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Understanding Arbitrability of Fraud through Case Analysis

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ABSTRACT

Arbitrability of fraud has been a major issue in Indian Arbitral regime for a very long time. Enforcement of arbitration agreement has become troublesome because of allegations of fraud raised by parties. There are no express provisions to prohibit arbitrability of fraud claims in the Indian Arbitration and Conciliation Act, 1996. Indian jurisprudence has taken great strides in the past year towards achieving parity with the international trends in respect of the arbitrability of fraud. While courts have been hitherto disinclined to refer disputes concerning fraud to arbitration, recent developments demonstrate a departure from this conservative approach. This paper aspires to arrive at an approach to deal with the same after a careful analysis. Present paper analyze arbitrability of fraud in UK in comparison to India.

Keywords: *arbitrability, fraud, dispute.*

I. INTRODUCTION

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.

The reluctance of English judges to refer such matters to an arbitral tribunal pre-dates the award of Judge Lagergen.[2] 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

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[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."

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 favor 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.[3] The court opined that the issue of fraud, which comprised the crux of the dispute, would be more competently dealt with by a jury as opposed to two brokers who, "would naturally shrink from a charge of fraud made against a person in the market." This case aptly evidences the prejudice that the judiciary harbored against arbitrators' ability to determine judicial issues in theirstead.[4] Wallis thus evolved a general principle advocating the exercise of judicial discretion to refuse a reference.[5] 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.[6]

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.[7] Thus, an arbitral tribunal was not considered an appropriate forum to decide serious allegations of fraud which would involve complex questions of evidence.[8]

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.

II. Development through case laws

A case with utmost precedential value in this regard, is the ruling of Master of Rolls, Jessel of the Chancery Division in Russell v. Russell, dealing with allegations of fraud by one partner

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[3] Cockburn CJ & Williams J, Wallis & Anr. v. Hirsch & Ors., 140 E.R. 131 (U.K.).
[4] 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.
[5] Hirsch & Ors. v. John Conrad im Thurn, (1858) 27 L. J. C. P. 254 ; Willesford v. Watson, (1873) 8 Ch App 473.
[6] Minifie v. Railway Passengers Assurance Co., (1881) 44 L.T. 55; Hirsch v. I.M. Thurn, (1858) 27 L.J.C.P. 254 ; Alexander v. Mendl, (1870) 22 L.T. (N.S.) 609 ; R. D. Thomas, The Judicial Supervision of Arbitral References Involving an Allegation of Fraud, 9 CIV. JUST. Q., 381, 398 (1990).
[7] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
[8] Hoch v. Boor, (1880) 43 L.T. 425.

against the other in dissolving a partnership.[9] MR Jessel held that courts would refuse a reference to arbitration if the party charged with fraud desires a public inquiry. 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. 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. It is pertinent to note that the aforementioned case of Wallis v. Hirsch did not deal with a situation where the party charged with fraud had opposed a stay yet the matter was not referred to arbitration. 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[10] despite the uncertainty created by the insertion of Section 14 in the Arbitration Act of 1934.

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.[11] Nevertheless, despite the retention of this provision [12] coupled with a general power of the court to stay proceedings in the 1950 Act for any sufficient reason,[13] Russell v. Russell continued to hold the field.[14]

(A) Camilla Cotton Oil Co. v. Granadex SA and Tracomin SA

However, confusion persisted for some time, over an aspect of the issue that was not directly dealt with by MR Jessel in Russell, i.e., 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

[9] Russell v. Russell, (1880) 14 Ch. D. 471.
[10] Minifie v. Railway Passengers' Assurance Co., (1881) 44 LT 552 at p. 554.
[11] Muthavarpu Venkateswara Rao v. N. Subbarao, A.I.R. 1984 A.P. 200 (India).
[12] Arbitration Act, 1950, c. 27, 14 Geo 6, §24(2).
[13] "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).
[14] Radford v. Hair & Ors., [1971] Ch. 758

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Co. v. Granadex SA and Tracomin SA etc[15], 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.[16] 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.

(B) Cunningham Reid & Anr. v. Buchanan-Jardine

In this case of, the House of Lords noted precisely this.[17] Strictly contextualizing 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.[18] 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 favor of increased trust in the competencies of private arbitrators.

English common law gradually began leaning towards a reverse bias in favour of enforcing arbitration agreements and awards, save in exceptional circumstances.[19] 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"].[20]

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

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[15] Camilla Cotton Oil Co. v. Granadex SA and Tracomin SA, [1976] 2 Lloyd's Rep. 10 H.L at p. 16.
[16] "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.." Wilberforce LJ, Camilla Cotton Oil Co. v. Granadex SA and Tracomin SA etc, [1976] 2 Lloyd's Rep. 10 H.L at p. 16.
[17] Cunningham-Reid & Anr. v. Buchanan-Jardine, [1988] 1 W.L.R. 678.
[18] "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." Wool LJ, Cunningham-Reid
and Anr v. Buchanan-Jardine, [1988] 1 W.L.R. 678 at p. 688.
[19] Rew & Ors. v. Cox & Ors., [1996] C.L.C. 472 wherein proceedings were stayed not owing to the allegations of impropriety in the dispute but considerations such as avoiding multiplicity of proceedings.
[20] Fiona Trust & Holding Corporation & Ors v. Privalov & Ors, [2007] 1 C.L.C. 144 at p. 158.

being performed or that there is 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.[21]

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[22] as opposed to leaving it to the court to find a "sufficient reason" to refuse arbitration.[23] 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.[24] 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."[25] However, this provision was never enforced for the fear of infringing European Community law by, in effect, treating English nationals differently. Therefore, the discretion of the court was virtually nullified and it became mandatory for the court to refer parties alleging 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

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[21] Paczy v. Haendler & Natermann G.M.B.H., [1979] F.S.R. 420. 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.

[22] "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).

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

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

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

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.[26] 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.[27]

Today, this problem could be tackled by the principle of Kompetenz-Kompetenz.[28] However, at that time, guidance in the form of the UNCITRAL Model law was not available.[29] 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.

(C) Heyman v. Darwins[30]

The orthodox view was debunked as "false logic" in Heyman v. Darwins. 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.[31] Even though the House of Lords did not explicitly

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

[27] Bankes LJ, in Monro v. Bognor Urban District Council, [1915] 3 K.B. 167 at 172 , "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."

[28] 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.

[29] Arbitration Act, 1950.

[30] Heyman v. Darwins Ltd., [1942] A.C. 356.

[31] "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

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.[32] 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.[33]

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."[34] Further, albeit as obiter, the court interpreted the opinions in Heyman and Munro 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."[35]

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 General International Insurance Co. Ltd., 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

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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." Macmillon LJ, Heyman at p. 374.

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

[33] 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." Macmillon LJ, Heyman at p. 371.

[34] Ashville Investments Ltd. v. Elmer Contractors Ltd., [1989] Q.B. 488.

[35] 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.

oversimplification.

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. 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."

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. 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.[36] These reasons include deference to the parties' wishes, the benefit of a one-stop adjudication, etc.

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.[37]

III. Fiona Trust Case and the Arbitration Act, 1996

An opportunity for clarification arose in Fiona Trust & Holding Corporation v. Privalov.[38]

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

[36] A. Berg, Arbitration Under a Contract Alleged not to Exist, 123 L.Q. REV. 352, 355 (2007)

[37] 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."

[38] Fiona Trust & Holding Corporation & Ors. v. Privalov & Ors., [2007] 1 C.L.C. 144 affirmed in Fili Shipping Co. Ltd. & Ors. v. Premium Nafta Products Ltd. & Ors. on appeal from Fiona Trust and Holding Corporation & Ors. v. Privalov & Ors., [2007] Bus. L.R. 1719.

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."[39]

The Court sought to answer this question in terms of the construction of the 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." 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.[40] 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. 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

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[39] Fiona Trust & Holding Corporation & Ors v. Yuri Privalov & Ors, [2006] EWHC (Comm) 2583; 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."

[40] "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.

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. 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.[41] 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.[42]

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

[41] T.D. Grant, International Arbitration and English Courts 56(4) INT'L & COMP. L.Q., 871, 879 (2007).

[42] "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.

lacks jurisdiction owing to an invalid arbitration agreement despite the principle of kompetenz-kompetenz.[43] 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.[44] 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.[45] 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.[46]

IV. Conclusion

From careful analysis of the above judgments, it can be concluded that fraud claims are arbitrable in India. In the opinion of the author, the judgments of the Supreme Court of India in WSG and Swiss Timing are welcome decisions as they make India a more arbitration-friendly jurisdiction. They further the policy of mini-mum judicial intervention in arbitral proceedings as enshrined under section 5, and recognize the competence of the arbitral tribunal to rule on its own jurisdiction even in matters pertaining to fraud. Lastly, the judgments rightly acknowledge the general principle that the function of the courts in matters relating to arbitration is to support and aid the mutually agreed dispute resolution mechanism, and not to usurp the entire mechanism.

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[43] 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.
[44] Arbitration In England 399 (J.D. M. Lew, et al eds., 2013.
[45] 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.
[46] See Deutsche Bank AG & Ors v. Asia Pacific Broadband Wireless Communications Inc. & Anr., [2008] 2 C.L.C. 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.).