DISPUTE RESOLUTIONS

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Message to the Readers

Arbitrator Intelligence

In the arbitration regime, 'AI' today does not stand for Artificial Intelligence. It stands for Arbitrator Intelligence. It is the new kid on the block. So, what is Arbitrator Intelligence?

Arbitrator Intelligence is a non-profit, academically affiliated entity that seeks to increase transparency, accountability, and diversity in arbitrator selection by making key information about arbitrators' past decision making more generally available through publication of AI Reports. The publication of such reports is made possible by collection of AIQ data which needs to be gathered from parties to arbitration/arbitrators.

The AIQ is an online survey administered on a secure website. Currently this system has been started in the U.S and is maintained by Penn State University. At the end of each arbitration, the AIQ enables systematic collection of feedback about the arbitration - regarding information about arbitrators' case management and decision making. Earlier such information was scarce and difficult to come by.

The AIQ is itself divided into two phases. Each Phase takes hardly ten minutes to fill in. Phase I concentrates on objective background information about the case, and can be completed by anyone who has access to the award or case file. On completion of Phase I, the responder will be asked to nominate one or more persons to take Phase II of the AIQ.

Phase II contains questions that are evaluative and, in some questions, request professional assessments. Phase II has to be taken by an attorney or party who actively participated in the case. Certain background information filled under Phase I is used to prefill some answers in in Phase II, making it even easier to complete Phase II.

Since arbitrations are all about confidentiality, the question that naturally arises is how this process protects party confidentiality. To protects parties' confidentiality, the AIQ does not ask for information that would readily identify the case or the parties. Instead of these details, the AIQ asks for key data that will facilitate assessment and analysis of arbitrator decision making and case outcomes in the absence of identifying information.

Once sufficient data is collected from responses to the AIQ, such data will be made available (usually for a fee) to parties, counsel, institutions, and arbitrators through "AI Reports." AI Reports will be published by Wolters Kluwer. The specific features and content of AI Reports are still being developed.

Most obviously, AI Reports will be useful to parties and counsel in selecting party-appointed arbitrators. AI Reports will also be useful, however, in quickly assessing the opposing party's nominated arbitrator, as well as any proposed or appointed chairpersons. Other data collected through the AIQ will provide useful information for case strategy planning and potential future reforms in international arbitration more generally.

Arbitrator Intelligence enjoys broad interest and support from around the world by arbitration practitioners who share AI's belief that more information about arbitrators will improve international arbitration for all.

To date, some very leading arbitrators worldwide like Gary Born and firms like Wilmer, Cutler, Pickering, Hale & Door have committed to provide such retrospective AIQ responses. Several other firms are currently in discussions with AI to follow suit.

While this is a very welcome initiative India must evolve its own system to likewise generate information about domestic arbitration which can be very useful in the domestic arbitration regime.

N.L. Rajah
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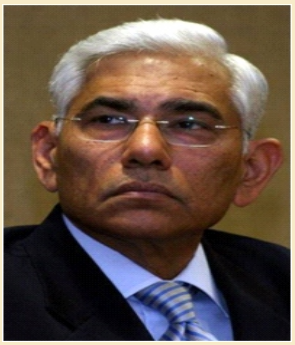
Director, NPAC

BRIEF NOTE ON 37TH NANI PALKHIVALA MEMORIAL LECTURE



"Institutions script the destiny of nations", said Mr. Vinod Rai, former Comptroller and Auditor General of India delivering the 37th Nani Palkhivala Memorial Lecture on 22nd August, 2020.

Introducing the importance of nation building in the context of public and constitutionally mandated institutions that facilitate governance, he observed that in a parliamentary democracy, the courts protect the rights of citizens within the institutional framework.

Tracing the journey of democratic India, he spoke of the significance of adopting an electoral model based on universal adult franchise and drew global parallels. He also referred to examples in Europe and their encounters with people's movements. Crossing over to contemporary issues, he spoke of the issues confronting India's parliamentary institutions. He highlighted that the various instances of session time being lost on account of disruptions showed the challenges that stand in the way of India becoming a more substantially robust democracy.

He drew attention to the emerging reality of criminalisation of politics, with over 43% of elected representatives in the 2019 National elections having a background of criminal cases against them. Whilst referring to the mechanism of constitutional checks and safeguards, he spoke of the importance attached to the procedures of question hour, zero hour and the method of transacting parliamentary business. Engaging critically on the question of parliamentary committees, he pointed out that political divisions had crept into these committees of public importance and a highly politicised atmosphere had come to dominate the discourse of parliamentary procedure.

Quoting the late Somnath Chaterjee, former Speaker, Lok Sabha who had commented - '*How long can a great institution remain great in the hands of small men?'* he said that there was considerable damage to the image of parliament in the national imagination which required immediate correction.

In the context of the judiciary, he dealt with the constitutionally enshrined values of judicial independence and accountability. Referring to the on-going debate on judicial appointments, he said that judicial misconduct was a grave concern and that institutional integrity must not be compromised. Generally remarking on the trend of mounting criticism against the judiciary, he said that since the Supreme Court is the guardian of liberties and constitutional rights, it was an operational imperative to protect the inviolability of constitutional values in guiding the vision for an effective institutional reform. Hailing the efforts of the late Nani Palkhivala, he referred to the constitutional voyage in ***Kesavananda Bharati*** judgment and the episode relating to the ***ADM Jabalpur*** case.

Moving to the next dimension of institutional reform, he spoke of the relations between the Reserve Bank of India and the Central Government. Drawing from anecdotal vignettes, he traced the relationships between various Finance Ministers and the Governors of the Reserve Bank and their respective fallouts on policy considerations. He then spoke of the saga of demonetisation and how the momentous policy decision had a ripple effect on institutional relations too. He also referred to the remarkable story of how the official convoy carrying the gold during the 1991 Balance of Payment crisis had to stop due to a punctured tyre and the reactions of Dr C Rangarajan, former Governor of the Reserve Bank of India to that incident!

Charting the way ahead, he said that the secret of success in preserving and renewing the institutional efficacy was to transform the ideology and regulatory culture. He observed that it was not the institutional structure that determines efficacy but the capability, statecraft, dexterity and resilience of the persons occupying important positions in these institutions. On the public concern of preserving the guarded edifice of institutional integrity and accountability, he remarked that good governance was not the sole concern of the government and that civil society had a contributory function in fulfilment of this constitutional mandate.

FRAUD AND ARBITRATION AN ATTEMPT TO DECONSTRUCT THE RUSSEL PRINCIPLES

By Nandini Khaitan[1]

A few years back, in October 2016, former Justice A.K.Sikri of the Supreme Court of India, in a legal symposium, spoke about a judgment he had recently co-authored with Justice D.Y. Chandrachud-***Ayyasamy vs. A. Paramasivam*** (***"Ayyasamy"***)[2], on the arbitrability of fraud. This piece of information seemed serendipitous as I was engaged in an arbitration case where this point of law had been raised. As the symposium drew to a close, I messaged the Senior Advocate leading us in the matter and scheduled a conference.

That conference with the doyen of the Calcutta Bar, Senior Advocate Mr. S. K. Kapur will remain etched in my memory. In the case, our client was the claimant and allegations of fraud were levelled against them. The respondent claimed that the matter could not be arbitrated on the ground of fraud. Mr. Kapur read the *Ayyasamy* judgment and was delighted as ***N. Radha Krishnan vs. Maestro Engineers*** ***("Maestro")***[3] which had stood in the way, had been cleared though not explicitly overruled by it. However, he also said the issue of fraud is fraught with misunderstandings. According to him, *Ayyasamy* was not strictly necessary in the facts of the case. In his opinion, *Maestro* was distinguishable as it was our client against whom allegations of simple fraud had been levelled. Turning to the library behind him, Mr. Kapur pulled out a book on the English law of arbitration which he had marked for discussion. Mr. Kapur believed that to appreciate any legal issue, it is wise to turn to the origin of its jurisprudence in our context, this was the seminal case of ***Russel vs. Russel***[4] from 1880 (***"Russel"***, also cited in ***Ayyasamy***). Since then, of course, there have been multiple judgments on the issue in India, most recently ***Avitel Post Studioz Limited vs. HSBC PI Holdings***[5] (***"Avitel"***). This essay attempts to explore the issue of fraud through the lens of *Russel* and its application and evolution in the Indian jurisprudence.

In *Russel*, partner W.A. Russell gave notice to the other partners - Henry Russell and Robert Crawford - for the partnership to determine. This was permitted according to the Partnership Deed. As a counter blast, Henry Russell commenced an action against W.A. Russell alleging fraud, claiming the notice was void and sought an injunction against acting on such notice. W.A. Russell then invoked the arbitration clause of the Partnership Deed and filed a motion in Court for the reference of all disputes to arbitration. Henry Russell objected to arbitration on the ground of fraud by W.A. Russell and requested for the continuance of his Court proceedings. Both the issues were heard together by the Court. While refusing to grant an injunction, the Court held

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[1] I am most grateful to Vidush Sinha, a student of Jindal Global Law School, for his excellent assistance in research and preparation of this essay.Iam also grateful to Aakash Bajaj and Pratik Shanu for their timely review.

[2] [2016] 10 SCC 386.

[3] [2010] 1 SCC 72.

[4] *Russel v Russel*[1880] LR 14 Ch D 471 [474]

[5] [2020] SCC OnLine SC 656. In this case, the main issue that The Supreme Court was called upon to address was, whether for the purpose of granting relief under s.9 of The Arbitration Act, 1996 to the Respondent, had the Respondent made out a strong prima facie case in the pending enforcement proceedings under s.48 of the Act in The Bombay High Court. It was the Appellant's case, that as there were allegations of serious fraud, the matter was not arbitrable and the Award ought not to be enforced under Indian law. The Supreme Court held that on a prima facie basis and on balance of convenience the Respondent had made out a case for interlocutory relief under s. 9 of The Arbitration & Conciliation Act, 1996.

> *"It must be an injury, as a rule, to the person charged with fraud to have it published, and I must say that I am by no means satisfied that the mere desire of the person charging the fraud is sufficient reason for the Court refusing to send the case to arbitration....*
> *...that rule ought only to be applied, as a matter of course, without investigating the circumstances, in cases where the person charged with the fraud desires the enquiry to be public.....*
> *....The next question is... what foundation there is for the charges...There must be sufficient prima facie evidence of fraud, not conclusive or final evidence, because it is not the trial of the action, but sufficient prima facie evidence."*

Thus, there were two principles that broadly emerged. First, on an allegation of fraud, arbitration could be resisted if the person charged with the fraud wanted a public enquiry. Secondly, there should be a *prima facie* case of fraud irrespective of who was resisting it, for the Court to consider refusing a reference to arbitration. For the sake of convenience, I will call these 'Principle 1' and 'Principle 2', respectively. Though it really is circular for reasons explained below.

Principle 1 does not seem to have gotten its due place in the trajectory of arbitrability of fraud in India as compared to the other principles. The Chancery Division's reasoning for Principle 1 was that anyone who faced an injury to his reputation had the right to get it cleared in public in open Court and by a Jury. Jury trials represented trial by a society of peers where a *not guilty* verdict would exonerate the shame in a public fashion. Though Section 11 of the Common Law Procedure Act 1854 of England[6] provided a wide discretion to the Court to enter or refuse reference to arbitration, the same was understood to be exercised in exceptional cases once the parties had agreed to arbitrate.[7] Jury trials were abolished in India in 1973 with the passing of the Code of Criminal Procedure 1973[8] and now it is the Judge who rules on the evidence. Though still in public domain, the element of peers ruling on a person's innocence is no longer available. Even so, Principle 1 has been recognized by the Indian Courts even after abolishment of Jury Trials.

While applying Principle 1, Indian Courts have not been consistent. Two early High Court judgments which dealt with Principle 1 divergently are ***Maharajah Sir Manindra Chandra Nandy vs. H.V. Low and Co. Ltd.***[9] and ***Narsingh Prasad Boobna vs. Dhanraj Mill***.[10] While the Calcutta High Court observed (and misapplied Principle 1) "*provided a prima facie case of fraud is made out, the action will be allowed to proceed, although it is the party alleging the fraud who desires the public enquiry*", the Patna High Court observed - "*if the party resisting an application to stay a civil suit is the party making a charge of fraud, different considerations arise as the person charged does not desire trial by a Civil Court".* One of the earlier Supreme Court decisions dealing with this principle of law was the case of ***Abdul Kadir vs. Madhav Prabhakar ("Abdul Kadir")***.[11]

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[6]S. 11, Common Law Procedure Act (UK), 1854. The amendments that took place in the law with the passing of the English Arbitration Act, 1934 and thereafter in 1950 and 1979, continued to give Courts discretion and allowed them to grant stay. The real change in England came with the Arbitration Act, 1996. Under the previous statute (Arbitration Act 1950), the courts could prevent tribunals from dealing with claims of fraud. This provision was repealed by s. 107(2) of the Arbitration Act 1996.

[7]Russel v Russel [1880] LR 14 Ch D 471 [474].

[8]Code of Criminal Procedure 1973.

[9]AIR 1924 Cal 796.

[10]AIR 1943 Pat 53. Though the principle was correctly applied, the civil suit was allowed to proceed as the Court held there was a prima facie case of fraud.

[11][1962] AIR SC 406.

Here the reference was under Section 20 of the Arbitration Act, 1940[12]- a provision which gave expansive discretionary powers to the Court for the purpose of deciding whether a matter should be referred to arbitration. The Supreme Court recognized the application of Principle 1 to the facts of the case correctly but as the allegations of fraud were held not serious and like in *Russel,* only based on suspicion, the matter was referred to arbitration. Thus, it is important to note that Principle 1 does not have an independent standing and is subservient to Principle 2. The test of Principle 2 (discussed below) also has to be met for Principle 1 to succeed. This gives rise to a peculiar situation. If there is a serious allegation of fraud,[13] the reference to arbitration may fail (irrespective of who is resisting the reference) as the Court is likely to hold that it cannot be arbitrated. If a sufficient prima facie case of fraud is not made out by the accuser, then, even if the accused wishes to resist arbitration, the Court may hold that it is not a serious or sufficient charge and refer it to arbitration. It is for this reason, that it may be interesting to observe how Principle 1 has played out in the Indian Courts.

Of the twenty-nine cases[14] that were looked at where Principle 1and/or the *Russel* judgment were discussed, in sixteen cases, it was the '*accuser'* of fraud who attempted to resist arbitration. Of those sixteen cases, eight times the Court refused to refer to arbitration holding that there was a prima facie case of fraud and/or serious fraud. Of the thirteen times the '*accused*' resisted arbitration, six times the Court refused to refer the matter to arbitration on the ground that the fact-situation prima facie pointed at serious fraud or that a civil court would be able to appreciate complex and voluminous evidence better than an arbitrator. It appears from these cases that the issue of fraud vexes the person charging the fraud quite often. Perhaps the reason is that they would like the accused to be held accountable in public and hence prefer a court trial. It may also be that if the accuser feels heavy evidence needs to be adduced in support of its claim, then a Court is a better forum. Conversely, it may well be that the person accused of fraud prefers the privacy of an arbitration to avoid public cynosure, especially if they have a weak case. Principle 1 in the long run upto *Avitel*[15] seems to have lost steam and only plays a small supporting role in the reasoning of a Court while declining or entering a reference for arbitration. Even so, *Russell* is often cited for Principle 1 in decisions relating to fraud and arbitrability. Though Principle 2 does not trace its inception to *Russel*, it is reiterated there and forms a strong basis of the verdict of the Chancery Division.

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[12] s 20, Arbitration Act 1940. (now repealed).

[13] Sufficient case of serious fraud in the Indian context.

[14] **[2011] SCC OnLine Bom 22; [2015] SCC OnLine Del 7351; [2018] SCC OnLine Del 11169;** MANU/PH/3010/2015; **AIR 1984 AP 200;** [2015] SCC OnLine Del 8734; [2014] SCC OnLine Del 3370; **[2019] 1 KLT (SN 117); [2018] SCC OnLine Del 11140; [2014] SCC OnLine CLB 121; [2014] SCC OnLine Del 6485; [1998] SCC OnLine Del 381; [2012] 1 AIR Kant R 293; AIR 1977 Cal 130; AIR 1963 Cal 405; AIR 1978 Cal 407;** AIR 1954 Cal 281; AIR 1988 Ori 186; [1995] 35 DRJ 319; [2020] SCC OnLine Ori 340; [1979] 92 LW 531; AIR 1962 SC 406; [2010] 1 SCC 72; [2019] 8 SCC 710; [2014] 6 SCC 677; [2020] SCC OnLine SC 656; [2016] 10 SCC 386; [1924] SCC OnLine Cal 172; [1942] SCC OnLine Pat 235.(This is a best effort basis to list as many cases that could be identified at the time of writing this essay. I do not claim that this is an exhaustive list of cases that cite Russel/ discuss Principle 1).

[15] *Avitel Post Studioz Limited v HSBC PI Holdings* [2020] SCC OnLine SC 656.

[16] *Avitel Post Studioz Limited v HSBC PI Holdings* [2020] SCC OnLine SC 656; *Ayyasamy v A. Paramasivam* [2016] 10 SCC 386; *Rashid Raza v Sadaf Akhtar* [2019] 8 SCC 710.

Principle 2 has gained a life of its own from a *prima facie* case of fraud in the 1880 judgment to a prima facie case of serious fraud in the Indian context.[16] This issue takes on a subjective form which has caused the Courts to spend much time trying to define its contours. In the case of *Russel*, the allegation of fraud was made on affidavit and no details were provided. The Court held that the allegation was a *"statement of belief, sufficient on a motion of this kind to call upon the party for a denial, but useless for any other purpose"*.Thus, in *Russel,* the Court referred the matter to arbitration because a prima facie case of fraud was not met. In the Indian context, the Courts have oscillated between a prima facie case of fraud and a prima facie case of serious fraud as grounds for refusing arbitration. Though really this difference was illusionary given that there was no objective threshold for what amounted to serious fraud. While Principle 2 came in the spotlight with the judgment of *Abdul Kadir*[17] in 1962, it is really between 2009 and 2011 that a spate of judgments like ***Maestro***,[18] ***Afcons Infrastructure Ltd. vs. Cherian Varkey Construction Company Pvt Ltd*** ***("Afcons")***[19] and ***Booz Allenvs. SBI Home Finance Ltd ("Booz Allen")***[20] cemented the importance of the issue of arbitrability of serious fraud.[21] In *Maestro*, the Supreme Court accepted that malpractices of finance amounted to a serious allegation of fraud that could not be dealt with by the arbitrator. However, no cogent reason was provided as to why the arbitrator would notbe competent enough to deal with the same. In *Afcons*,[22] the Supreme Court of India spelled out certain type of cases which it held to be not suitable for the process of alternative dispute resolution. This list included in entry (iv) cases involving serious and specific allegations of fraud, fabrication of documents etc. This was followed by *Booz Allen*[23] where it clarified that actions *in rem* were outside the purview of arbitration. Though these judgments held that serious fraud was not arbitrable, inreality they were and are cited regularly to resist arbitration even in simpler cases.

It took only 6 years for the tide to turn for Principle 2.[24] In *Ayyasamy*, the Supreme Court held that mere allegation of fraud simpliciter may not be enough to nullify an arbitration agreement. It held that a Court has to consider what the nature of the dispute is and then strict and meticulous enquiry into the allegations is needed. Only when the Court is satisfied that the allegations are serious and of a complicated nature should the reference to arbitration be refused. The Court clarified that serious fraud would include allegations which make a case of criminal offense[25], allegations which are complicated and require appreciation of voluminous evidence, allegations of forgery/fabrication of documents, allegations of fraud against the arbitration agreement itself/fraud permeating the contract. The Court also held that allegations of fraud touching upon the internal affairs of the parties, with no implication on the public domain could be referred to arbitration.The Supreme Court in ***Ameet Lalchand Shahvs.Rishabh Enterprises***[26] ***("Ameetchand")***and ***Rashid Raza vs. Sadaf Akhtar***[27] ***("Rashid Raza")*** followed ***Ayyasamy*** and also distinguished between serious and simple fraud. It would be useful to see how allegations of serious fraud have manifested in cases:

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[17] [1962] AIR SC 406.
[18] [2010] 1 SCC 72. Note: The Supreme Court in Avitel states that the ratio in Maestro being based on a judgment of the 1940 Act and without considering S.5,8 and 16 of The 1996 Act, cannot be applied as a precedent on the application of fraud to negate arbitration (para 31).
[19] [2010] 8 SCC 24.
[20] [2011] 5 SCC 532.
[21] Note: The Arbitration & Conciliation Act, 1996 does not specify what matters are not arbitrable.
[22] [2010] 8 SCC 24.
[23] [2011] 5 SCC 532.
[24] [2016] 10 SCC 386 [25].
[25] It is to be noted that in *Avitel*, the Court has stated that the filing of a criminal case will have no bearing on the allegation of fraud. Thus, there appears to be some amount of ambiguity here.
[26] [2018] 15 SCC 678.

- **Suit for accounts** - In *Abdul Kadir*, the allegation was that the accounts were not made up to date, were incomplete and incorrect. On a closer look, the Court observed that the allegations were based only on a suspicion. The Court held that such allegations on correctness of entries of accounts are often made in account suits but do not amount to serious fraud. In *Maestro*, the Court while relying on *AbdulKadir* for the ratio on serious fraud not being arbitrable, took a different turn on the appreciation of facts. The Court held that malpractice in account books and finances of the partnership could not be dealt with by an arbitrator. The position seems to have turned a full circle in *Ayyasamy*and *Avitel*. In *Ayyasamy*, the issue of signing a cheque without the consent of other partners was held to be an accounts issue and not one of serious fraud or involving any complex issue.[28] In *Avitel,* the Supreme Courton a *prima facie*finding, allowed the relief of a full deposit in a Section 9 of the Arbitration & Conciliation Act, 1996 ("**The Act**") proceeding to safeguard the pending enforcement proceedings under Section48 of The Act. This was despite the objection of the Respondent that the Foreign Award would not be enforceable under Indian laws as there were serious allegations of fraud including siphoning of funds. Thus, it can be said that inter-party accounting irregularities and siphoning of funds can be dealt with in arbitration.

- **Voluminous evidence better suited for Court** The Court in *Maestro*[29] accepted the argument that when detailed material evidence (both documentary and oral) is required to prove malpractice, then the arbitrator would not be a competent authority. Even the Court in *Ayyasamy* observed that there could be complex cases which could only be tried by the Court due to voluminous evidence. This factor has caused much heartburn, as the question is often raised: Why can't an Arbitral Tribunal conduct a commercial trial even if the matter is complicated? There seems to be little clarity on what matters may require such complex voluminous evidence and why a Tribunal cannot deal with the same, especially after the enactment of Sections26 and27 of The Act. The international arbitration space is thriving with complex private disputes.[30] The old perception of ADR[31] still manifests in contemporary Indian arbitral jurisprudence despite the enactment of a modern statute (The Act) and its consequent amendments.

- **Public domain** If the allegation at hand, has a public element, it is unlikely the same can be arbitrated as a private dispute. In the case of ***World Sport Group vs. MSM Satellite***,[32] Part II of The Act was under consideration. The Supreme Court held that consideration of fraud was not relevant for the purposes of Section45. Even so, the impugned Order of the Bombay High Court[33] made an interesting observation on the issue of arbitrability when it touches the public domain.

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[27][2019] 8 SCC 710.

[28][2016] 10 SCC 386 [26].

[29][2010] 1 SCC 72 [20].

[30]See https://iccwbo.org/media-wall/news-speeches/icc-releases-2019-dispute-resolution-statistics/ ; https://www.siac.org.sg/images/stories/articles/annual_report/SIAC%20AR_FA-Final-Online%20(30%20June%202020).pdf.- From the websites of The [31]International Chamber of Commerce and The Singapore International Arbitration Centre. Last visited Last visited 9 September, 2020.
Alternate Dispute Resolution.

[32][2014] 11 SCC 639.

[33][2010] SCC OnLine Bom 1375 [58].

It observed that when the issues of fraud have a bearing on the position of BCCI in the game of cricket, the involvement of the general public in the game and the television rights which are conferred for viewing the games by public, and also presence of BCCI being necessary, then, the matter is fit for an open public trial by a Court of law. Thus, even an indirect public element may lead to a stay on arbitration. On the other hand, in *Rashid Raza,*[34] the Supreme Court held that the affairs of partnership and siphoning of funds do not concern the public domain and the dispute was arbitrable.

- **Public domain** If the allegation at hand, has a public element, it is unlikely the same can be arbitrated as a private dispute. In the case of ***World Sport Group vs. MSM Satellite***, Part II of The Act was under consideration. The Supreme Court held that consideration of fraud was not relevant for the purposes of Section45. Even so, the impugned Order of the Bombay High Court made an interesting observation on the issue of arbitrability when it touches the public domain. It observed that when the issues of fraud have a bearing on the position of BCCI in the game of cricket, the involvement of the general public in the game and the television rights which are conferred for viewing the games by public, and also presence of BCCI being necessary, then, the matter is fit for an open public trial by a Court of law. Thus, even an indirect public element may lead to a stay on arbitration. On the other hand, in *Rashid Raza,* the Supreme Court held that the affairs of partnership and siphoning of funds do not concern the public domain and the dispute was arbitrable.

- **Effect of parallel criminal proceedings** - An interesting discussion in *Avitel* is about the effect a criminal proceeding has on a reference for arbitration. As the standard of proof is different in civil and criminal proceedings, the mere filing of a criminal case would not amount to the allegations of fraud being upscaled to serious in the civil proceedings. While the concept of finding of facts in civil and criminal matters not having a bearing on each other is trite law, it has been expounded in a crystal-clear manner in the context of reference to arbitration matters in *Avitel*. Thus, both *Afcon* and *Booz Allen*may have to henceforth be read with a rider that that *merely because criminal proceedings can be or have been instituted in respect of the same subject matter, it would not mean that a dispute which is otherwise arbitrable, ceases to be so*.[35]

While the above factors are not exhaustive and the outcome of each case will depend on its facts, they do provide some indication that Courts are moving towards permitting commercial fraud to be arbitrated. It goes without saying that any serious allegations of fraud cannot be based on mere suspicion for the Court to consider refusing arbitration. In *Avitel*, the Supreme Court while relying on *Ayyasamy,* has tried to distill the various factors into a two-prong test for meeting the threshold of a serious allegation of fraud.[36]

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[34][2019] 8 SCC 710 [5].
[35][2020] SCC OnLine SC 656 [42]; See also: *Swiss Timing Limited v Commonwealth Games 2010 Organizing Committee*[2014] 6 SCC 677;*Ameet Lalchand Shah v. Rishabh Enterprises* [2018] 15 SCC 678.
[36][2020] SCC OnLine SC 656 [34].

The first test is satisfied when the arbitration clause itself cannot be said to exist in a clear case in which the Court finds that the party against whom breach is alleged, cannot have been said to have entered into the agreement at all. The second test is where allegations are made against the state or its instrumentalities of arbitrary and fraudulent conduct which would require adjudication in a writ court[37]. Though the intention to streamline the threshold for fraud by the two-prong test is well meaning, it is quite narrow. It is possible that litigants will rely on *Ayyasamy* to keep the door of serious fraud open a little wider.

Russel to *Avitel,* it has been a long journey for arbitrability of fraud. While Indian Courts have relied on the principles propounded in *Russel* to grapple with questions of fraud, the Supreme Court's tests laid down in *Ayyasamy* and *Avitel* have attempted to forge touch stones for these principles. This will hopefully bring in some predictability on how Courts will look at the issue of fraud and arbitration and is thus a progressive step towards strengthening the arbitration regime in India. This is also in keeping with the international trend of private resolution for inter party disputes. In a country like India, where the case pendency is a staggering 3,43,17,238 cases,[38] and bound to get worse due to the COVID-19 pandemic, the importance of ADR cannot be over emphasized. All efforts should be made by the Courts to give ADR the impetuous needed to thrive.

"*Why should not the childish quarrels of princes be settled through the arbitration of these learned men"*
- Desiderius Erasmus....sometime in the 1500s[39]

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[37][2020] SCC OnLine SC 656 [34].
[38]https://njdg.ecourts.gov.in/njdgnew/index.php.National Judicial Data Grid Last visited on 9 September 2020.
Desiderius Erasmus, ADAGIA, Chil. IV, Centur. I. Prov. I, quoted in Henry S. Fraser, "A Sketch of the History of International Arbitration," 11 CORNELL
[39]L.Q. 179, 186 (1925-1926:2)https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1236&context=clr.- Last visited 9 September, 2020..