Pulp Mills case, *supra* note 41, at 14, 83.
[122] Partial Award, *supra* note 31, at 170, ¶ 450.
[123] *Id.* at 171–172, ¶ 454.
[124] Available from *African River Basins: Nile River Basins,* INTERNATIONAL WATER LAW PROJECT, *available at* http://www.internationalwaterlaw.org/documents/africa.html#Nile River Basin.
[125] Final Award, *supra* note 34, at 33, ¶ 91.
[126] Daanish Mustafa, *supra* note 67, at 7.
[127] VLADIMIR SMAKHTIN ET AL., DEVELOPING PROCEDURES FOR ASSESSMENT OF ECOLOGICAL STATUS OF INDIAN RIVER BASINS IN THE CONTEXT OF ENVIRONMENTAL WATER REQUIREMENTS 1 (2007).
[128] *Id.* at 2.

VII. CONCLUSION

While the PCA Awards are something that India and Pakistan can resort to, albeit to a limited extent, resolution of existing disputes as well as future disputes and amending the relevant Treaty provisions will help strengthen the Treaty provisions. This will not only address but prevent further disputes. As already stated, the Treaty does provide for India's construction of the hydel projects but on the proviso that it does not disrupt or reduce water flows to Pakistan. Its duty to ensure that a minimum flow reaches Pakistan also stems from the Treaty's interpretation in light of customary international environmental law. However, the Treaty neither provides for ecological flows nor does it oblige the Parties to furnish an environmental impact assessment report for planned projects to evaluate transboundary impacts. Further, it does not allow for ongoing audits of projects already in place and does not provide for quality assurance of data exchanged. It does, however, allow for modifications to be duly made to its texts and India and Pakistan should take advantage of that to provide for: environmental flows, environmental impact assessments and audits and quality assurance of data exchanged. Until then, while increased damming and infrastructural development may serve the economic interests of both Parties, lack of environmental considerations will simply fail to achieve the very balance that the principle of sustainable development seeks.