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(h) nevertheless, the court should intervene if the award is manifestly unlawful and unconscionable;
(i) the arbitral tribunal remains the sole determiners of questions of fact and evidence; and
(j) while the finding of facts and the application of legal principles by the arbitral tribunal may be wrong, the court should not interfere unless the decision is perverse.

Issues of recognising a question of law

The Court of Appeal also observed that determining what constitutes a 'question of law' is a difficult process, and cited with approval the acute observations of Mustil J in *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis,* where the court observed that the answer of what constitutes a 'question of law' is to be found by dividing the arbitrator's process into three stages:

The tribunal ascertains the facts. This process includes the making of findings on any facts which are in dispute.

1) The tribunal ascertains the law. This process comprises not only the identification of all material statutes and common law rules, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts that must be taken into account when the decision is reached.
2) In light of the facts and the law so ascertained, the tribunal reaches its decision.
3) The court agreed with the approach above and held that the second stage of the process of reasoning is the proper focus of the inquiry under section 42 of the Act.

Finally, applications made under section 42 of the Act are only allowed in respect of questions of law falling within the second stage and not for attempting to second guess the tribunal's findings of fact.

Conclusion

In conclusion, parties in domestic and international arbitration where the seat of arbitration is Malaysia have at least two avenues for challenging an arbitral award, that is, under both sections 37 and 42 of the Act. This is significant as there is no equivalent provision of section 42 of the Act in the UNCITRAL Model Law. Nonetheless, it is only applicable in the very limited circumstances as explained in the case of *Kerajaan v Perwira.*

Notes
1 [2015] 1 CLJ 617.
2 [2015] 8 CLJ 58.

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Arbitration in India: dealing with fraud claims

The law in India regarding the arbitrability of fraud claims remains contentious, but has recently become more predictable following a series of important developments. The Indian statute governing domestic and international arbitration is the Arbitration and Conciliation Act, 1996 ('the Arbitration Act'). The Arbitration Act does not expressly bar the jurisdiction of an arbitral tribunal in disputes involving allegations of fraud.

Non-arbitrability of fraud claims under Indian law

The issue of arbitrability of fraud claims under the Arbitration Act came before the Supreme Court of India in 2010 in the case of *N Radhakrishnan v Maestro Engineers & Ors* ('*N Radhakrishnan*').[1] In this case, disputes arose between the appellant and the respondent, who were partners in a firm known as Maestro Engineers. The appellant had retired from the firm. Subsequently, the appellant alleged that he continued to be a partner. The respondent filed a civil suit

seeking a declaration that the appellant was not a partner of the firm. In that suit, the appellant filed an application under section 8 of the Arbitration Act seeking reference of the dispute to domestic arbitration. The plea was rejected by the trial court and the High Court on the basis that the application involved a fraud claim. The Supreme Court found that cases involving 'fraud claims' related to the contract were not arbitrable and refused to refer the case to arbitration. It opined that a court of law was more competent than an arbitral tribunal to decide fraud claims. This exclusion of the jurisdiction of an arbitral tribunal in deciding allegations of fraud departs from jurisprudence in multiple other jurisdictions, including the United Kingdom, Singapore and France, where fraud claims related to the contract are arbitrable.

The decision in *N Radhakrishnan* arguably violates the 'separability principle', by which the agreement to arbitrate continues to remain valid even if the main agreement is held to be invalid. Furthermore, the related concept of competence–competence gives the arbitral tribunal jurisdiction to rule on its own jurisdiction. Thus, in many jurisdictions, allegations of fraud may vitiate the main agreement but should not bar the arbitrability of the dispute.

The evolving position in India

The difficulty caused by the findings in *N Radhakrishnan* has led to various attempts by different High Courts in India to develop legal reasoning to permit arbitrations to proceed where there has been an allegation of fraud in respect of the contract containing the arbitration agreement. In particular, certain High Courts have distinguished between a so-called 'serious issue of fraud' and a 'mere allegation of fraud', with the latter being held as arbitrable. In one such instance, the Karnataka High Court in *CS Ravishankar v CK Ravishankar*[2] found that allegations that the accounts were not up to date, that various statements were incomplete and that there was an incomplete inventory of goods created were 'mere allegations of fraud', and were, therefore, arbitrable.

However, such vague distinctions lead to further uncertainty. In 2014, the Supreme Court had another opportunity to consider the issue of arbitrability of fraud claims in *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte Ltd* ('*World Sport Group*')[3]. In this case, the appellant and the respondent had entered into a facilitation deed that contained an arbitration clause. The appellant initiated arbitral proceedings in Singapore under the International Chamber of Commerce (ICC) Rules in respect of the various disputes between the parties, including allegations by the respondent of fraud and misrepresentation. The respondent approached the Bombay High Court for an injunction against this arbitration on the basis that, among other things, the arbitration contained allegations of fraud. The appellant challenged the injunction order before the Supreme Court. The Supreme Court held that reference to arbitration was mandatory under section 45 of the Arbitration Act, which deals with foreign-seated arbitrations, and that allegations of fraud are arbitrable. This decision assisted in alleviating the difficulty caused by the decision in *N Radhakrishnan*. However, it also created a dichotomy between the treatment of allegations of fraud in domestic and foreign-seated arbitrations.

This dichotomy was addressed by the Supreme Court later in 2014 in *Swiss Timing Ltd v Organising Committee, Commonwealth Games 2010, Delhi* ('*Swiss Timing*').[4] In this case, the petitioners approached the Supreme Court under section 11 of the Arbitration Act for the appointment of the nominee arbitrator and the constitution of the arbitral tribunal, as the respondent had failed to appoint an arbitrator in time. The respondent alleged that the petitioner had indulged in corrupt practices and had committed fraud. The respondent, referring to the decision in *N Radhakrishnan*, submitted that fraud is not arbitrable and that no reference to arbitration can be made in the matter. Because the case involved a domestic-seated arbitration, the Supreme Court was able to reconsider its reasoning in *N Radhakrishnan*. The Supreme Court decided to extend the decision in *World Sport Group*, which permits the arbitrability of cases involving allegations of fraud, to domestic arbitrations as well. It held that the decision in *N Radhakrishnan* was *per incuriam* as it had not considered earlier decisions of the Supreme Court, which have clearly held that civil courts are obligated to refer parties to arbitration as per the arbitration agreement. It also found that section 16 of the Arbitration Act, which requires that parties be referred to arbitration in accordance with their arbitration agreement, is peremptory. Thus, after the decision in *Swiss Timing*, fraud claims seemingly became arbitrable in India,

bringing Indian arbitration law in line with international jurisprudence.

Unfortunately, the celebrated decision in *Swiss Timing* has been called into question by a later decision by the Supreme Court in *State of West Bengal v Associated Contractors* ('*Associated Contractors*')[5]. In this case, the Supreme Court held that decisions of courts under section 11 of the Arbitration Act, which deals with the appointment of arbitrators by the court, do not have precedential value. Specifically, the Supreme Court stated that any such appointment would be a decision of the Chief Justice or his designate, and not that of the Supreme Court or the High Court, which means that it would therefore not be a court of record. Though the decision in *Associated Contractors* did not expressly overrule *Swiss Timing*, it has rendered the applicability of the decision in *Swiss Timing* uncertain, leaving the arbitrability of fraud claims in domestic arbitration under a cloud.

Impact of the Arbitration and Conciliation (Amendment) Ordinance 2015

After the aforementioned conflicting decisions of the Supreme Court, the Indian legislature amended the Arbitration Act through the Arbitration and Conciliation (Amendment) Ordinance (the 'Arbitration Ordinance').[6] Though the Arbitration Ordinance was largely based on the 246th Report[7] of the Law Commission of India ('the Law Commission'), it failed to resolve the issue of arbitrability of fraud claims. Specifically, the Arbitration Ordinance did not include the recommendation of the Law Commission to explicitly recognise the arbitrability of fraud claims in arbitration by amending section 16 of the Arbitration Act to permit an arbitral tribunal to 'make an award or give a ruling notwithstanding that the dispute before it involves a serious question of law, complicated questions of fact or allegations of fraud, corruption etc'.

In fact, the Arbitration Ordinance may have added to the confusion, albeit in favour of the arbitrability of fraud claims, by amending section 8 of the Arbitration Act. The amended section 8 requires courts to refer parties to arbitration if a valid arbitration clause exists, irrespective of any decision by the Supreme Court or any other court. Though the amended section 8 appears to uphold the arbitrability of fraud, it will be subject to judicial interpretation, making the arbitrability of fraud claims in domestic arbitrations an ongoing uncertainty.

Conclusion

It is important that the law in India on the arbitrability of fraud claims be clarified, as alleging fraud is a well-worn route to escaping or stalling arbitral proceedings in India. Though the trend in India has been to recognise the arbitral process as an effective medium and to discourage interference by courts, the seemingly conflicting decisions of the Supreme Court have left the arbitrability of fraud in India uncertain. The recent Arbitration Ordinance demonstrates a conscious effort to encourage arbitration, but there remains a lacuna in the law due to the lack of an explicit statutory provision recognising the jurisdiction of an arbitral tribunal to deal with fraud. The Indian Government should strongly consider incorporating the recommendation of the Law Commission to amend section 16 of the Arbitration Act, and finally resolve this pressing issue.

Notes

1 (2010) 1 SCC 72.
2 2011 (6) Kar LJ 41.
3 (2014) 11 SCC 639.
4 (2014) 6 SCC 677.
5 (2015) 1 SCC 32.
6 Promulgated on 23 October 2015.
7 Dated 5 August 2015 and available at http://lawcommissionofindia.nic.in/reports/Report246.pdf.