INTERNATIONAL COMMERCIAL ARBITRATION & ARBITRABILITY OF FRAUD : AN INDIAN CONTEXT

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ABSTRACT

The Article concerned with the issue of International Commercial Arbitration and Arbitrablity of Fraud in Indian Context. On the back drop of growth in International Investment in India this issue is of great relevance. Integration of the national economy with the world and in the era of globalization the commercial disputes has increased. Thus timely resolution of the matters are desired by the parties, allegation of fraud often create conflict of laws. Indian judicial Authorities for the last decade were not able to define its stand over the concern and there was ambivalence prevailed. The Article through precedents project change in the judicial approach matters concerning with fraud.

It deals with the arbitrablity of fraud under national and international domains. A reference has been given of the New York convention and other international legal frames. Along with the concern essential doctrine of Public Policy, Seprability and interpretation of the courts over them. For substantiating each concern precedents have been deployed which also gave the interpretation of the courts along with the approach. From the Radhakrishnan era when the courts had an orthodox and restrictive approach towards the arbitrability of fraud. Till the contemporary times when the court upholds the arbitrablity of fraud for the arbitration in India to an extent.

Dawn of pro arbitration era been described with the help of precedents. How the courts started changing its view towards the arbitrability of fraud in both the national and international commercial arbitration. This is to broaden the scope of research. The present government has also taken considerable steps to make the arbitration more user friendly, cost effective and time bound. Recommendation has been made in the 246th Law commission reports in the same concerns. The roads look ahead very promising to make India an international destination for arbitration and also against the Indian parties.

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KEY WORDS- COMMERCIAL ARBITRATION, FRAUD, ARBIRTABILITY, PUBLIC POLICY, ARBITRTION.

International Commercial Arbitration (hereinafter called ICA) is an **alternative method of resolving disputes** arising out of business and commercial transactions that happens between private parties across national borders at international forum that allow the parties to **avoid litigation in national courts**.

Growth in cross-border commercial disputes has caused tremendous growth due to increased international trade and investment. International arbitration has emerged as the preferred choice for partitioning cross-border business disputes and conserving business relationships because of the increasing and given need for associate economical dispute resolution system,

With a flow of overseas business transactions and complete liberalised economic policies has increased the scope and extent of international commercial disputes involving Indian states are steadily rising. This has led to tremendous hub from the international community in India's international arbitration regime. Owing to certain disputable choices by the Indian judiciary within the recent past, mainly in the cases where there is involvement of a foreign party, the international community has kept a near watch on the development and progress of arbitration laws in India and has mostly criticized the Indian judiciary for its interference in the matter of international arbitration and further territorial application of domestic laws to awards obtained outside India. But this aspect of the Indian judiciary towards arbitration is now becoming dynamic since the past couple of years. Never before has one seen several pro-arbitration rulings by Indian Courts. From 2012 to 2014 the honorable Supreme Court of India declared the Indian arbitration law to be seat centrical, removed Indian judiciary's power to interfere with arbitrations that are seated outside the territory of India, and denied strict limit of interference in India seated arbitrations (or arbitrations seated in India), stated and found fraud to be arbitrable in India, referred non-parties to an arbitration agreement to resolve disputes through arbitration mechanism, defined the scope and importance of 'public policy' (latter on discussed in detail) in foreign seated arbitration, and also accepted the importance,

independence and fairness of even arbitrators appointed by the government, and has thus shown the abundant requirement of pro-arbitration approach.

ARBITRABLITY OF FRAUD IN ENGLISH LAW

Today most of the countries jurisdictions have become arbitration friendly this is because of emerging global needs of investment enhancement and economic prosperity. Arbitration today is one of the most rational forum where timely resolution of disputes can be possible both in national and transnational domain. This article is particularly concerned with how courts dealt with the questions of Arbitrablity of disputes comprising of the fraud allegations at pre award stage and at post award stage. Arbitrablity serves as a check and balance over the autonomy of the parties which is the cornerstone of Arbitration. At, one point of time it was widely acknowledged that the ambit of the parties' autonomy should not involve the freedom of referring the allegations of bribery, fraud and illegality to the private tribunal. The judgment of *J. Gunar lagergren* in 1963 had been widely upheld to evince the unwillingness of the courts to extend the parties autonomy to refer the allegations of fraud to a private arbitral tribunal. While such restraints to the parties autonomy might seem alien in present day jurisdiction of the countries. India also gradually letting this restraint off from his legal framework. The question of Arbitrablity of fraud allegations is a "*rationae materiae* notion, implies it's a subjective matter depending upon the nature of fraud and the parties autonomy. The sort of considerations which affects the arbitrablity of a fraud ranges from public policy, expediency and propriety which are indeed debated. Therefore, the stand of the courts of a country is an important parameter while determining the arbitrablity of the issues involving the allegations of fraud.

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- **ARBITRABLITY AND THE COMMON LAW PROCEDURE ACT, 1854.**

To summarize how initially the English Judges were reluctant to refer the matters involving the allegations relating to fraud to Arbitration and how today the English jurisdiction Arbitration friendly provided the question of arbitrablity of Fraud has become irrelevant. One of the First cases

on the related issue *Wallis v. Hirch*[1] involved the allegations of fraud in a contract of sale of goods. The seller has supplied the goods not as per the description, the plaintiff claims the money. Considering an Arbitration clause in a contract, the issue of staying the proceedings under Section 11 of the common law procedure Act came before the court's consideration. The Court refused to stay the proceedings in favors of the Arbitrations, reasoning that the parties could not have contemplated to refer a dispute involving fraud under the arbitration agreement and thus such disputes does not come under the ambit of arbitral clause[2]. The court held that the issue of fraud could be more competently is dealt by the Courts as it involves hearing of the witnesses, examination of the facts which requires procedural laws to be applicable by a jury. As, opposed to two brokers who would naturally shrink from a charge of fraud made against a person in the market[3] This case aptly showing the prejudice of the judges that the judiciary should be harboured against the arbitrators ability to determine the judicial issues in there stead[4].

Thus by this case a general principle has involved that it is on the discretion of the judicial authority to refuse or to accept a reference. The judiciary was also concern with the efficiency and efficacy of arbitration. Arbitration was considered to be a compromised form of dispute resolution for its inabilities to replicate the rigorous fact form finding processes of judicial proceedings absent similar rules of procedures[5] thus an arbitral tribunal was not considered a appropriate forum to decide serious allegations of fraud which would involve complex questions of evidence[6].

A case involving allegation of fraud can be bared for arbitration on the grounds of propriety as well. An important case with utmost precedential value hold in the given concern is the ruling of the Master of the chancery division in *Russell v. Russell*[7] involving allegation of fraud in dissolving of partnership firm.[8] MR Jessel held that courts would refuse a reference to arbitration if the party charged with the fraud desires a public inquiry.[9] This judgment had concisely presented the

[1] *Wallis &ors. V. Hirsch & ors*, 140 E.R. 131 (U.K.) (Percockburn CJ & Williams J).
[2] *Wallis &ors. V. Hirsch & ors*, 140 E.R. 131 (U.K.) (Percockburn CJ & Williams J).
[3] ibid.
[4] Stavros L. Brekoulakis, "Persisting micro conceptions and new area of concern in arbitrablity ; International and comparative prescriptive" [2009].
[5] *Alexander v. Gardner-Denver co.* 415 US 36 (1974) (USA).
[6] *Hoch v. boor*, (1880 43 lt 425)(UK).
[7] *Russell v. Russell* (1880) 14 ch. D. 471 (U.K.).
[8] ibid. at 476.
[9] ibid. at 476.

preposition but also foresight certain limitation on the proposed rule. He holds that there is no such question of misconduct and fraud would be beyond the ambit of the arbitration clause as a matter of necessity. As allegation of fraud always have certain implications over the reputational framework of parties, thus a procedural methods would always be more convenient for resolution of disputes where rights of further appeal is available with the parties. Another ground for refusing the reference to arbitration is when the party against whom fraud is alleged requests the same. Moreover, the courts need to ensure that the dispute must satisfy itself that there exist prime facie evidences of serious fraud allegations and the mere allegations are not employed by the parties to skip the arbitral proceedings.[10] Therefore, Russell did beget a decisive change in the law and seemed to create a different change in the rules to the arbitrablity of fraud allegation dispute.

- **THE ADVENT OF AN ARBITRATION FRIENDLY ENGLISH LAW**

Enforcement of English Common Law Arbitration Act 1996 gradually began leaning towards a reverse bias in favour of enforcing the arbitration agreement and awards, only in exceptional cases.[11]Contemporaneously, the legislative scope of discretion was diluted over the years in order to give effect to the international obligation of England arising from the New York Convention of enforcement of foreign awards, 1958.[12]

Mention in Section 1 of chapter 3 of the Arbitration Act, 1975 enables the courts to stay the proceedings, unless satisfied that the arbitration agreement is null and void, or inoperative or incapable of being performed or that there is any dispute between parties with respect to matter agreed to be referred. In fact, in *Paczy v. Haendler & Natemann G.H.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.[13] Similarly, in the Arbitration Act 1996, which repealed the 1950 Act and the changes made in 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

[10] See *Hirsh & 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.).

[11] See *Rew & Ors. V. Cox & Ors*, [1996] C.L.C. 472 (U.K.) Wherein proceedings were stayed not owing to the allegation of impropriety in the dispute but consideration such as avoiding multiplicity of proceedings.

[12] *Fiona Trust & Holding Corporaion & Ors v. Privalvo & Ors*, [2007] 1 C.L.C. 144: [2007] Bus.L.R: 686 at p. 158 (U.K.).

[13] *Paczy v. Haendler & Natermann G.M.B.H.*, [1979] F.S.R. 420 (U.K.).

being performed[14]as opposed to leaving it to the court to find a sufficient reason to refuse arbitration.[15]These reforms have made the English Arbitration Act, aligned to the UNCITRAL Model Law and the New York Convention, which were an umbrella legislation to be applied on International Commercial Arbitration. Although exception was carved out for domestic Arbitration in the form of section 86 that exclude the application of section 9 (4) to domestic Arbitration 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 arbitral agreement.[16]

- **EVOLUTION OF KOMPETENZ DOCTRINE UNDER ENGLISH LAW**

In the above discuss cases the court had precisely dealt with defining sorts of fraud that would restrain the autonomy of parties to opt arbitration as a mode of resolution of disputes.

There are different set of cases having different stream of precedent deals with the situation

Were allegation of fraud is invoked as a ground to challenge the validity of contract or the arbitration agreement. An established principles namely ***kompetenz*** and ***seperability*** has influence the courts in deciding the arbitrablity of the above mentioned issues. Earlier the principle was subjected to criticism but with the time it got evolved and international recognitions under several legislations. The orthodox view dictates that *"NOTHING COMES FROM NOTHING" – If the contract is repudiated or was ab initio, the arbitration clause contained therein would also be revoked or void. The simple logic at play was that if the contract was void, it is obvious that the subordinate clause would also be void and as a result, a party could nit claim the benefits of arbitration clause.*[17]

[14] UKAA, 1996.

[15] Arbitration Act 1950, s 9(4).

[16] UKAA, 1996, ARBITRATION IN ENGLAND 399(J.D.M. Lew.et al eds., 2013).

[17] *Jureidini v. National British & Irish Miller Insurance Co. Ltd.* [1950] A.C. 499 (U.K.) ; *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.* , [1926] A.C. 497 at p.505 (U.K.).

Today this problem can be resolved by the principle of Kompetenz-Kompetenz[18]. However at that time UNCITRAL model law was not available. The orthodox view was labelled as a false logic in Heyman v. Darwins[19] the court dealt with the dispute between the manufacturer and the distributors of steels, where the manufacturer had repudiated the contract upon the creeping of differences when the appellant distributor initiated the legal proceedings the respondent asked for the injunctions to stay the proceedings and refer the dispute to the arbitration. The court held a contract to be repudiated on the grounds of frustration and bring the contractual relationship between the parties to an end. However, the contract would still survive for certain purposes and the arbitration clause will survive for the settlement of the dispute. Even though the concept of seperability was not entertained by house of lords but still the above case act as a precedent and Authority for the establishment of the doctrine of seperability under English law.

Lords Chancellor Viscount Simon made a distinction between the disputes wherein the party contended the contract as a *void ab initio* along with the situation were the party denied to have enter into the contract. And a situation where the parties sort to repudiate a binding contract. He held the former to situations where the disputes which could not be referred to a arbitration even though having arbitration clause because they would be *void ab initio* or would not have came into existence respectively.[20]

[18] The Arbitration and Concilliation Act no. 26 of 1996 ; INDIA CODE (1996) [hereinafter called Arbitration Act 1996] ; UNICITRAL model law on International Commercial Arbitration, Article 16 (1985) And UKAA, 1996.

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

[20] As per Viscound Simon LC, "Heyman" at p 366. See also , "Aclaim to set aside the contract on such ground as fraud".

ARBITRABLITY OF FRAUD & FOREIGN SEATED ARBITRATION- INDIAN CONTEXT

Foreign Seated Arbitration - The Arbitration and Conciliation (Amendment) Act, 2016 has brought relevant reforms in the parent legislation. It upholds the definition of foreign seated arbitration defined under Part 1 of the act which specifically deals with it. Referring section 9 reading with section 27 (1) (a), and section 37 (3) which deals with a foreign seated arbitration as

1. The arbitration must be international commercial arbitration.
2. The place of arbitration must be outside the India.
3. The arbitration award made in such places must be enforceable and recognized in India.
4. There must be no agreement to the contrary.[21]

- **Foreign Awards- New York Convention, 1985**

Article I of the New York Convention, 1985 defines the application of the arbitral award and its ambit at the international podium. Article I contain two definitions of foreign awards the first definition, set forth in sentence 1 that the foreign awards are those which are made in territory of a state other then the state where the enforcement are sought. Accordingly these awards are made in a foreign state. Second definition, set forth in sentence 2 that it also provides that it applies to the recognition and enforcement of foreign arbitral awards which is not considered as a domestic awards in the state where the recognition and enforcement sought[22]. On the back drop of the above discussed text the arbitral awards can be further bifurcated:-

1. An award made in the enforcement state under the arbitration law of another state.
2. An award made in the enforcement state under the arbitration law of that state where there is foreign element present.

[21] Gunjan Chhabra, "Foreign Seated Arbitrations: Section 9 Reliefs Posr Amendment, 2015" (Indiacorplaw, 9 May, 2016) < http://indiacorplaw.blogspot.in/2016/05/foreign-seated-arbitrations-section-9.html> accessed 20 April, 2016.

[22] Hanotiau & van den Berg, Brussels, Belgium. President, Netherlands Arbitration Institute, Rotterdam. Professor at law (arbitration), Erasmus University, Rotterdam. General Editor, Yearbook: Commercial Arbitration.

An award that is regarded as a national in that it is not governed by any arbitration law.[23] By this bifurcated head it has been claimed that the convention also has the applicability over the awards which does not cover under any national laws In case of enforcement of an "a-national" award under the Convention, the place where the award was made is in principle irrelevant. It is controversial whether "de-nationalized" arbitration and the resulting "a-national" award are legal reality and if so, whether the New York Convention can be applied to them.[24]

Case analysis:- " *RadhaKrishanan v. Maestro Engineer"s*[25]

Facts- In the Given case the parties before the court had entered in a partnership agreement provided with an arbitral clause. The dispute arose between the parties and letters were executed. In these letters one party who was the appellant alleged for serious charges of fraud and malpractices.

Comment – The Supreme court of India in a recent case held that in case where allegation of fraud been made against any party in such case will affect the parties rights to refer such disputes foe arbitration, provided with the existence of arbitral agreement.

Before examining the court judgment it is important to refer the relevant section 5 and section 6 for analysis given under Arbitration and Conciliation Act, 1996.

Section 5 states that "notwithstanding anything contained in any other law for the time being in force, in matters governed by [Part I of the Act], no judicial authority shall intervene except where so provided [in Part I of the Act].[26] Interestingly there is no other provision in the Part 1 of the Act, which explicitly deals with the exception of section 5. Therefore there exist no explicit exception for the intervention of the judicial authority where fraud allegation been made. On the contrary, section 27 of the act provides judicial assistance in arbitral proceedings for taking the statements

[23] Albert Jan van den Berg, "The New York Convention of 1958: An Overview" (Arbitration ICCA, 10 June, 1858) <http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf> accessed 20 April, 2016.

[24] Gunjan Chhabra, "Foreign Seated Arbitrations: Section 9 Reliefs Posr Amendment, 2015" (Indiacorplaw, 9 May, 2016) < http://indiacorplaw.blogspot.in/2016/05/foreign-seated-arbitrations-section-9.html> accessed 20 April, 2016.

[25] *Radhakrishnan v Maestro Engineers*, (2009 (13) SCALE 403).

[26] Arbitration and Conciliation Act 1996, s 5.

and evidences on an application of arbitral tribunal or any of the party.[27] The language of section 8 on the backdrop of it appears to mandate the judicial authority on the two essentials- (1) The party must applies for the reference before filling any submission on the same dispute, (2) and the application must be accompanied with the original arbitration agreement.

Analysis:-

In the handed case although the apex court not find the parties to meet the requirement as per section 8(2). However this finding did not had a bearing on the Supreme Court decision on the arbitrablity of the fraud allegation in India. Despite of the clear provision in section 5 of the act, the court diluted the provision and made required interventions. The court reasoned that the allegation of fraud can only be settled in the court by an open trial. Similar dicta been given by the English courts making judicial intervention and avoiding the jurisdiction of the arbitral tribunal in the cases where fraud been alleged.

Dawn of Pro Arbitration in Indian Judiciary

1. ***Bharat Aluminum Co. v. Kaiser Aluminum Technical Service, Inc*[28] .**

The constitutional bench in the case after laudable consideration on Indian jurisprudence its nature, objective and ambit, along with referring the international jurisprudence, with international commercial arbitration laws fortify that dictum in ***Bhatia International v. Bulk Trading of South Africa*[29],** was incorrect. It concluded that the Part I of the Arbitration and Conciliation Act, 1996 has no jurisdiction to the Arbitration seated outside India, irrespective whether the parties willing to apply the act or not. The court further held that there is no over lapping of part I and II of the act, and part II is not merely supplementary but completely segregated between both the parts, provided part I deals with four phases of arbitration-commencement, conduct, challenge, recognition and enforcement. Whereas part II pertains only to the recognition and enforcement of foreign awards. Interestingly through this dictum the apex court mark the dawn of pro arbitration era and

[27] Kriti Tannan, "Alleging Fraud Affects Ability to Enforce Arbitration Clause" (Legally India, 18 February, 2010) <http://www.legallyindia.com/20100217507/Legal-opinions/alleging-fraud-affects-ability-to-enforce-arbitration-clause> accessed 21 April, 2016.

[28] *Bharat Aluminum Co. v. Kaiser Aluminum Technical Service, Inc* (2012) 9 SCC 552.

[29] *Bhatia International v. Bulk Trading of South Africa* (2002)4 SCC 105.

enforcement of foreign arbitral awards in India. The judgment has clarified several legal anomalies which had tarnished the image of Indian arbitration laws and judicial system. It has remedied the primary concern which a foreign party faced in a dispute alleging fraud against an Indian party, ensuring minimum interference by local courts in arbitrations seated outside India the judgment by further clarifying that no annulment proceedings would lie in India against an award made outside India has got the Indian arbitration law at par whit the international jurisdiction. It has eased the difficulties the foreign investors or players have been facing in enforcing awards in India against Indian parties.

2. ***Reliance Industries Ltd. & Ors. V. Union of India***[30]

In the handed case an application has been filed section 34 of arbitration and conciliations act, 1996 to set aside a final partial award with respect to arbitrablity of claims made in respect of service tax and CAG audit under two production sharing contract between reliance industries and ONGC. It was contended that questions of payments of taxes, royalties and rentals were not arbitral under Indian laws.[31] However, the courts was quick to characterize the question of jurisdiction on as in pre Bhatia International era (as the agreement was entered into before 6th September 2012).[32] Therefore, the question of whether the claims were arbitral and under what law were they arbitral would not have to be considered unless the award was brought for enforcement.

3. **Swiss *Timing Limited v. Organizing Committee, Commonwealth Games 2010, Delhi***[33]

The apex court held in the dictum that now fraud can be arbitral under the arbitration laws. Where an arbitration agreement exit between the parties. This sets a new pro arbitration tone to the issues of arbitrablity of fraud in Indian seated Arbitration. Earlier in ***Radhakrishnan***[34] the Indian courts had adopted a very restrictive approach and refused the arbitrablity of fraud to arbitral tribunal but to hold trial in open courts. Finding of the courts in the case were as follows-

[30] *Reliance Industries Ltd. & Ors. V. union of India*, 2014 S.C.C. online SC 411.
[31] ibid at 10.
[32] ibid at 10.
[33] *Swiss Timing v. Organising Committee, Commonwealth Games* 2010, (2014) 6 SCC 677.
[34] *Radhakrishnan v Maestro Engineers*, (2009 (13) SCALE 403).

Fraud held arbitrable in the judgment the court held the allegation of fraud to be arbitrable and declined the ***Radhakrishnan*** **case,** wherein the civil courts were obliged to direct parties before it to arbitration where the arbitration clause exist between the parties.

Distinction between void and voidable contracts the court in the judgment held that the cases where defense taken by the parties that the contract is voidable, such contract cannot be declined from reference to arbitral tribunal. Such cases would include unsound mind, fraud, coercion, Misrepresentation.

Least Interference the court further observed that the courts should adopt the principle of minimum interference in the arbitral proceeding as per section 5 of the Act.[35]The court held that all issues including the main matter to void or voidable can be arbitrable.

- ***World Sports Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pvt. Ltd***[36]

In the landmark judgment the supreme court of India had removed all the bars over the arbitrablity of fraud allegation for all the foreign awards. The court had now removed all possible restrains from the arbitrablity of fraud in Indian when there is foreign award to be enforced or when the arbitration is outside India.

No application required under section 45 the court held that no formal application is required under section 45 the court is obliged to refer the same dispute to the arbitration. The only exception is where the arbitration agreement is void or unable to be performed or inoperative thus limiting the scope of judicial scrutiny at the stage of referring the suit t the foreign seated arbitration.

These were the line of precedents which were considered as the dawn of pro arbitration in Indian jurisprudence. These were the welcome decisions for the foreign parties having commercial trade or intercourse with the Indian parties. Before these decisions were made Indian parties were challenging the arbitration decision and even the arbitrablity in the issues where allegation of fraud has been made taking the support of **Rahdhakrishnan**[37] case. But the court by the above decisions opens the doors for the allegation of fraud a party or consequential rescission of the main agreement is not a bar on the arbitrablity.

[35] Arbitration and Conciliation Act 1996, s 5.

[36] *World Sports Group v. MSM Pvt. Ltd*., AIR SC 2014 968.

[37] *Radhakrishnan v Maestro Engineers*, (2009 (13) SCALE 403.

DOCTRINE OF PUBLIC POLICY-

The doctrine of Public policy is only a branch of common law and is governed by the precedents; the principles have been crystallized under different heads and though it is possible for courts to expound and apply them to different situation, it should only be invoked in clear and incontestable cases of harm to the public; though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days.[38] RUSSELL[39] states: *The New York Convention is to the same effect. Accordingly, though the 1975 Act does not so specify, it must be taken that the reference is intended to the English Public Policy which indeed is the only public policy into which the English courts can sensible enquire.* Public Policy connotes the matter which contains the Public good or the Public Interest. The concept what is good for the public good or in public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time.[40]

The Public Policy exception under Article v (2) (b) of the New York Convention is a well framed exception to the enforcement and recognition of a foreign award. To the extent it has been capable of definition, it has been found to embrace nebulous concepts such as a state's most basic notions of morality and justice. In more established arbitration friendly jurisdiction restrains has been made on the Public Policy concept while in other it has been taken as a last resort to for a dissatisfied party with a arbitral tribunal. This concern was succinctly put in the *2009 Hong Kong case A v R*[41] where the court said:

"Public policy is often invoked by a losing party in an attempt to manipulate an enforcing court into re-opening matters which have been (or ought to have been) determined in an arbitration. The public policy ground is thereby raised to frustrate or delay the winning party from enjoying the fruits of a victory. The court must be vigilant that the public policy objection is not abused in order to obtain for the losing party a second chance at arguing a case. To allow that would be to undermine the efficacy of the parties' agreement to pursue arbitration."[42]

[38] *Gherumal Parakh v. Mahadeodass Maiya* AIR 1986 Del 82.
[39] David St John Sutton, *Russell on Arbitration* (20th edn, Sweet & Maxwell 1982) 384.
[40] *Central Inland Water Transport Corp. Ltd. v. Brojo Nath Ganguly* (1986) 3 SCC 156: (1986) 2 SCR 278.
[41] HCCT 54/2008.
[42] Ibid.

- **PUBLIC POLICY IN INDIAN CONTEXT:-**

India had perceived a jurisdiction provided with a narrow interpretation of public policy when it comes to enforcement of foreign arbitral awards. The perception of the corporate users of arbitration according to the Queen Mary/PWC 2008 survey "International Arbitration: Corporate attitudes and practices". This perception got fortify by the *Supreme Court in the case of ONGC v Saw Pipes*[43] in 2003 and *Venture Global Engineering v Satyam Computer Services Ltd*[44] in 2008. The court has held that any arbitral award can be set aside if it is contrary to the following:

1. Fundamental policy of the Indian Law.
2. The interest of India.
3. Justice or Morality.
4. If it is having any patent illegality.

The word Fundamental policy of the Indian Law has richly interpreted by the court which includes**:-**

Firstly Judicial Approach- it lays an implication that the judicial authorities must not act arbitrary or in a whimsical manner while performing its function and it must not lead to any harm or injury to the rights of the citizens of India or any civil consequences

Secondly Principle of natural justice- all judicial authorities or other quasi judicial authorities must entertain the principle of natural justice wile determining the cases.

Thirdly Wednesbury principle- no decision should be preserve such that no reasonable person should arrive that.

The above mentioned principles if not been followed then it would led to violation of public policy doctrine and the same could be challenged under section 34 (2) (b) of Arbitration and Conciliation Act 1996. In Saw Pipes the Supreme Court took a broad approach to the meaning of public policy and held that a domestic arbitral award could be set aside on the grounds of public policy if it was "patently illegal"; i.e. contravened Indian legislation. In Venture Capital, the Supreme Court set aside another arbitral award on the same basis, but this time it was a foreign arbitral award. It held

[43] (2003) 5 SCC 705.
[44] (2008) 4 SCC 190].

that the provisions of the Indian Arbitration Act which allow an arbitral award to be set aside on the basis of domestic public policy applied because the relief ordered was for the sale of shares in an Indian company which could only be affected under Indian law. The concern was therefore that the Indian courts would apply a broad test of public policy to foreign arbitral awards where there was a sufficient connection with India – out of keeping with the reluctance in more developed jurisdictions to invoke the public policy exception.[45]

Case- *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[46] the apex court of India transform its approach and considerations towards the public policy. Under the dawn of ever growing judicial supports to the International Commercial Arbitration due to integration of the world economies ultimately leads to seminal shift in the judicial mindset by an established judgment of the apex court[47]. While dealing with the enforceability of certain foreign award on the grounds that these awards are opposed to the public policy of India under section 48 (b) (2) of the Arbitration and Conciliation Act, 1996.[48] The judgment unmistaken ally established difference between the scope of objection of the enforceability of a foreign award under section 48[49] of the Act and to set aside an award altogether under section 34[50] of the Act.

Analysis- The apex court gave the scope of the term *public policy* considered the following cases-

1. *Oil and Natural Gas Corporation Ltd. v. Saw pipes Ltd.* [51]
2. *Phulchand Export Limited v. o.oo. Patriot.*[52]
3. *Renusagar Power Co. Ltd. v. General Electric Company.*[53]

The supreme court had over ruled the judgment in the Phulchand case fortify that the expression Public policy and its applicability is narrower in section 48 as compare to section 34 of the Arbitration Act. Referring the *Renusagar Power Co. Ltd. v. General Electric Company*[54] the court

[45]Matthew Gearing, "The Public Policy Exception – Is the Unruly Horse Being Tamed in the Most Unlikely of Places?" (Kluwer Arbitration, 17 March, 2011) < http://kluwerarbitrationblog.com/2011/03/17/the-public-policy-exception-is-the-unruly-horse-being-tamed-in-the-most-unlikely-of-places-4/> accessed 19 April 2016.

[46] *Shri Lal Mahal Ltd. v. Progetto Grano Spa*, 2003 (2) ARBLR 5 (SC).

[47] Civil Appeal no.5085 of 2013 arising from SPL©No.13721 of 2012.

[48] Arbitration and Conciliation Act 1996, s 48.

[49] Arbitration and Conciliation Act 1996, s 48.

[50] Arbitration and Conciliation Act 1996, s 34.

[51] *Oil and Natural Gas Corporation Ltd. v. Saw pipes Ltd*, (2003) 5 SCC 705.

[52] *Phulchand Export Limited v. o.oo. Patriot*, (2011) 10 SCC 300.

[53] *Renusagar Power Co. Ltd. v. General Electric Company*, (1994) 13 SCC 644.

[54] ibid.

had made a distinction between that applying rule of public policy as in matter of domestic laws and those matters involving the conflicts of laws as in majority of international commercial Arbitration cases. The court observed that the applicability of Public Policy doctrine has a narrow or limited scope in the issue where the conflict of national and international laws exist. As a matter involve any foreign element such as foreign arbitration seat the applicability of the aforesaid doctrine will be limited and can be inclined to be invoked such doctrine.

Further in a recent decision of the Delhi High Court, *Penn Racquet Sports v Mayor International Ltd*[55] appeared to buck this trend. It was held that a more restrictive approach to be taken in application of Public Policy doctrine in case of the enforcement of foreign seated arbitral award. Where there was a sufficient connection with India – out of keeping with the reluctance in more developed jurisdictions to invoke the public policy exception.

Therefore, now the enforcement of the foreign award would not be refused so easily. Thus as an obvious implication of the above judgments in *Renusagar Power Co. Ltd. v. General Electric Company*[56] and *Penn Racquet Sports v Mayor International Ltd*[57] in disputes where the parties refer for arbitration they will prefer foreign seated arbitration then the Indian arbitral institution. Even in cases of fraud because of more flexible approach being incurred by the Indian courts for the enforcements of the foreign arbitral awards. Although the Indian domestic parties will continue to face the problems of enforcements in international arbitration in cases where allegation of fraud being made. Thus required steps are to be taken by the courts to make the enforcement of the domestic awards more convenient and easy and to make the domestic enforcement parallel to the international regime.

REPUTE OF ARBITRABLITY OF FRAUD IN INDIA

The Arbitrablity of Fraud in India particularly, has been a subject of shading discussion and usual conflict of authorities. Parties have employed fraud, collusion or malpractices as a bid to avoid the arbitration proceedings or to neutralize the arbitral award purposely. The development of the Indian Jurisprudence over the concern was not immediate but the path of precedents is difficult map with

[55] Ex. P. 386/08 & EA Nos 451/2010, 704-705/2009 & 77/2010.
[56] *Renusagar Power Co. Ltd. v. General Electric Company*, (1994) 13 SCC 644.
[57] Ex. P. 386/08 & EA Nos 451/2010, 704-705/2009 & 77/2010.

certain ambivalence over the approaches taken by the judicial authorities. However, Indian jurisprudence has taken great strides in the past year towards achieving parity with the international trends in respect of the arbitrablity of fraud. Initially the Indian Jurisprudence was not much inclined in reference of fraud to the arbitral tribunal. Provided with the integration of the world economies and in the era of investment friendly both in the national and international regime legislative liberalization been undertaken by the judicial authorities of India by the removal of certain restrains.

To trace the legislative development over the arbitrablity of fraud in India a chain of cases been presented how the Indian courts initially had a restrictive approach but with the time they adopted a liberalize approach for both national and international disputes of fraud.

1. In *Majet Subbahiah and Co. v. Tetley and Whitley*[58] the court while addressing the issues of breach of contract and damages to be referred to the arbitration of the resolution by stating several cases where such references were refused by the court. 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.."
2. The Union of India through the *Secretary Ministry of Food Government of India v. Firm Vishydha Ghee Vyopar Mandal*, *Sudhangsu Bhattacharjee v. Ruplekha Pictures*.[59] While adjudicating these cases the court held that it's been considered as general principle that the matter where allegation of fraud been made by the parties irrespective its degree or nature the matter not to be referred to the arbitration but to be adjudicated under the open court. Showing the concern over the procedural requirement and testifying the witnesses along with the examination of evidences are major factors which the court considered while entertaining such principle. In the end the court laid that in an open court the party who is charged for the fraud had an opportunity to appeal further. On the other side in an arbitral proceeding such quality adjudication process was absent and in the due course of the proceedings if there was any question of law to be addressed then the arbitral tribunal can only suggest or discuss but not empower to gave a decision over the concern. In 1934, the Madras High

[58] *Majet Subbahiah & Co. v. Tetley & Whitley*, A.I.R. 1923 Mad 693; 1923 Indlaw MAD 218 (India).

[59] 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 1950 Indlaw ALL 142 (India); *Sudhangsu Bhattacharjee v. Ruplekha Pictures*, A.I.R. 1954 Cal 28 (India).

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.[60]In certain cases the court failed to uphold the same views but simply that if the allegation of fraud been made then the jurisdiction of the arbitrator was lost and the dispute can only be addressed by the open courts.[61]

- **Discretion of the court in deciding the Arbitrablity of fraud-**

The principle of the discretionary powers of the courts in determining the arbitrablity of the Fraud was established in *Printers (Mys) Pvt. Ltd. v. P. Joseph* 1960 Indlaw SC 40082[62] and *Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak and another* 1961 Indlaw SC 338.[63]In the first case *Printers (Mys) Pvt. Ltd. v. P. Joseph* dealt with a termination dispute between Deccan Herald and one of his editors Joseph, who claimed profit under the employment contract and working journalist Act. While the appellant sought a stay of suit in favor of arbitration proceedings, P. Joseph, sought to oppose the same on grounds that his character had been impeached. The court here used its discretionary power under section 34 of the Arbitration Act of 1940[64] *"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''*. The court observed that the party charged with the Fraud charges must be given the opportunity to vindicate the fraud charges on him through an open trial by formal procedure where the party had a right to appeal in case required, provided that the fraud charges have implication on the public image of the person.

[60]*Laldas Lakshmi Das & Anr. v. J.D. Italia,* A.I.R. 1938 Mad 918 1938 Indlaw MAD 386 (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 1942 Indlaw CAL 127 at ¶6 (India).

[61] *Pramada Prasad Mukherjee v. Sagarmal Agarwalla,* A.I.R. 1952 Pat 352 1952 Indlaw PAT 593 (India); *Narsingh Prasad Boobna v. Dhanrai Mills*, I.L.R. 21 Pat 544 India.

[62] *Printers (Mys) Private Ltd. v. P. Joseph*, [1960] 3 S.C.R. 713 1960 Indlaw SC 400 (India).

[63] *Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak and another*, [1962] 3 S.C.R. 702 1961 Indlaw SC 338 (India) [hereinafter Madhav Prabhakar]

[64] Arbitration Act 1940, s 34.

The upholding of the court in *Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak and another* serves as a more exacting precedent. There was an agreement between the Appellant and respondent. The respondent applied for a stay in the arbitral proceedings by invoking the arbitral agreement. 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. Modeled 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. The court held that the grant of stay comes under the discretionary powers which it exercises by examining the facts of each case and the questions of law. 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".[65] 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."[66] This observation of the court was taken as important references by the lower courts and been responsible interpreted.

- **Short comings:-**

Short comings of the above cited observation of the court came up in *Raymond Engineering v. Union of India*[67] the court noticed that Indian Arbitration Act 1940, did not house any such provision corresponding to section 24 clause (2), (3), so as to grant such discretion to the court to refuse the enforcement of any arbitration agreement when fraud is alleged. In the light of the same the court held that the party charging the fraud only upholds the stay over the arbitral proceedings and desired trial, that would not amount to a reasonable cause to restrain the arbitral proceedings in

[65] *Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak and another*, [1962] 3 S.C.R. 702 1961 Indlaw SC 338 (India) at ¶ 10.

[66] *Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak and another*, [1962] 3 S.C.R. 702 1961 Indlaw SC 338 (India) at ¶ 14 also referring to the case of *Minifie v. The Railway Passengers Assurance Company*, (1881) 44 L. T. 552 (U.K.).

[67] *Raymond Engineering v. Union of India*, A.I.R. 1972 cal 281 (India).

the given case.[68]However this case omitted to notice the section 20 (4) of the Indian Arbitration Act, 1940, which defines the sufficient cause to refuse an arbitral proceedings which itself amounted to the discretion of the court.

- **Analysis**:-

The stands of the Indian Judicial Authorities on the concern matter of the arbitrablity of fraud are somewhere constraining and repressive initially. We had seen the precedents where the courts intensely held that fraud allegation of all types or nature can only come under the court's jurisdiction. Later with the time courts had remove such bar on reference and hold that only allegation which are of serious in nature and comprises questions of law would only be dealt by the courts. The courts would perform this exclusive function by using its discretionary powers to decide the arbitrablity of the dispute.

The courts must approach the matter in unison way where the legislative provision to be framed by the apex to dealt with the issues. This would not only provide a better approach towards the issue but also enables an authority in the form of parent law provision.

VALIDITY OF AGREEMENT ASSAILED FROM FRAUD- INDIAN CONTEXT

The question who decides the validity of an arbitral agreement can be classified as an issue under the arbitrablity of a dispute. The courts are the appropriate authority who can resolve the disputes regarding the validity of Arbitral agreement. The concern has evolved and become legally liberalized with the passage of time. To project the shadings of liberalization a chain of precedents has been projected by the author to trace the concern and its evolution.

- **Doctrine of Separability:-**

the doctrine of separability is universally accepted principle in international arbitration, and it is recognized by most of the jurisdiction of the world.[69] Article 16 of the Model Law states that an

[68] ibid at 19.

[69] Tweeddale, Andrew and Tweeddale Keren, Arbitration *of Commercial Disputes: International and*

arbitral award is an independent contract, which is separate from the rest of the contract. The doctrine of separability been taken from the principle of Kompentenz – Kompentenz. It's been described that the arbitrator decision that the contract between the parties is null and void, will not affect the validity of the arbitral agreement.

- **<u>Relative chain of precedents which will establish and describe the concern</u>**

1. **In *Ruby General Insurance v. Pearey lal Kumar*[70]**
   the apex court held that the disputes where the contract which contains the arbitral agreement is in question among the parties to be entered or not. Such can never be referred to the arbitral tribunal for the resolution. By this precedent the court initially put a bar on the arbitrablity of dispute, provided with the arbitration agreement. An obvious been raised on the validity of contract along with the arbitral agreement. Later with the era of pro arbitration era this move got changed.

2. Similar approach has been held by the court in ***Union of India v. Kishori Lal Gupta***[71] 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 non established or void ab initio but exists for all other purposes.

3. Invalidity of contract was more specifically on grounds of fraud was held in ***Bilasrai and Co. v. Tolaram Nathmall***[72] although the court held that the dispute must be arbitrable and the proceeding must not be stayed but when the contract assailed from fraud in such cases dispute cannot be arbitrable, followed by reasoned that the existence of the contract is in question thus involve the questions of facts and laws to be resolved. Thus court is the most appropriate forum for such

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English Law and Practice (Oxford, New York: Oxford University Press, 2007) ¶ 4.55.

[70] *Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar*, [1952] 1 S.C.R. 501 1952 Indlaw SC 81 (India).

[71] *Union of India v. Kishorilal Gupta*, A.I.R. 1959 S.C. 1362 1959 Indlaw SC 185 (India); See also *Shiva Jute Baling Ltd. v. Hindley & Company Ltd.*, A.I.R. 1959 S.C. 1357 1959 Indlaw SC 105, ¶10 (India); *Hussain Kasam Dada v. Vijayanagaram Commercial Association*, (1960) 1 S.C.R. 569 1953 Indlaw MAD 126 (India).

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

resolution. Therefore, India too feel prey to the 'false logic' that once plagued English Jurisprudence.

4. The decision of the constitutional bench in Patel Engineering is also a cause of concern. While dealing with the scope of power of chief justice in appointment of the arbitrator under section 11 of the Act. The court under section 8 also observed that it is difficult to contemplate that the judicial authority has also to acct mechanically or merely to see the original arbitration agreement present before it, and mechanically refer the parties to the arbitration.[73]The Supreme Court in ***Arasmeta Captive Power Co. Pvt. v. Lafarge India P. Ltd***[74] also holds the reasoning of **Patel Engineering**[75] and holds that the court can go into the question of arbitrablity of a contract under section 11 of the Act. However it was also held that the question of validity of the contract would always not come under the ambit of within the ambit of arbitrablity.

5. The Supreme Court in ***India Household and health care Ltd. v. L.G household and health care Ltd***[76] observed in context of application under section 45 specifically removed the question of fraud so as to held that the arbitration agreement cannot be saved by the doctrine of separability as fraud will vitiates the agreement. **In *Sundaram Brake Linings v. Kotak Mahindra Ltd***[77] the court under took review of all the decision regarding arbitrablity of both general allegation of fraud as well as validity of an agreement on the grounds of fraud and held that the language of section 45 of the Act dictates the power of the judicial authority.

The above cited precedents fortify that the approach of Indian judiciary was initially not to refer any such contract where its existence is in question to the arbitration. The question that who will decides such validity of the agreement where fraud allegation been made will be the trial courts. As an arbitral tribunal deciding such question will be like adjudicating its own jurisdictional questions.

[73] *S.B.P. & Co. v. Patel Engineering,* A.I.R. 2006 S.C. 450 2005 Indlaw SC 696 at ¶18 (India).
[74] *Arasmeta Captive Power Co. Pvt. v. Lafarge India P. Ltd.*, A.I.R. 2014 S.C. 525 2013 Indlaw SC 824, ¶40-42 (India).
[75] *S.B.P. & Co. v. Patel Engineering,* A.I.R. 2006 S.C. 450 2005 Indlaw SC 696 at ¶18 (India).
[76] *India Household Ltd. v. L.G Household Ltd.,* 2007 IndLaw SC 327.
[77] *Sundaram Brake Linings v. Kotak Mahindra Ltd.,* (2010) 4 Comp. L.J. 345 (Mad) at ¶26 (India).

Now further reference would be made of those precedents of pro arbitration era which changes the approach of the court.

Contention of substantive contract being void or voidable is not a bar to the arbitration and the court must follow the policy of least interference. This was the dictum of the apex court of India in ***Swiss Timing Ltd. v. Organizing Committee, Common wealth Games 2010***[78] the Supreme Court highlighted that the court should adopt the policy of least interference under section 5[79] and section 16[80] of the Act. Further observed that all he matters including the issues related to the contentions on the validity of the contract can be referred to the arbitration. Drawing a difference between void and voidable contracts. The Supreme Court held that the cases where the defense is taken the contract is voidable; it would not be possible to decline the reference to arbitration.

6. ***World Sports Group (Mauritius) v. MSM Satellite (Singapore) Pvt. Ltd***[81] this precedent has been discussed significantly as it marks the beginning of pro arbitration era in Indian judicial system. The supreme court of India held that allegation of fraud is not a bar to refer parties to foreign seated arbitration. In arbitration agreement exists and a party seeks reference to a foreign seated arbitration, court is obliged to refer the parties to arbitration.

As per 246th Law Commission Report[82] brings the closure to the entire preposition regarding who will decide the validity of the arbitral agreement where the allegation of fraud and corruption been made. It further held that the complicated question of facts and Laws can be expressly arbitrable. This will ensure that- (a) that there are no fraud allegation are raised o bypass the arbitral agreement, (b) the parties can alleged fraud without any fear of that such allegation would evade arbitration.

Thus gradually from an orthodox approach the Indian judiciary undergone transformation and now in the contemporary times it holds a liberalized approach where judgment been given by the court any contract where allegation of made and the contentions are on the validity of the contract. In such cases also the civil courts are obligated to refer the same to the arbitration. The Law

[78] *Swiss Timing Ltd. v. Organizing Committee, Common Wealth Games* 2010, Arbitration petition no. 34, 2013.
[79] Arbitration and Conciliation Act 1996, s 5.
[80] Arbitration and Conciliation Act 1996, s 16.
[81] (2010) 1 SCC 72.
[82] Law Commission, *Amendment to Arbitration and Conciliation Act, 1996* (Law Com No 246, 2014).

commission of India has also made favorable recommendations to fortify the arbitral jurisdiction on determining the validity of contract and arbitral agreement.

CONCLUSION

As per the above deliberation, it is clear that the judicial approach of Indian courts is not yet clear on the arbitrablity of fraud. Although Judiciary has a liberalized approach for the International arbitration and foreign awards. But in the domestic context still the judicial outlook stemmed from a strong prejudice and distrust over the ability of arbitral tribunal as a mode of dispute resolution. Section 5 Indian Arbitration Act, 1996 of the act provide for extent of judicial intervention and such intervention required for provisions provided in Part I. No explicit mention been made for the arbitrablity of an agreement in case of allegation of fraud or corruption or bribery. Under section 48(2) of the same Act although ambit of public policy been housed in the act, provided with the fact that the public policy is always subjected to the discretion of the courts. So ultimately the discretionary powers of courts led to overpower the section 5 as provision of the Act.

Although the advent of pro arbitration era happened with the dictum like **Swiss Timing or The World Sports Group** where the court give authority to the arbitral tribunal for deciding the allegation of fraud and even the validity of an arbitral contract. But this fortification limited to the International arbitration or foreign awards only. For the domestic awards the contentions are still undefined and ambivalence exists in judicial approach. A sense of prejudice or distrust on the ability of arbitral tribunal been depicted by the dictum of the courts. Thus fortified steps are required to be taken in the concern area by adopting a uniform and liberalized approach towards the disputes alleging frauds. This will help in upbringing the Indian Arbitration Tribunal at par with the International line.