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The Back and Forth of the Arbitrability of Fraud in India

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The issues arising out of allegations of fraud in international commercial arbitration can be listed by way of two closely connected questions:

1) Do arbitral tribunals have the substantive jurisdiction to make determinations upon allegations of fraud?
2) If the contract containing an arbitration agreement is tainted by allegations of fraud, does the arbitration agreement survive?

Although courts in the UK have ruled that arbitral tribunals are entitled to make determinations upon claims of fraud, the issue was still indeterminate in India. Over the last decade, several judgments of the Supreme Court of India ("**SCI**") have held that fraud claims are not arbitrable in the interests of justice while in other instances the SCI has made references to arbitration in spite of fraud claims. On January 24, 2014 the Supreme Court of India settled the law by way of its decision in *World Sport Group (Mauritius) Ltd v. MSM Sattelite (Singapore) Pte. Ltd* (Civ. App. No. 895 of 2014) ("**World Sport Group**") holding that fraud claims fall under the substantive jurisdiction of an arbitral tribunal in cases of arbitrations falling under Part II of the Indian Arbitration and Conciliation Act 1996 (i.e., foreign seated arbitrations) ("**the Act**").

As for the second issue, although the SCI did not lay down an exacting test such as that of "*direct impeachment*" of the arbitration agreement like in *Fili Shipping v. Premium Nafta Products* ([2007] UKHL 40) ("**Fili Shipping**"), the SCI referred the dispute involving an allegation of the voidability of the main contract on account of fraud to arbitration which seems to imply that an arbitration agreement does not perish if there are allegation of fraud pertaining to the main contract. However, the court referred to its previous decision in *SMS Tea Estates (P) Ltd v. Chandmari Tea Co (P) Ltd* ([2011] 14 SCC 66) and observed that the

> "court will have to **see in each case** whether the arbitration agreement is also void, unenforceable or inoperative along with the main agreement or whether the arbitration agreement stands apart from the main agreement and is not null and void" (emphasis added).

Therefore, just like the House of Lords defined the exception in cases involving allegations of

fraud that attack both the main agreement and the arbitration agreement in *Fili Shipping*, the Indian courts accepted the causation argument with respect to whether the matters affecting the validity of the main contract also affect the validity of the arbitration clause.

The SCI also said that the impugned arbitration clause was *"wide enough to bring this dispute within the scope of arbitration"*. This point seems to imply that a literal interpretation of arbitration agreements will be undertaken henceforth. This will lead to several complications such as what is covered by a clause covering *"disputes arising under this agreement"* versus clauses which read *"disputes arising in connection with this agreement"*. The redundancy of this distinction was touched upon by the House of Lords in *Fili Shipping* where, emphasizing on the importance of interpreting an agreement or clause in connection with its *"rational commercial purpose"*, the SCI observed that parties in the international market used standard forms of contracts for the purposes of speed and efficiency and it seems odd to conclude that parties would want certain kinds of disputes referred to arbitral tribunals and other kinds to be adjudicated upon by courts unless specifically defined as so. This issue was resolved by creating the *"direct impeachment"* test which requires the allegation of fraud to be made specifically targeting the arbitration agreement for the dispute to go before courts when a standard arbitration agreement is contained in the main contract.

Keeping in mind the values of international commerce, it seems necessary that such a direct impeachment test be adopted by other courts. The Bombay High Court in *Mulheim Pipecoatings v. Welspun Fintrade* (Appeal [L] No. 206 of 2013) tried to formulate the essential features of the doctrine of separability on 16 August 2013 and identified the direct impeachment test as an indispensable feature. Although this decision of the Bombay High Court has not been expressly overruled, the SCI seems to have decided otherwise on 22 August 2013 in *M/s Young Achievers v. IMS Learning Resources* (Civ. App. 6997 of 2013). In *World Sport Group* the SCI had the opportunity to revisit this issue but ruled in favour of a case by case approach.

However, it is critical to understand the difference in the position of law in India as against English law. The SCI clarified that it was referring a fraud claim to arbitration only since it was an arbitration to which Part II of the Act applied. Part II of the act applies to arbitrations which would lead to a *"foreign award"*. This would require that the arbitration be seated in a country other than India which is both party to the New York Convention and listed in the Official Gazette of India.

The law with respect to domestic arbitrations continues to be governed by the judgment in *N. Radhakrishnan v Maestro Engineers* (Civ. App. 7019 of 2009) which states that arbitral tribunals do not have the substantive jurisdiction to adjudicate upon complex issues of fact such as those arising out of serious allegations of fraud in the interest of justice. However, these distinct positions of law leads to another question as to whether an arbitral award adjudicating upon a fraud claim would be refused enforcement in India on grounds of the award being against the public policy of India. The SCI did make a finding on public policy stating that the:

> "Parliament has made the Arbitration and Conciliation Act, 1996 providing domestic arbitration and international arbitration as a mode of resolution of disputes between the parties and Exception 1 to Section 28 of the Indian Contract Act, 1872 (agreements in restraint of judicial proceedings are void) clearly states that Section 28 shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects

> shall be referred to arbitration".

In this respect, the court seems to have said that an arbitral tribunal adjudicating upon fraud claims would not be against the public policy of India since the parties have agreed for such disputes to be adjudicated by the said tribunal.

In conclusion, in spite of some shortcomings, *World Sport Group* should be recognized as a welcome judgment in line with the string of liberal arbitration related judgments from the Supreme Court of India in the past year.

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