

# ARBITRABILITY OF OPPRESSION, MISMANAGEMENT AND PREJUDICE CLAIMS IN INDIA: NEED FOR RE-THINK?

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*This article seeks to re-evaluate the Indian legal position relating to arbitrability of oppression, mismanagement and prejudice claims taking into account developments in the United Kingdom and Singapore. In order to accomplish this objective, the article examines the law relating to the subject in these jurisdictions and the principles governing the arbitrability of disputes. Thereafter, the article examines whether the principles rendering oppression, mismanagement and unfair prejudice claims per se arbitrable in the United Kingdom and Singapore can be adopted with suitable modifications under Indian law. The article also proposes certain legal tests that could be adopted by courts in India while adjudging arbitrability of oppression, mismanagement and prejudice claims.*

## I. INTRODUCTION

According to the Corporate Governance Committee Report of the Securities and Exchange Board of India published on October 5, 2017 (*‘Uday Kotak Committee Report’*), there are broadly two styles of running a company in India – the “Raja”<sup>1</sup> (i.e. Monarch) model and the “Custodian” (i.e. Trusteeship) model.<sup>2</sup>

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<sup>1</sup> The use of the term “Raja” by the Uday Kotak Committee Report’s is inappropriate to describe despotic promoters who place their interests before the interests of other stakeholders of the company. The use of the term “Raja” to describe despotic promoters only perpetuates an inaccurate and disparaging cultural stereotype. The “Raja” and “Rani” or kings and queens in ancient India were not all absolutist rulers, and were bound by various commandments that tempered or limited the exercise of their powers. For instance, Kautilya’s political treatise ‘Arthashastra’ authored during the Mauryan period (i.e. 3 B.C.E -2 B.C.E) and Shantiparva of the Mahabharata extensively dealt with ‘Rajadharma’- duties of kings and queens in India. Therefore, the authors use ‘Monarch’, a term which is culturally and gender neutral, to describe despotic promoters in this article.

<sup>2</sup> SECURITIES AND EXCHANGE BOARD OF INDIA, *Report of the Committee on Corporate Governance* (October, 2017), available at [https://www.sebi.gov.in/reports/reports/oct-2017/report-of-the-committee-on-corporate-governance\\_36177.html](https://www.sebi.gov.in/reports/reports/oct-2017/report-of-the-committee-on-corporate-governance_36177.html) (last visited on July 22, 2018).

Under the “Monarch” model, the management, promoters and the board expend their energies towards advancing the interest of the promoters of the company even if it is at the expense of the other stakeholders.<sup>3</sup> This is but natural considering that the board and management personnel depend on the patronage of the promoters/majority shareholders of the company for re-election as board members or continuance of their employment with the company (as the case may be). In contrast, under the “Custodian” model, the promoters, boards and management of the company wear the hat of “trustees” and act in the interests of all stakeholders – minority shareholders, investors, employees, customers, *et al.*, keeping stakeholder interests before interests of the promoters of the company. Unfortunately, the “Monarch” model of running a company is more prevalent than the “Custodian” model in India.<sup>4</sup>

In order to redress the ill-effects of majority opportunism inherent in the “Monarch” model of running a company, Indian lawmakers like their counterparts in other jurisdictions have adopted the following three broad techniques: (i) Formulating procedural rules mandating decisions on some important matters to be taken by super-majorities (i.e. seventy five percent voting power) to reduce incidence of unfair prejudice being caused to the minority shareholders of the company;<sup>5</sup> (ii) Improving standards of corporate governance by *inter alia* providing for safeguards and disclosures pertaining to related party transactions,<sup>6</sup> the composition and independence of the board of directors,<sup>7</sup> independence of companies’ auditors and improving the quality of audit of its financial statements<sup>8</sup>; (3) Empowering courts/specialized tribunals in India to review the decisions of the majority shareholders of the company on the grounds that they are oppressive to the interests of minority shareholders in the company.<sup>9</sup>

In addition, the minority shareholders of Indian public sector enterprises can invoke public law remedies to redress the ill-effects of majority opportunism. For instance, the public laws of India safeguard persons from arbitrary action of governments and their instrumentalities.<sup>10</sup> The Indian courts *inter alia* have taken a view that any enterprises in which the Indian Government (i.e. Federal government) or any of its constituent federal units (i) hold significant share capital; or (ii) exercise deep and pervasive control, would be regarded as ‘instrumentalities’ of the Government.<sup>11</sup> Therefore, the minority shareholders of such companies, in addition to remedies under private laws, can turn to public law remedies to

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See The Companies Act, 2013, §§ 5, 13, 48, 66.

<sup>6</sup> See The Companies Act, 2013, § 188.

<sup>7</sup> See The Companies Act, 2013, §§ 149, 151, 163, 164, 166.

<sup>8</sup> The Companies Act, 2013, §§ 139-148.

<sup>9</sup> The Companies Act, 2013, §§ 241-246.

<sup>10</sup> The Constitution of India, 1950, Art. 14; M.P. JAIN, INDIAN CONSTITUTIONAL LAW, Vol.1 1291 (6<sup>th</sup> ed., 2010) (‘M.P. Jain’).

<sup>11</sup> See generally JAIN, *supra* note 10, 1202.

protect their proprietary rights as shareholders. This assumes significance because public sector enterprises are important vehicles of wealth generation in the Indian economy.<sup>12</sup>

Further, sophisticated minority investors involved in joint venture, private equity, venture capital and similar corporate investments transactions enter into shareholders' agreement that confer rights and protections above and beyond provided by statutory law. Mainly, these shareholders' agreements confer rights relating to (i) board representation; (ii) veto rights to ensure involvement in major business decisions; (iii) anti-dilution rights to protect equity stake in the company being improperly diluted by subsequent share issues; (iv) dividend rights to ensure proper distribution of profits of the company; (v) information rights to ensure adequate access to information regarding the affairs of the company; (vi) exit provisions to enable the minority investors to exit the company; and (vii) dispute resolution provisions.<sup>13</sup>

The enforceability of the said covenants contained in the shareholders' agreements, but not incorporated into the constitutional documents of the company, has been vexed question under Indian law.<sup>14</sup> Accordingly, in order to avoid uncertainty, most minority investors in Indian companies ensure the incorporation of the shareholders' covenants into the company's articles of association.<sup>15</sup> This has resulted in protections provided in the shareholders' agreement including dispute resolutions clauses being replicated in the articles of association of the company.

In many instances, the minority shareholders of Indian companies pursue statutory remedies of oppression, prejudice or mismanagement under the Companies Act, 2013 to enforce these rights enshrined in the shareholders' agreement and articles of association of the company.<sup>16</sup> In some cases, the promoters/majority shareholders in Indian companies seek to avoid such proceedings by seeking reference of the underlying dispute to arbitration.

<sup>12</sup> See generally MINISTRY OF HEAVY INDUSTRIES AND PUBLIC ENTERPRISES, DEPARTMENT OF PUBLIC ENTERPRISES, *Public Enterprises Survey 2016-17 Vol. 1 7-9* available at <https://dpe.gov.in/sites/default/files/PE%20ENG%20Volume-1%20FINAL%20web.pdf> (Last visited July 22, 2018); PRESS INFORMATION BUREAU, GOVERNMENT OF INDIA, *Contribution of PSUs in GDP* (November 23, 2016) (Also, as per the information given by the Minister of State in the Ministry of Heavy Industries and Public Enterprises in November 2016, the gross turnover of Central Public Sector Enterprises to the Gross Domestic Product ("GDP") of India at current prices in 2014-15 amounted to 15.9%.)

<sup>13</sup> See generally I. Hewitt, S. Howley & J. Parkes, *Minority Investment and Protection* in HEWITT ON JOINT VENTURES 221-232 (5<sup>th</sup> ed., 2016).

<sup>14</sup> See generally V. Niranjan & Umakanth Varottil, *Enforceability of Contractual Restrictions on the Transfer of Shares*, (2012) 5 SCC J-1; IndiaCorpLaw Blog, *Shareholder Agreements: Clauses and Enforceability*, December 31, 2010, available at <https://indiacorplaw.in/2010/12/shareholders-agreements-clauses-and.html> (Last visited on May 5, 2018).

<sup>15</sup> International Bar Association, *IBA Guide on Shareholders' Agreement*, available at <http://www.shareholderagreementweb.com/form/415828012-Raja-Sujith> (last visited May 5, 2018).

<sup>16</sup> The Companies Act, 2013, §§ 241-244.

The purpose of this article is to examine the ‘arbitrability’ of such oppression, prejudice and mismanagement claims under Indian law, taking into account the developments in other common law jurisdictions such as the United Kingdom and Singapore. The authors have chosen to benchmark the question of ‘arbitrability’ of oppression, mismanagement and prejudice claims in India against UK and Singaporean law because (i) of the similarities between the law relating to oppression, mismanagement and prejudice claims in these three jurisdictions;<sup>17</sup> and (ii) most of the Indian parties choosing to arbitrate their disputes with the aid of foreign arbitral institutions seated in Singapore and UK.<sup>18</sup>

In order to accomplish the aforesaid objective, the authors will examine the Law of oppression, prejudice and mismanagement claims in India in Part II of the paper. Part III of the paper will discuss the general principles governing the arbitrability of disputes in India including claims relating to oppression, prejudice and mismanagement claims. Part IV of the paper will analyse the considerations governing the arbitrability of oppression and mismanagement claims in Singapore and UK. Thereafter, in Part V of the paper, the authors will express their views on the approach that could be adopted by courts and parties in India on arbitrability of oppression, prejudice and mismanagement claims in India.

## II. LAW RELATING TO OPPRESSION AND MISMANAGEMENT IN INDIA

Considering that this paper seeks to examine the arbitrability of oppression and mismanagement claims in India, this Part will briefly examine: (A) the historical background leading to oppression, prejudice and mismanagement claims being introduced in Indian companies’ law; (B) the general principles relied on by courts to adjudge oppression, mismanagement and prejudice claims of the minority shareholders; (C) scope and the powers of the National Company Law Tribunal (hereinafter ‘NCLT’) to provide relief in cases of oppression, mismanagement and prejudice claims; (D) common instances wherein minority shareholders invoke remedies of oppression, prejudice or mismanagement; and (E) Summary.

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<sup>17</sup> These similarities are explained in greater detail in Part IV of the article. *See generally*, GOVERNMENT OF INDIA, *Report of the Company Law Committee*, ¶¶ 199-203 (1952), available at <http://reports.mca.gov.in/Reports/22-Bhabha%20committee%20report%20on%20Company%20law%20committee,%201952.pdf> (Last visited May 8, 2018) (‘Bhabha Committee Report’); *Tomolugen Holdings Limited & Another v. Silica Investors Limited and Other*, [2015] SGCA 57, ¶¶ 85-89.

<sup>18</sup> The statistics have been examined in greater detail in Part IV of the article. *See generally* Singapore International Arbitration Centre, *Annual Report 2017*, available at [http://siac.org.sg/images/stories/articles/annual\\_report/SIAC\\_Annual\\_Report\\_2017.pdf](http://siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2017.pdf) (last visited on July 11, 2018); London Court of International Arbitration, *Facts and Figures: 2017 Case Report*, available at <http://www.lcia.org/lcia/reports.aspx> (last visited on July 12, 2018).

## A. HISTORICAL BACKGROUND

The remedies against oppression and mismanagement in India were first introduced in Indian companies' law through an amendment in 1951 to the Companies Act, 1913 ('1913 Act').<sup>19</sup> These provisions were based on § 210 of the UK Companies Act, 1948, which in turn was based on recommendations of the Cohen Committee<sup>20</sup> set up to recommend amendments to the companies' law of the United Kingdom.<sup>21</sup>

One of the major issues before the Cohen Committee was how to devise effective means for the protection of minority shareholders against the "oppression" of the majority.<sup>22</sup> For instance, the restrictions on the transferability of shares in the articles of association of a private company resulted in great hardship to the legal representatives of the minority shareholders. The legal representatives had to usually raise money to pay estate dues.<sup>23</sup> The directors of a company who were usually the majority shareholders, sometimes refused to register the transfer of shares to outsiders.<sup>24</sup> This resulted in executors being compelled to realize the testators' shares by selling the shares to persons approved by the directors, who were usually majority shareholders, at prices much lesser than the value assessed by tax authorities.<sup>25</sup> Another abuse which was found to occur was that the directors would absorb an undue proportion of the profits of the company in remuneration for their services and so that little or nothing was left to be distributed among the shareholders as dividends.<sup>26</sup> This was especially detrimental to the minority shareholders because, in most cases, the majority shareholders would expropriate all the profits of the company as directors' remuneration.

Prior to the enactment of §210 of the UK Companies Act, 1948, the only effective remedy against such oppressive acts by the majority shareholders was to file a petition for winding-up under the "just and equitable" clause of §168 of the UK Companies Act, 1929.<sup>27</sup> The remedy was, however, very often worse than the disease. For, in practice, it generally meant that the business of the company

<sup>19</sup> A. RAMAIYA, *GUIDE TO THE COMPANIES ACT*, Vol. 3 4003 (8<sup>th</sup> ed., 2015) ('Ramaiya'); Shanti Prasad Jain v. Kalinga Tubes Ltd., AIR 1965 SC 1535, ¶ 13.

<sup>20</sup> BOARD OF TRADE, *Report of the Committee on Company Law Amendment* (1945), available at <http://reports.mca.gov.in/Reports/17Justice%20Cohen%20committee%20report%20of%20the%20committee%20on%20company%20law%20amendment,%201943.pdf> (last visited 8 May 2018) ('Cohen Committee Report').

<sup>21</sup> Shanti Prasad Jain v. Kalinga Tubes Ltd., AIR 1965 SC 1535, ¶ 13; Bagree Cereals (P) Ltd. v. Hanuman Prasad Bagri, 2000 SCC OnLine Cal 371 : (2001) 105 Comp Cas 465, ¶ 66.

<sup>22</sup> Bhabha Committee Report, *supra* note 17, ¶ 199.

<sup>23</sup> Estate tax or estate dues were levied on the legal heirs of the deceased in some common law jurisdictions at the time of inheriting an asset of the deceased under a will or under the laws of succession (in case the deceased died intestate). *See, e.g.*, United Kingdom Finance Act, 1894.

<sup>24</sup> Cohen Committee Report, *supra* note 20, ¶ 58.

<sup>25</sup> *Id.*, ¶ 60.

<sup>26</sup> *Id.*, ¶ 58.

<sup>27</sup> *Id.*, ¶ 59.

in liquidation would have passed into the hands of the majority shareholders who would ordinarily be the only available purchasers of the business.<sup>28</sup> As a result of the winding-up proceedings, the business would be taken over by the majority against whose conduct the minority had sought to obtain redress, without the latter being compensated in any way for their interest.<sup>29</sup> Further, the rule of law, under which the Courts administered the provisions, generally precluded the making of winding-up order in cases where alternative remedy was available.<sup>30</sup> Therefore, in order to remedy this situation, the Cohen Committee recommended that, the Courts should, in addition to the power to wind-up the company, have a right to impose whatever settlement they deemed necessary to put an end to the oppressive acts of the majority shareholders of the company.<sup>31</sup> Thus, §210 was introduced in the UK Companies Act, 1948. Under this Section, the Court, if satisfied that a winding-up order would not do justice to the minority shareholders would be empowered, to make such other order as it deemed fit on finding that the ‘acts’ or/ and ‘omissions’ of the majority shareholders (i) were oppressive, and (ii) justified winding-up of the company on fair and equitable grounds.<sup>32</sup>

These provisions relating to oppression came to be materially incorporated in the Indian Companies Act, 1913, and subsequently adopted in § 397 of the Indian Companies Act, 1956.<sup>33</sup> Additionally, § 398 of the Indian Companies Act, 1956, was enacted to make any gross mismanagement of the affairs of the company actionable on an application by members of the company. This provision has no comparable provision in other common law jurisdictions.<sup>34</sup> Viewed from a historical standpoint, this provision may have been enacted by the Indian lawmakers to deal with the exploitative system of managing agents that plagued Indian companies during the colonial period and early years of India’s independence (i.e. post-1947). Under the managing agency system, Indian companies entrusted individual/firms to run the business of the company under the supervision of the board. These managing agents/ entities had often abused their positions to enrich themselves at the expense of the shareholders of the company.<sup>35</sup> Thus, it appears that in order to remedy the said situation, mismanagement was made actionable by the members of the company.

<sup>28</sup> *Id.*, ¶ 60.

<sup>29</sup> Bhabha Committee Report, *supra* note 17.

<sup>30</sup> *Id.*

<sup>31</sup> Cohen Committee Report, *supra* note 20, ¶ 60.

<sup>32</sup> Companies Act, 1948, § 210 (United Kingdom).

<sup>33</sup> The Companies Act, 1956, Chapter; Ramaiya, *supra* note 19, 4003.

<sup>34</sup> Bhabha Law Committee, *supra* note 17, ¶ 199

“We have carefully examined the scope of the section and consider that not only can it suitably be adapted to the circumstances of this country, but its scope may be appropriately enlarged to cover not only cases of oppression to minority shareholders, but also of gross mismanagement of the affairs of a company which cannot be otherwise suitably be dealt with under the other provisions of the Act”)

*See also* Bagree Cereals (P) Ltd. v. Hanuman Prasad Bagri, 2000 SCC OnLine Cal 371 : (2001) 105 Comp Cas 465, ¶¶ 68-69.

<sup>35</sup> *See generally* UmakanthVarottil, *Corporate Law in Colonial India: Rise and Demise of the Managing Agency System* (NUS Working Paper Series, 2015).

Later, the Indian Companies Act, 1956, was repealed and replaced by the Indian Companies Act, 2013. The provisions relating to oppression and mismanagement have been re-enacted with certain modifications under Chapter XVI of the Indian Companies Act, 2013. The next section will examine the law relating to oppression and mismanagement claims as set out in Chapter XVI of the Indian Companies Act, 2013.

## *B. OPPRESSION AND MISMANAGEMENT CLAIMS UNDER THE COMPANIES ACT, 2013*

Chapter XVI of the 2013 Act *inter alia* empowers members holding 1/10<sup>th</sup> of the issued share capital of the company or 1/10<sup>th</sup> of the members of the company to file a claim of ‘oppression’ or ‘mismanagement’ in the National Company Law Tribunal (‘NCLT’) – the statutory body conferred with special powers to deal with such cases.<sup>36</sup> While these remedies were available to the minority shareholders even under the erstwhile Indian Companies Act, 1956, the Indian Companies Act, 2013, also enables members to file a petition under Chapter XVI of the said legislation even if the acts of the majority shareholders are ‘prejudicial to his/her interest as members’ or ‘prejudicial’ to the interests of the company.

### 1. Relief of ‘Oppression’ under the Indian Companies Act, 2013

In cases of oppression, the NCLT has the power to make such order as it deems fit, if it comes to the conclusion that (i) the affairs of the company are being conducted in a manner “oppressive” to any member or members; and (ii) to wind up the company, if it would unfairly prejudice such member or members, but that otherwise the facts might justify the making of a winding-up order of the company on just and equitable grounds.<sup>37</sup> The law, however, has not defined ‘oppression’ and gives wide discretion to the NCLT to determine on the facts of each case whether such conduct amounts to ‘oppression’ under the Act.

Over a period of time, courts in India have adopted broad tests based on jurisprudence in other common law jurisdictions to determine whether acts amount to ‘oppression’ under Indian companies’ law.<sup>38</sup> In *Shanti Prasad Jain v. Kalinga Tubes Ltd.*,<sup>39</sup> the Supreme Court of India relying on English and Scottish decisions<sup>40</sup> interpreted the term “oppression” to mean a series of events that showed that the affairs of the company were being conducted in a manner that was

<sup>36</sup> The Companies Act, 2013, §§ 241, 244.

<sup>37</sup> The Companies Act, 2013, § 242.

<sup>38</sup> *Shanti Prasad Jain v. Kalinga Tubes Ltd.*, AIR 1965 SC 1535, ¶¶ 16-20; *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holdings Ltd.*, (1981) 3 SCC 333, ¶¶ 46-54.

<sup>39</sup> *Shanti Prasad Jain v. Kalinga Tubes Ltd.*, AIR 1965 SC 1535, ¶¶ 16-20.

<sup>40</sup> *George Meyer v. Scottish Co-operative Wholesale Society Ltd.*, 1954 SC 381; *Scottish Co-operative Wholesale Society Ltd. v. Meyer*, [1958] 3 All E.R. 56; *In Re: H. R. Harmer Limited*, [1938] 3 All E.R. 689.

burdensome, harsh and wrongful to the minority shareholders of the company. Furthermore, such conduct necessarily involved an element of lack of probity or fair dealing towards the minority shareholders, who had entrusted their capital to the company. But, mere lack of confidence in the majority shareholders would not *per se* be regarded as “oppressive” under Indian companies’ law.

In other words, the minority shareholders complaining of “oppression” have to demonstrate that they were constrained to submit to continuous acts or omissions which were (i) unfair; (ii) lacked in probity; and (iii) prejudiced the exercise of their legal and proprietary rights as shareholders of the company.<sup>41</sup> Further, legality or illegality of the action does not have a bearing on adjudging whether the act would be regarded as oppressive. Conduct which is perfectly legal can be “oppressive” whereas conduct which is illegal and in the interests of the company may not be regarded as “oppressive”.<sup>42</sup> Therefore, while adjudging oppressiveness, the courts need to look at the business realities of the situation and not confine themselves to a narrow legalistic view.<sup>43</sup>

Nevertheless, it is not enough to show that the conduct of the affairs of the company is ‘oppressive’ to some members of the company. The minority shareholders of a company have to further prove that there are ‘just and equitable’ grounds for winding-up company, but the passing of such an order will cause unfair prejudice to them.<sup>44</sup> This requirement again has been incorporated in Indian companies’ law from UK companies’ law and other common law jurisdictions.<sup>45</sup> As a result, Indian courts and tribunals have relied on the UK and other common law jurisdictions to expound instances that are regarded as ‘just and equitable’ grounds for winding-up of the company.<sup>46</sup>

Common law jurisdictions including India have recognized the fact that ‘just and equitable’ grounds for winding-up a company are fairly wide and they cannot be reduced to a sum of particular instances.<sup>47</sup> However, over a period of time, courts in common law jurisdictions have formulated broad tests to determine

<sup>41</sup> Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holdings Ltd., (1981) 3 SCC 333, ¶ 46.

<sup>42</sup> Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holdings Ltd., (1981) 3 SCC 333, ¶ 51; Sheth Mohanlal Ganpatram v. Sayaji Jubilee Cotton and Jute Mills Co., 1964 SCC OnLine Guj 66 : (1964) 34 Comp Cas 830-831 (Guj).

<sup>43</sup> Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holdings Ltd., (1981) 3 SCC 333, ¶ 46.

<sup>44</sup> Shanti Prasad Jain v. Kalinga Tubes Ltd., AIR 1965 SC 1535, ¶ 18; Hind Overseas (P) Ltd. v. Raghunath Prasad Jhunjhunwalla, (1976) 3 SCC 259, ¶ 37.

<sup>45</sup> The Companies (Consolidation) Act, 1908, § 129 (The United Kingdom); The Companies Act, 1910, § 127 (Barbados); The Companies Act, 1862, § 79 (The United Kingdom); The Companies Act, 1948, § 222(f) (The United Kingdom).

<sup>46</sup> See generally Hind Overseas (P) Ltd. v. Raghunath Prasad Jhunjhunwalla, (1976) 3 SCC 259.

<sup>47</sup> See generally Ebrahimi v. Westbourne Galleries Limited, 1973 AC 360; Symington v. Symington Quarries Limited, (1905) 8 F.121; In Re Yenidje Tobacco Company Limited, [1916] 2 Ch. 426; Hind Overseas (P) Ltd. v. Raghunath Prasad Jhunjhunwalla, (1976) 3 SCC 259, ¶ 34.



whether acts or omissions give rise to ‘just and equitable’ grounds for winding-up the company. They have discussed in greater detail below.

### a. Lord Clyde’s ‘just and equitable test

In *Baird v. Bees*,<sup>48</sup> Lord Clyde attempted to set out some of the considerations that could be taken into account by courts while determining whether there were ‘just and equitable’ grounds for winding-up the company. He noted that shareholder puts his money into the company on certain conditions. They were:

1. ***Objects test***: The business in which the shareholder invests shall be limited to certain defined objects in the constitutional documents of the company. Under the Indian Companies Act, 2013, it is pre-requisite for the company to set out the defined objects for which it is being established before it is incorporated under the Act.<sup>49</sup>In the past, Indian courts have taken a view that acts ultra vires the constitutional documents are void and delinquent officers are personally liable to compensate the company for any losses resulting from such actions.<sup>50</sup>
2. ***‘Management and control’ test***: The business of the company shall be carried on by certain persons elected by the shareholders of the company in a specific way. Under the Indian Companies Act, 2013, the Board of Directors of a company is entitled to do all such acts and things to carry on the business of the company.<sup>51</sup>Such board of directors is elected by the shareholders of a company and is under an obligation to carry on the business in accordance with articles of association of the company.<sup>52</sup>
3. ***‘Statutory compliances’ test***: The business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide guarantee of commercial probity and efficiency. As noted earlier, the Indian Companies Act, 2013, provides for various safeguards to improve the standards of corporate governance in a company such as disclosures pertaining to related party transactions,<sup>53</sup> composition and independence of board of directors,<sup>54</sup> etc.

According to Lord Clyde, if the shareholders found that these conditions or some of them are deliberately and consistently violated and set aside by actions of member(s) or officials of the company who wielded overwhelming voting

<sup>48</sup> *Baird v. Lees*, 1924 SC 83, 92.

<sup>49</sup> The Companies Act, 2013, §§ 4(c), 7.

<sup>50</sup> See generally *A. Lakshmanaswami Mudaliar v. LIC*, AIR 1963 SC 1185.

<sup>51</sup> The Companies Act, 2013, § 179(1).

<sup>52</sup> See generally The Companies Act, 2013, § 179(1); The Companies Act, 2013, Chapter XI.

<sup>53</sup> The Companies Act, 2013, § 188.

<sup>54</sup> The Companies Act, 2013, §§ 149, 151, 163, 164, 166.

power resulting in extrication of their rights as shareholders, it would be ‘just and equitable’ for the company to be wound up.<sup>55</sup>

### *b.* Ebrahmi’s ‘just and equitable’ test

In *Ebrahimi v. Westbourne Galleries Limited*,<sup>56</sup> which was subsequently relied on by the Supreme Court of India in *Hind Overseas (P) Ltd v. Raghunath Prasad Jhunjunwalla*,<sup>57</sup> the House of Lords noted that ‘just and equitable’ ground would justify an order of winding-up even when the business of the company was being conducted in accordance with the principles of commercial administration in company law and constitutional documents, but in breach of understanding/agreement between the shareholders. However, such a presumption was to be limited to cases where the association formed continued on the basis of a personal relationship and mutual confidence.<sup>58</sup> This is because, in such situations, all the expectations and obligations of the parties were not exhaustively set out in the constitutional documents of the company. Therefore, the exercise of legal rights as set out in law or constitutional documents might result in unjust or inequitable treatment of the minority shareholders of the company.

The authors briefly examine common instances regarded as ‘just and equitable’ in common law jurisdictions below:

1. ***Loss of substratum of company’s business:*** A case in which circumstances occur which have the effect of knocking the bottom of company’s business.<sup>59</sup> For instance, a company was formed to work a patent which turned out to be invalid.<sup>60</sup> The Court’s order required the winding-up of the company on ‘just and equitable’ grounds because the main object for which the company was incorporated had become impossible.<sup>61</sup>
2. ***Deadlock in affairs of the management:*** A case in which business of the company is brought to a deadlock by some cause which does not consist merely in a dispute between two bodies of shareholders with regard to policy which the company has to pursue.<sup>62</sup> For instance, in *Re Yenidje Tobacco*

<sup>55</sup> *Id.*

<sup>56</sup> *Ebrahimi v. Westbourne Galleries Limited*, 1973 AC 360 (HL) (per Wilberforce L.J.) affirmed by the Supreme Court of India in *Hind Overseas (P) Ltd. v. Raghunath Prasad Jhunjunwalla*, (1976) 3 SCC 259.

<sup>57</sup> *Hind Overseas (P) Ltd. v. Raghunath Prasad Jhunjunwalla*, (1976) 3 SCC 259, ¶ 34.

<sup>58</sup> *Ebrahimi v. Westbourne Galleries Limited*, 1973 AC 360 (HL) (per Wilberforce, L.J.).

<sup>59</sup> See generally *Baird v. Bees*, 1924 SC 83; *Symington v. Symingtons’ Quarries Limited*, (1905) 8 F. 121, 129; *In Re Yenidje Tobacco Company Limited*, [1916] 2 Ch. 426 (per Cozens Hardy L.J.); *Hind Overseas (P) Ltd. v. Raghunath Prasad Jhunjunwalla*, (1976) 3 SCC 259, ¶ 34.

<sup>60</sup> *In Re Suburban Hotel Co., L.R.*, 2 Ch. 737.

<sup>61</sup> *Id.*

<sup>62</sup> *Baird v. Lees*, 1924 SC 83, 90 (per Clyde LJ).

*Company Limited*,<sup>63</sup> two persons carrying on independent businesses incorporated a private company. Under the constitution of the company, both the persons had equal voting powers, both at the board and the shareholder level.<sup>64</sup> Certain differences arose between the gentlemen and the relationship of trust and confidence deteriorated to such an extent that they did not speak to each other and an intermediary had to convey communications between them.<sup>65</sup> The court ordered winding-up of the company on 'just and equitable' grounds because there was a complete deadlock in the affairs of the management and the company was in a state not contemplated by the parties at the time of its formation.<sup>66</sup>

3. **Complete loss of confidence:** A case in which the minority shareholders can demonstrate a complete lack of confidence in the conduct of the management of company's affairs by the board of directors.<sup>67</sup> However, such dissatisfaction must not spring from being outvoted on the business affairs, but on account of lack of confidence rested on lack of probity in the conduct of company's affairs.<sup>68</sup> For instance, in *Loch v. John Blackwood Limited*, the majority shareholder's acts inevitably led to the conclusion that he regarded the company as the product of his own labors and tried to buy out the minority shareholders at an undervalue.<sup>69</sup> In such a scenario, the Court ordered winding-up of the company on account of loss of confidence in the conduct of management of company's affairs because principles of commercial administration set out in the statute were totally disregarded.<sup>70</sup>

Thus, in order to successfully bring a claim of oppression, the minority shareholders have to demonstrate that (i) the affairs of the company are being conducted with lack of probity in a burdensome, harsh and wrongful manner; and (ii) it would be 'just and equitable' for the company to be wound up, but such an order will prejudice them. It is not possible to exhaustively set out the various situations justifying winding-up of company on 'just and equitable' grounds, but ordinarily 'loss of substratum of company's business', 'deadlock' or 'complete loss of confidence' are regarded as situations giving rise to winding-up on 'just and equitable' grounds. The next sub-Section will briefly set out the other remedies available to minority shareholders under Chapter XVI of the Indian Companies Act, 2013.

<sup>63</sup> In *Re Yenidje Tobacco Company Limited*, [1916] 2 Ch. 426, 429-432.

<sup>64</sup> *Re Yenidje Tobacco Company Limited*, [1916] 2 Ch 426, 430.

<sup>65</sup> *Re Yenidje Tobacco Company Limited*, [1916] 2 Ch 426, 434.

<sup>66</sup> *Re Yenidje Tobacco Company Limited*, [1916] 2 Ch 426, 433, 436.

<sup>67</sup> *Hind Overseas (P) Ltd. v. Raghunath Prasad Jhunjhunwalla* (1976) 3 SCC 259, ¶ 33; *Loch v. John Blackwood Limited*, [1924] AC 783.

<sup>68</sup> *Loch v. John Blackwood Limited* [1924] AC 783.

<sup>69</sup> *Loch v. John Blackwood Limited*, [1924] AC 783,794.

<sup>70</sup> *Loch v. John Blackwood Limited*, [1924] AC 783, 795-797.

## 2. Mismanagement

As noted earlier, the remedy of ‘mismanagement’ is peculiar to Indian companies’ law and it has no counterpart in UK companies’ law or other common law jurisdiction.<sup>71</sup> In order to successfully prosecute a claim of mismanagement, the minority shareholders will have to demonstrate that (a) a material change has taken place in the management of the company; and (b) consequently, the affairs of the company will be conducted in a manner prejudicial to the interests of the company or all or some of its members.<sup>72</sup> Such material change may be effected in any manner including by an alteration of the board of directors, manager and ownership of company’s shares. However, a material change in the management brought in the interests of creditors, including debenture holders or any class of shareholders of the company will not be actionable as mismanagement under Indian companies’ law.<sup>73</sup>

In this regard, it is pertinent to note that a strict literal interpretation of the Indian Companies Act, 2013, seems to suggest that the minority shareholders bringing a case of mismanagement will also have to demonstrate that it is ‘just and equitable’ for the company to be wound up.<sup>74</sup> However, from a perusal of the parliamentary and other expert committee reports that preceded the enactment of the Indian Companies Act, arguably –it does not appear to be the intention of the legislature.<sup>75</sup>

That said, like oppression, mismanagement cannot be reduced to a set of specific instances. It can occur in a wide variety of ways. However, generally, conditions that prevent the proper functioning of the company in accordance with Indian Companies’ law will qualify as ‘mismanagement’ under the Indian Companies Act, 2013.<sup>76</sup>

## 3. Prejudice claims

Under the Indian Companies Act, 2013, members are also empowered to approach the NCLT in the event that the affairs have been conducted in a manner ‘*prejudicial to the interests of the company*’ or members.<sup>77</sup> This provision seems to

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<sup>71</sup> Ramaiya, *supra* note 19, 4079.

<sup>72</sup> The Companies Act, 2013, § 241(b).

<sup>73</sup> *Id.*

<sup>74</sup> The Companies Act, 2013, § 241(b), 242; *See generally* Ramaiya, *supra* note 19, 4079.

<sup>75</sup> *See generally* Ministry of Corporate Affairs, *Concept Paper- Note on Approach* (August 4, 2004), available at <http://www.mca.gov.in/Ministry/pdf/conceptpaper.pdf> (last visited on May 11, 2018); Expert Committee on Company Law, *Report on Company Law*, (May 31, 2005) available at <http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf> (last visited on May 11, 2018); STANDING COMMITTEE ON FINANCE, Fifteenth Lok Sabha, *Companies Law Bill*, 2011, Fifty Seventh Report (June, 2012).

<sup>76</sup> Ramaiya, *supra* note 19, 4082.

<sup>77</sup> The Companies Act, 2013, § 241(a).

have been introduced at the instance of the Bombay Chamber of Commerce and Industry.<sup>78</sup> The underlying intent for introducing this additional remedy seems unclear. However, in all likelihood, the provision seems to be inspired by development in companies' law in the United Kingdom. The Jenkins Committee was constituted in the UK to consider amendments to the UK Companies Act, 1948, in 1959. It considered the law relating to oppression and mismanagement in United Kingdom in 1962 (i.e. s210 of the UK Companies Act, 1948) and drew attention to a number of defects and suggested changes to remedy them.<sup>79</sup> They were:

1. ***Necessity of establishing 'fair and equitable' grounds for relief of oppression or unfair prejudice:*** The Jenkins Committee noted that there was no justifiable reason to require minority shareholders in 'oppression' claims to establish that there were justifiable reasons for winding-up the company on 'fair and equitable' grounds before granting any relief.<sup>80</sup>
2. ***'Legality' and 'oppression' claims:*** Second, the Jenkins Committee noted that, it was unclear as to whether, for acts to be regarded as 'oppressive', there was need for the petitioners to establish actual illegality or it was satisfied by conduct which without being illegal could nevertheless be justly described as reprehensible.<sup>81</sup>
3. ***'Isolated' acts and 'oppression':*** Third, the Jenkins Committee noted that oppression claims did not cover isolated acts but rather the conduct of a continuing nature.<sup>82</sup>

In order to remedy these defects, the Jenkins Committee recommended that the UK Companies Act, 1948, be amended *inter alia* to (1) make it clear that UK Companies Act, 1948 covered 'isolated' acts as well as a course of conduct; (b) extend to cases where the affairs are being conducted in a manner '*unfairly prejudicial to the interests of some part of the members and not merely in a "oppressive" manner*'. This recommendation was adopted by the British Parliament in § 75 of the UK Companies Act, 1985, and reproduced with minor amendments in § 459 of the UK Companies Act, 1985, and the present §994 of the UK Companies Act, 2006.<sup>83</sup>

<sup>78</sup> STANDING COMMITTEE ON FINANCE, Fifteenth Lok Sabha, *Companies Law Bill*, 2009, Twenty First Report (August, 2010).

<sup>79</sup> BOARD OF TRADE, *Report of the Company Law Committee*, ¶¶ 200-212 (1962), available at [http://www.takeovers.gov.au/content/Resources/other\\_resources/downloads/jenkins\\_committee\\_v2.pdf](http://www.takeovers.gov.au/content/Resources/other_resources/downloads/jenkins_committee_v2.pdf) (last visited 11 May 2018) ('Jenkins Committee Report')

<sup>80</sup> Jenkins Committee Report, *supra* note 79, ¶ 201.

<sup>81</sup> Jenkins Committee Report, *supra* note 79, ¶ 203.

<sup>82</sup> Jenkins Committee Report, *supra* note 79, ¶ 202.

<sup>83</sup> Re Saul D Harrison & Sons Plc. [1994] BCC 475, 488 (per Hoffman LJ).

In *Re Saul D Harrison & Sons Plc.*,<sup>84</sup> Neill LJ, after examining the historical background leading to introduction of the erstwhile § 459 of the UK Companies Act, 1985, noted that the scope of protection afforded in case of ‘unfair prejudice’ claims was far wider than the relief of ‘oppression’ under the English Companies Act, 1948. However, like ‘oppression’, ‘unfair prejudice’ needed to be applied flexibly and could not be reduced to a set of particular circumstances. Further, he held that, in order to successfully prosecute an ‘unfair prejudice’ claim, conduct must be both prejudicial (in the sense of causing harm to the relevant interest) and also unfair.<sup>85</sup> Additionally, the use of word “unfairly” indicated that, the court needed to take into account not only the legal rights of the petitioners, but also their legitimate expectations. However, such legitimate expectations were limited to the legal rights enshrined in the articles of association of the company save in circumstances where (a) an association was formed or continued on the basis of personal relationship; (b) agreement or understanding all or some of the members would participate in the management of the company; or (c) restrictions upon the transfer of members’ interest in the company.<sup>86</sup>

Therefore, from the aforesaid analysis, one may argue that presently, the terms ‘*prejudicial to the interests of the company or members*’ in Chapter XVI of the Indian Companies Act, 2013, are to be given the same meaning as in UK companies’ law.

Accordingly, in order to demonstrate that the acts are “*prejudicial to the interests of the company or members*”, one need not establish that the conduct is of a continuing nature. Isolated acts are also actionable under the 2013 Act. Lastly, like in cases of “oppression”, conduct which is strictly legal may still be regarded as ‘*prejudicial to the interests of the company or members*’ in certain select circumstances. However, that said, while relying on UK cases to interpret the aforesaid nascent provision, one needs to carefully examine the conditions and circumstances of the present Indian society and evaluate whether a somewhat different approach needs to be adopted.<sup>87</sup>

The next section will briefly examine the powers of the NCLT in cases of such oppression, mismanagement or prejudice claims by the minority shareholders of a company.

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<sup>84</sup> *Re Saul D Harrison & Sons Plc.*, [1994] BCC 475, 499 (per Neill LJ).

<sup>85</sup> *Id.*

<sup>86</sup> *Re Saul D Harrison & Sons Plc.*, [1994] BCC 475, 500 (per Neill LJ).

<sup>87</sup> *Kilpest (P) Ltd. v. Shekhar Mehra*, (1996) 10 SCC 696.

### C. RELIEF IN CASES OF OPPRESSION, MISMANAGEMENT OR PREJUDICE CLAIMS: POWERS OF THE NATIONAL COMPANY LAW TRIBUNAL

The 2013 Act has constituted the NCLT, a specialized tribunal, to *inter alia* deal with matters relating to oppression, mismanagement or prejudice claims.<sup>88</sup> Any party aggrieved by the order of the NCLT, can file an appeal before the National Company Law Appellate Tribunal ('NCLAT'), and thereafter before the Supreme Court of India.<sup>89</sup> Further, the 2013 Act excludes the jurisdiction of the civil courts to entertain any suit or proceeding in respect of any matters that are within the purview of the NCLT and the NCLAT.<sup>90</sup> Accordingly, under the 2013 Act, the NCLT and NCLAT have been conferred with exclusive jurisdiction to deal with matters relating to oppression, mismanagement or prejudice claims brought by the minority shareholders of a company.

In terms of §242 of the 2013 Act, the NCLT/NCLAT (as the case may be), can pass any order if it deems fit to bring an end to the matters complained of, if it is satisfied that: (i) the company's affairs have been or are being conducted in a manner prejudicial or oppressive to the members or prejudicial to the interests of the company or public interest; and (ii) that to wind-up the company would unfairly prejudice the interests of members, but otherwise the facts justify an order of winding-up on fair and equitable grounds.

In this regard, it is pertinent to note that § 242 of the 2013 Act is *pari-materia* to erstwhile § 402 of the Indian Companies Act, 1956. While interpreting § 402, Courts in India have taken a view that the relief under §402 can be granted even if the petitioners fail to prove oppression or mismanagement provided that the minority shareholders establish there are 'just and equitable' grounds for winding-up the company.<sup>91</sup> Therefore, the NCLT/ NCLAT (as the case may be) can grant any relief it deems fit under §242 of the 2013 Act to bring an end to the affairs complained of, even if the minority shareholders only establish 'just and equitable' grounds for winding-up the company. These reliefs can be in the nature of (i) regulation of the affairs of the company in future;<sup>92</sup> (ii) purchase of shares or interests of the members of the company;<sup>93</sup> (iii) termination, setting aside or modification of any agreement between the company and managing director, other directors or manager upon such terms and conditions as it deems fit;<sup>94</sup> (iv) removal of the

<sup>88</sup> The Companies Act, 2013, §§ 242, 408.

<sup>89</sup> The Companies Act, 2013, §§ 421, 423.

<sup>90</sup> The Companies Act, 2013, § 430.

<sup>91</sup> *Hanuman Prasad Bagri v. Bagress Cereals (P) Ltd.*, (2001) 4 SCC 420, ¶ 3; *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holdings Ltd.*, (1981) 3 SCC 333, ¶ 173; *M.S.D.C. Radharaman v. M.S.D. Chandrasekara Raja*, (2008) 6 SCC 750, ¶¶ 22-23.

<sup>92</sup> The Companies Act, 2013, § 242(2)(a).

<sup>93</sup> The Companies Act, 2013, § 242(2)(b).

<sup>94</sup> The Companies Act, 2013, § 242(2)(e).

managing director, manager, or any other director of the company;<sup>95</sup> (v) altering the articles of association of the company;<sup>96</sup> (vi) assess damages against delinquent managers, directors and officers of the company for fraudulent conduct, misfeasance, breach of trust etc.;<sup>97</sup> and (vii) any other reliefs deemed 'just and equitable' by the tribunal.

Furthermore, the 2013 Act provides various safeguards in the Act to ensure that orders of the NCLT/NCLAT (as the case may be) are complied with in letter and spirit. For instance, (i) if any alteration of the constitutional documents of the company is ordered by the NCLT/ NCLAT, they can be amended subsequently only with the permission of the Tribunal;<sup>98</sup> (ii) any order of the NCLT/ NCLAT directing termination or modification of any agreement executed by the company will not give rise to compensation claims;<sup>99</sup> and (iii) no managing director, manager or other director whose agreement is terminated under §242 of the 2013 Act can be re-appointed except with the permission of the NCLT/NCLAT.<sup>100</sup> The NCLT/ NCLAT have also been vested with the power to punish parties acting in contempt of their orders.<sup>101</sup> Thus, it is evident that NCLT/ NCLAT virtually enjoy unbridled powers while dealing with oppression, mismanagement and prejudice claims, under the 2013 Act. The next section will identify common instances wherein minority shareholders invoke the remedy of oppression, mismanagement and prejudice claims in India.

#### *D. COMMON INSTANCES OF OPPRESSION, MISMANAGEMENT AND PREJUDICE CLAIMS IN INDIA*

Unfortunately, unlike in other jurisdictions, there are no detailed statistical studies in India examining the specific grounds on which the minority shareholders of the company bring oppression, mismanagement and prejudice claims. However, on a perusal of reported decisions, it appears that the jurisdiction of the NCLT is often invoked in cases where there is (i) exclusion from management; (ii) dilution of shareholding; (iii) mismanagement of company's assets.

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<sup>95</sup> The Companies Act, 2013, § 242(2)(h).

<sup>96</sup> *See generally* The Companies Act, 2013, § 242(5).

<sup>97</sup> The Companies Act, 2013, § 246.

<sup>98</sup> The Companies Act, 2013, § 242(5).

<sup>99</sup> The Companies Act, 2013, § 243(a).

<sup>100</sup> The Companies Act, 2013, § 243(b).

<sup>101</sup> The Companies Act, 2013, § 425.



## 1. Exclusion from management

Most of the companies in India continue to be run by business families.<sup>102</sup> In many of these family run companies, family members actively participate in the day-to-day management of the company along with holding an ‘ownership interest’ as a shareholder. Ordinarily, exclusion of a family member from active management of such companies has been regarded as “oppressive”.<sup>103</sup>

Furthermore, even in cases where the relationship between the members of the company is in the nature of (i) partnership; or (ii) based on personal relationship involving mutual trust and confidence, exclusion from management is averred as a ground for ‘oppression’. For instance in *Vikram Bakshi v. Connaught Plaza Restaurants Ltd.*,<sup>104</sup> the petitioner Vikram Bakshi and McDonald’s India Private Limited (‘McDonald’s India’) entered into a joint venture agreement (‘JVA’) to form Connaught Plaza Restaurants Limited (‘Connaught’) to establish McDonald’s India outlets in New Delhi and other places in India. Mr. Vikram Bakshi was appointed as the Managing Director of Connaught. The JVA required McDonald’s India and its nominees to vote for re-election of Mr. Bakshi as Managing Director on continued fulfillment of certain conditions.<sup>105</sup> If his employment as Managing Director of the company was terminated, McDonald’s India had a right to purchase all his and affiliates’ shares.<sup>106</sup> McDonald India’s nominee directors did not vote for re-election of Mr. Bakshi.<sup>107</sup> Consequently, he ceased to be the Managing Director of the Company. Furthermore, McDonald’s India exercised its right to purchase the Mr. Bakshi and his affiliates’ shareholding in the company.<sup>108</sup> The NCLT held that the non-election of Mr. Bakshi as Managing Director of the company was oppressive as it was based on extraneous consideration of purchasing the shares of Mr. Bakshi at throwaway prices.<sup>109</sup> Therefore, it passed an order reinstating him as Managing Director of the company.

<sup>102</sup> Forbes India, *It’s all in the family (business)*, February 15, 2018, available at [http://www.forbesindia.com/article/indias-family-businesses/its-all-in-the-family-\(business\)/49443/1](http://www.forbesindia.com/article/indias-family-businesses/its-all-in-the-family-(business)/49443/1) (last visited on May 16, 2018).

<sup>103</sup> Ramaiya, *supra* note 19, 4028; *See generally* T.A.M. Adhavan v. Sun Freight Systems (P) Ltd., 2004 SCC OnLine CLB 39 : (2004) 4 Comp LJ 593.

<sup>104</sup> Vikram Bakshi v. Connaught Plaza Restaurants Ltd., 2017 SCC OnLine NCLT 560 : (2017) 140 CLA 142. The decision is pending before the National Company Law Appellate Tribunal. Thereafter, the parties entered into a settlement and thus may be withdrawn in the near future.

<sup>105</sup> Vikram Bakshi v. Connaught Plaza Restaurants Ltd., 2017 SCC OnLine NCLT 560 : (2017) 140 CLA 142, ¶ 13.

<sup>106</sup> Vikram Bakshi v. Connaught Plaza Restaurants Ltd., 2017 SCC OnLine NCLT 560 : (2017) 140 CLA 142, ¶ 13.

<sup>107</sup> Vikram Bakshi v. Connaught Plaza Restaurants Ltd., 2017 SCC OnLine NCLT 560 : (2017) 140 CLA 142, ¶ 39.

<sup>108</sup> Vikram Bakshi v. Connaught Plaza Restaurants Ltd., 2017 SCC OnLine NCLT 560 : (2017) 140 CLA 142, ¶ 39.

<sup>109</sup> Vikram Bakshi v. Connaught Plaza Restaurants Ltd., 2017 SCC OnLine NCLT 560 : (2017) 140 CLA 142, ¶¶ 21, 22.

## 2. Dilution of shareholding

A member who holds the majority of shares in company is entitled by virtue of his majority to control, manage and run the affairs of the company in accordance with company law. However, in many instances, these rights of the majority shareholders are diluted by issue of additional capital, rights issue and various other nefarious mechanisms, which in effect, reduce their majority shareholding to a minority. Such conduct is usually regarded as “oppressive” under the Indian Companies Act, 2013. For instance, in *Dale & Carrington Investment (P) Ltd. v. P.K. Prathapan*,<sup>110</sup> the managing director of the company issued and allotted additional share capital to himself without following either any proper legal procedure or justification. This resulted in the majority shareholders of the company being reduced to a minority.<sup>111</sup> The Supreme Court of India held that such conduct amounted to “oppression” and set aside the allotment of additional shares in favor of the Managing Director.<sup>112</sup>

However, every additional issue of share capital will not be regarded as “oppressive”. If the power to issue shares has been exercised to create sufficient number of shareholders to enable the company to exercise statutory powers, or to enable it to comply with legal requirement or in the larger interest of the company, it will not amount to oppression even if it incidentally leads to the majority shareholders losing control over the company.<sup>113</sup> For instance, in *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holdings Ltd.*,<sup>114</sup> the Supreme Court of India held that issue of additional share capital (*via* rights issue) was not oppressive because it was issued to ensure the continuance of development activities of the company that had stood frozen on account of non-compliance with exchange control laws of India. Thus, the consequent result of the majority shareholders being reduced to a minority would not be “oppressive”.

## 3. Mismanagement of company’s assets

Sale of assets of the company without compliance with the provisions of Indian companies law resulting in loss of substratum of the business of the company are some of the other grounds on which oppression and mismanagement claims are pressed by minority shareholders in India.<sup>115</sup>

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<sup>110</sup> *Dale & Carrington Investment (P) Ltd. v. P.K. Prathapan*, (2005) 1 SCC 212.

<sup>111</sup> *Dale & Carrington Investment (P) Ltd. v. P.K. Prathapan*, (2005) 1 SCC 212, ¶ 12.

<sup>112</sup> *Dale & Carrington Investment (P) Ltd. v. P.K. Prathapan*, (2005) 1 SCC 212, ¶¶ 15-30, 38.

<sup>113</sup> *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holdings Ltd.*, (1981) 3 SCC 333, ¶ 118; *Tea Brokers (P) Ltd. v. Hemendra Prosad Barooah*, (1998) 5 Comp LJ 463; *Dale & Carrington Investment (P) Ltd. v. P.K. Prathapan*, (2005) 1 SCC 212, ¶¶ 15-27.

<sup>114</sup> *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holdings Ltd.*, (1981) 3 SCC 333.

<sup>115</sup> See generally Ramaiya, *supra* note 19, 4083-4084.

### *E. SUMMARY OF LAW OF OPPRESSION AND MISMANAGEMENT IN INDIA*

The law relating to oppression, mismanagement and prejudice claims in India has developed in a unique corporate cultural environment and has thus far applied remedies recognizable in other common law jurisdictions. In order to succeed in a claim of oppression, the applicants have to demonstrate that (a) affairs of the company have been conducted with a lack of probity in a burdensome, harsh and wrongful; and (b) there are ‘just and equitable’ grounds for winding-up a company, but such an order will prejudice the interests of the applicants.

Similarly, in order to successfully prosecute a case of mismanagement, the applicants have to demonstrate that a material change has taken place in the management of the company, and in all likelihood, such change will result in the affairs of the company being conducted in a manner prejudicial to its interests.

In the event that the minority shareholders succeed in proving either oppression or mismanagement, the NCLT has been vested with wide powers to pass any orders it deems fit (including winding-up) to bring an end to such mismanagement or oppressive conduct. With the promulgation of the Indian Companies Act, 2013, even acts which ‘prejudice’ the interests of the members or company are actionable under Indian companies’ law.

The next Part will examine the arbitrability of such oppression and mismanagement claims in India.

### III. ARBITRABILITY OF OPPRESSION, MISMANAGEMENT AND PREJUDICE CLAIMS IN INDIA

The Arbitration and Conciliation Act, 1996 (‘Indian Arbitration Act, 1996’) is the enactment governing arbitration including the arbitrability of disputes in India. Accordingly, in order to determine the arbitrability of oppression, mismanagement and unfair prejudice claims in India, the author will (A) firstly, provide a brief overview of the Indian Arbitration Act, 1996; (B) secondly, deal with the general tests adopted by the courts in India to determine the arbitrability of disputes; and (C) lastly, analyse the Indian legal position relating to arbitrability of oppression, mismanagement and prejudice claims in India.

In this regard, it is pertinent to note that, the term ‘arbitrability’ has different meaning in different contexts. It may mean that:

1. disputes are not covered by the arbitration agreement between the parties;

2. disputes being covered by the arbitration agreement between the parties, do not fall within the scope of submission to the Arbitral Tribunal; or
3. disputes are incapable of adjudication and settlement by arbitration and fall within the exclusive domain of the public fora such as courts and tribunals.<sup>116</sup>

In the present context, the author uses the term ‘arbitrability’ to refer to the category of disputes that are incapable of adjudication by arbitration and are reserved exclusively for public forums such as courts and tribunals.

### *A. SUMMARY OF LEGAL FRAMEWORK GOVERNING ARBITRATION IN INDIA*

Prior to the enactment of the Indian Arbitration Act, 1996, arbitration in India was governed by three enactments, namely, the Arbitration Act, 1940; the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Awards (Recognition and Enforcement) Act, 1961.<sup>117</sup>

The Arbitration (Convention and Protocol) Act, 1937, was enacted to give effect to the Geneva Protocol, 1923,<sup>118</sup> and the Geneva Convention, 1927<sup>119</sup>. Similarly, the Foreign Awards (Recognition and Enforcement) Act, 1961 was enacted to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘New York Convention’).<sup>120</sup> The provisions of both these enactments have now been consolidated and re-enacted in Part II of the Indian Arbitration Act, 1996.<sup>121</sup>

As far as the Arbitration Act, 1940, that dealt with domestic arbitration was concerned, it was widely felt that it had become outdated and was not responsive to the contemporary needs of the Indian economy.<sup>122</sup> Further, around the same time, the General Assembly of the United Nations had recommended that all countries give due consideration to United Nations Commission on International Trade Law (‘UNCITRAL’) Model Law on International Commercial Arbitration

<sup>116</sup> *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532, ¶ 34.

<sup>117</sup> See generally Arbitration and Conciliation Act, 1996, § 85; *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552, ¶ 68 (‘BALCO’); The Arbitration and Conciliation (Amendment) Bill, 2001, 176 of 2001, Cl. 176.5 (‘LCI: Report 176’).

<sup>118</sup> Protocol on Arbitration Clauses, 24 September, 1923, 27 League of Nation Treaty Series 157.

<sup>119</sup> Convention on Execution of Foreign Awards, 26 September, 1927, 92 League of Nations Treaty Series 301.

<sup>120</sup> New York Convention on the Recognition and Enforcement of Foreign Awards, 10 June 1958, 330 UNTS 3.

<sup>121</sup> O.P. MALHOTRA, *THE LAW & PRACTICE OF ARBITRATION AND CONCILIATION 1569-1572* (Indu Malhotra, 3<sup>rd</sup> ed., 2015).

<sup>122</sup> BALCO, *supra note* 117, ¶ 68.

(‘UNCITRAL Model Law’),<sup>123</sup> in order to provide a uniform legal framework for settlement of disputes arising out of international commercial arbitration.<sup>124</sup> Thus, the Indian Arbitration Act 1996 was enacted to re-cast the law governing arbitration in India after taking into account the recommendations in UNCITRAL Model Law. However, unlike the UNCITRAL Model Law, the Indian Arbitration Act 1996 applies to both –domestic arbitration and international commercial arbitration, i.e., where at least one party is not an Indian national and also to arbitrations where all parties are Indian nationals.<sup>125</sup>

The Indian Arbitration Act, 1996 is divided into four parts. Part I (i.e. Sections 1 to 43) is headed ‘Arbitration’; Part II is headed ‘Enforcement of Certain Foreign Awards’ (i.e. §§44-60); Part III is headed ‘Conciliation’ (i.e. §§ 61-81) and Part IV being supplementary provisions (i.e. §§ 82-86).<sup>126</sup> Since Part III and IV of the Indian Arbitration Act, 1996, do not contain provisions specifically dealing with arbitration, the author will only deal with Part I and Part II of the Indian Arbitration Act, 1996.

Part I titled ‘Arbitration’ comprises of two categories of provisions. The first category regulates the conduct of arbitration proceedings- composition of arbitral tribunal,<sup>127</sup> jurisdiction of arbitral tribunals,<sup>128</sup> pleadings,<sup>129</sup> evidence,<sup>130</sup> making of arbitral awards and termination of proceedings<sup>131</sup> et al., whereas the second category are ancillary provisions that support the arbitral process—grant of interim measures prior to constitution of arbitral tribunal,<sup>132</sup> assistance of courts for taking evidence,<sup>133</sup> setting aside of the arbitral award<sup>134</sup> et al.. Thus, Part I of the Indian Arbitration Act deals with regulation of all stages of arbitration. On the other hand, Part II titled ‘Enforcement of Certain Foreign Awards’ does not contain any provisions regulating the conduct of arbitration proceedings or setting aside awards. It merely contains provisions relating to enforcement and recognition of foreign awards under the New York Convention and the Geneva Convention.<sup>135</sup>

<sup>123</sup> The Arbitration and Conciliation Act, 1996, Preamble; LCI: Report 176, *supra* note 117, ¶176.5; BALCO, *supra* note 117, ¶ 68.

<sup>124</sup> BALCO, *supra* note 117, ¶ 68; The Arbitration and Conciliation Act, 1996, Preamble.

<sup>125</sup> LCI: Report 176, *supra* note 117, ¶176.5; Konkan Railway Corpn. Ltd. v. Mehul Construction Co. (2000) 7 SCC 201, ¶ 4.

<sup>126</sup> Rohan Tigadi, *The Ghost of Implied Exclusion and Other Related Issues*, 12(2) ASIAN INTERNATIONAL ARBITRATION JOURNAL 183 (2016).

<sup>127</sup> The Arbitration and Conciliation Act, 1996, § 10-15.

<sup>128</sup> The Arbitration and Conciliation Act, 1996, § 16, 17.

<sup>129</sup> The Arbitration and Conciliation Act, 1996, § 23.

<sup>130</sup> The Arbitration and Conciliation Act, 1996, §§ 26, 27.

<sup>131</sup> The Arbitration and Conciliation Act, 1996, Chapter VI.

<sup>132</sup> The Arbitration and Conciliation Act, 1996, § 9.

<sup>133</sup> The Arbitration and Conciliation Act, 1996, § 27.

<sup>134</sup> The Arbitration and Conciliation Act, 1996, §§ 35, 36.

<sup>135</sup> Balco, *supra* note 117, ¶¶ 122-124.

In *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*,<sup>136</sup> the Supreme Court of India held that Part I and Part II of the Act are mutually exclusive of each other, apart from a few provisions. Further, the Court held that Part I would be mandatorily applicable to all arbitrations seated in India whereas Part II will only apply to enforcement of foreign awards seated outside India. Thus, the Indian Arbitration Act, 1996, follows the territoriality principle and the ‘seat’ is deemed to be the centre of gravity under the Indian Arbitration Act 1996.<sup>137</sup>

In respect of arbitrability of a dispute, §2(3) of the Indian Arbitration Act, 1996, stipulates that Part I of the enactment “*shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration*”. However, there is no specific provision either in Part I or Part II of the Indian Arbitration Act, 1996, setting out any criteria or category of disputes – civil or commercial – that would be regarded as ‘inadmissible’ under the laws of India.<sup>138</sup> However, the issue of arbitrability assumes significance and is of vital importance while dealing with some of the provisions of the Indian Arbitration Act, 1996. These provisions have been discussed in brief below:

## 1. Pre-arbitral judicial interference

The Indian Arbitration Act, 1996 stipulates various situations wherein the intervention of the Court is recognized prior to the constitution of the arbitral tribunal.<sup>139</sup>

### a. Domestic seated arbitrations

In case of Indian-seated arbitrations, §8 of the Indian Arbitration Act, 1996, requires a judicial authority seized of an action which is the subject-matter of arbitration agreement, to refer the parties to arbitration if a party to the arbitration agreement applies not later than submitting the first statement on the substance of the dispute. Further, §11 of the Indian Arbitration Act, 1996, empowers certain institutions such as the High Courts or the Supreme Court of India to appoint arbitrators if the procedure for appointment of arbitrator in the arbitration agreement fails.

While there is no express requirement in both these provisions requiring courts or other judicial authorities to determine the arbitrability of the subject-matter of the dispute, they usually pronounce on the arbitrability or

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<sup>136</sup> *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552, ¶¶ 122-124.

<sup>137</sup> Tigadi, *supra* note 126, 183.

<sup>138</sup> *A. Ayyasamy v. P. Paramasivam*, (2016) 10 SCC 386, ¶33 (per D.Y. Chandrachud J.).

<sup>139</sup> Law Commission of India, *Amendments to Arbitration and Conciliation Act, 1996*, Report No. 246, 28-30, (August 2014).

non-arbitrability of the dispute.<sup>140</sup>In *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*,<sup>141</sup> the Supreme Court of India seems to have taken a view that in case of an application for appointment of an arbitrator under §11 of the Indian Arbitration Act, 1996, the issue of “arbitrability” should be left to the arbitral tribunal for determination. The author disagrees with such a differential approach being followed in relation to proceedings under §8 and §11 of the Indian Arbitration Act, 1996. First, since §8 and §11 proceedings constitute pre-arbitral judicial interference, there is no reason why differential approach has to be adopted in case of each of these provisions. Second, if one carefully examines the text of §8 and §11 of the Indian Arbitration Act, 1996, there is no express language in these provisions suggesting that the Courts and judicial authorities have the power to adjudicate on whether the dispute is capable of settlement by arbitration. In fact, according to the author, courts and judicial authorities derive the power to determine ‘arbitrability’ of the dispute in case of §8 and §11 proceedings from §2(3) of the Indian Arbitration Act, 1996. This provision provides that any law that renders any dispute incapable of settlement by arbitration will have overriding effect over the provisions of Part I of the Indian Arbitration Act, 1996 (Part I includes §8 and §11). Thus, given the source of the power to determine ‘arbitrability’ stems from §2(3) of the Indian Arbitration Act, there is no reason as to why the issue of “arbitrability” should be left to arbitral tribunal for determination in case of proceedings under §11, unlike the proceedings under §8 of the Indian Arbitration Act, 1996.

## b. Foreign-seated arbitrations

In case of foreign seated arbitrations, §45 of the Indian Arbitration Act, 1996, requires courts and other judicial authorities to refer the parties to arbitration if the subject matter of the dispute is covered by the arbitration agreement and is capable of settlement by arbitration.<sup>142</sup> Thus, before referring the parties to arbitration, the Courts and other judicial authorities necessarily undertake an enquiry regarding the arbitrability of the subject-matter of the dispute.<sup>143</sup>

## 2. Arbitral proceedings

§16 of the Indian Arbitration Act, 1996 empowers the arbitral tribunal seated in India to rule on its jurisdiction.<sup>144</sup> Thus, it is open to any party to such arbitration proceedings to challenge the jurisdiction of the arbitral tribunal on the ground that the subject-matter of the arbitration is not capable of settlement by arbitration. Any party aggrieved by rejection of such a plea of non-arbitrability

<sup>140</sup> See generally *A. Ayyaswamy v. A. Paramasivam*, (2016) 10 SCC 386, ¶ 13 (per Sikri J.); *Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd.*, (1999) 5 SCC 688, ¶ 4-5; *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532; *Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee*, (2014) 6 SCC 677.

<sup>141</sup> *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532, ¶ 32.

<sup>142</sup> *The Arbitration and Conciliation Act, 1996*, §§ 44, 45 read with Schedule I, Art. II.

<sup>143</sup> *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641, ¶ 64.

<sup>144</sup> *The Arbitration and Conciliation Act, 1996*, § 16(1).

can make an application for setting aside the award in terms of Section 34 of the Indian Arbitration Act, 1996.<sup>145</sup>

### 3. Post award proceedings

The issue of arbitrability also assumes significance during enforcement proceedings and setting aside of awards. Under the Indian Arbitration Act, 1996, an arbitral award may be set aside or refused enforcement if the subject-matter of dispute is not capable of settlement by arbitration under the laws of India.<sup>146</sup>

The next section will examine the general tests applied by courts and judicial authorities in India to determine whether the subject-matter of the dispute is capable of settlement by arbitration.

## B. PRINCIPLES GOVERNING ARBITRABILITY OF DISPUTES UNDER THE INDIAN ARBITRATION ACT, 1996

The Indian Arbitration Act, 1996 does not lay down any tests or guidelines to determine whether any dispute – civil or commercial – is capable of settlement by arbitration. It is not at all surprising since there is no agreement, either internationally or otherwise, about what arbitrability entails, or about what kind of subject-matter or what kind of disputes, fall within one or other of the various understandings of the concept.<sup>147</sup>

Normally, any dispute, civil or commercial, contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the arbitral tribunal is excluded either expressly or by necessary implication.<sup>148</sup>

In *Booz Allen & Hamilton Inc. v. SBI Home Finance Inc.*,<sup>149</sup> the Supreme Court of India held that – generally and traditionally, all disputes relating to rights *in personam* were considered to amenable to arbitration; and all disputes relating to right *in rem* were required to be adjudicated by courts and public tribunals and hence inarbitrable. A right *in rem* is a right exercisable against the world at large whereas a right *in personam* is an interest solely against specific individuals. Thus, disputes relating to (i) criminal offences; (ii) matrimonial matters relating

<sup>145</sup> The Arbitration and Conciliation Act, 1996, § 16(6).

<sup>146</sup> The Arbitration and Conciliation Act, 1996, § 34(2)(b)(i); The Arbitration and Conciliation Act, 1996, § 48(2)(a).

<sup>147</sup> MICHAEL J. MUSTILL & STEWART BOYD, *COMMERCIAL ARBITRATION: 2001 COMPANION VOLUME TO THE SECOND EDITION* 71 (2<sup>nd</sup> Ed., 1989).

<sup>148</sup> *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532, ¶ 35; *A. Ayyaswamy v. A Paramasivam*, (2016) 10 SCC 386, ¶ 29 (per D.Y. Chandrachud J.).

<sup>149</sup> *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532, ¶ 35-38



to divorce, judicial separation, restitution of conjugal rights etc.; (iii) insolvency and winding-up proceedings; (iv) testamentary matters, such as grant of probate, letters of administration and succession certificates; and (v) intellectual property are regarded as inarbitrable.<sup>150</sup> This is because a decision/judgment under any of these proceedings generally determines the condition or status of the person or property not only vis-à-vis the parties to the dispute, but against the world at large (i.e. non-parties). Therefore, arbitration being a consent-based dispute resolution mechanism is regarded as unsuitable for deciding actions *in rem* because it affects the rights of persons not parties to the arbitration.

Further, Dr. D Y Chandrachud J. in his supplementing opinion in *A. Ayyasamy v. A. Paramasivam*<sup>151</sup> observed that disputes which are within the exclusive jurisdiction of specialized tribunals to the exclusion of ordinary civil courts in pursuance of a specific social objective may also be in arbitrable under the Indian Arbitration Act, 1996. For instance, disputes arising out of rent control legislations and consumer protections laws are reserved for exclusive adjudication by public forums and courts in pursuit of certain specific social and welfare objectives.<sup>152</sup>

Additionally, courts in India while determining the arbitrability of a dispute have also evaluated whether the arbitral tribunal is capable of granting the reliefs prayed by the parties.<sup>153</sup> In this regard, it is pertinent to note that in case of Indian-seated arbitrations, the arbitral tribunals do not have the power to provide equitable relief unless they are expressly authorised by the parties.<sup>154</sup> While this may not be an issue while dealing with disputes being adjudicated in ordinary courts, it is of vital importance when the subject matter of the arbitration agreement is a dispute that lies before equitable forums such as NCLT. In such a scenario, courts and judicial authorities in India usually demonstrate disinclination towards denuding the parties of their rights solely on account of an arbitral tribunal being chosen as a forum to adjudicate disputes. Instead, they refuse to refer the parties to arbitration so as to retain wide and extensive equitable powers to do complete justice in the matter.

Thus, broadly speaking, disputes which (i) pertain to rights *in rem*; (ii) fall within the exclusive jurisdiction of specialized tribunals to the exclusion of ordinary courts in pursuance of a specialized objective; or (iii) lack effective remedies when adjudicated by arbitral tribunal are generally regarded as inarbitrable

<sup>150</sup> *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532, ¶ 36; *A. Ayyaswamy v. A. Paramasivam*, (2016) 10 SCC 386, ¶ 14.

<sup>151</sup> *A. Ayyaswamy v. A. Paramasivam*, (2016) 10 SCC 386, ¶ 38.

<sup>152</sup> *A. Ayyaswamy v. A. Paramasivam*, (2016) 10 SCC 386, ¶¶ 36-38; *Natraj Studios (P) Ltd. v. Navrang Studios*, (1981) 1 SCC 523 : (1981) 2 SCR 466; *Skypak Couriers Ltd. v. Tata Chemicals Ltd.*, (2000) 5 SCC 294; *National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy*, (2012) 2 SCC 506.

<sup>153</sup> *Rakesh Malhotra v. Rajinder Kumar Malhotra*, 2014 SCC OnLine Bom 1146 : (2015) 2 Comp LJ 288.

<sup>154</sup> The Arbitration and Conciliation Act, 1996, § 28(2).

under the Indian Arbitration Act, 1996. The next part will examine the arbitrability of oppression, mismanagement and unfair prejudice claims in India.

### *C. ARBITRABILITY OF OPPRESSION, MISMANAGEMENT AND UNFAIR PREJUDICE CLAIMS IN INDIA*

As noticed earlier, the issue of arbitrability of the subject-matter of the dispute may arise in (i) at the pre-arbitral stage; (ii) during arbitration proceedings; or (iii) in post award proceedings. The author has not come across any reported judgments wherein the issue of arbitrability of oppression, mismanagement and prejudice claims has been raised (i) before an arbitral tribunal under §16 to oust its jurisdiction (i.e. during arbitration proceedings); or (ii) for setting aside or refusing enforcement of arbitral awards (i.e. post award proceedings). Almost all the challenges relating to arbitrability of the subject-matter of the dispute arise during the pre-arbitral stage. Typically, the party aggrieved by oppressive, prejudicial behavior or mismanagement approaches the NCLT seeking a plethora of reliefs. As a counterblast to these allegations, the other party moves an application either under §8 or §45 of the Indian Arbitration Act, 1996 (depending on whether the arbitration is India-seated or foreign-seated) before the NCLT seeking reference of the dispute to arbitration.<sup>155</sup> Therefore, the issue of arbitrability of oppression, mismanagement and prejudice claims has been determined in Indian jurisprudence solely from the standpoint of proceedings under §8 and §45 of the Indian Arbitration Act, 1996.

While deciding these applications, courts and judicial authorities in India have taken a view that oppression, mismanagement and unfair prejudice claims, are usually not capable of settlement by arbitration because of the following reasons:

#### 1. Remedies Test

Ordinarily, an arbitral tribunal could adjudicate on all disputes that could be adjudicated by regular civil courts. However, claims relating to oppression and mismanagement stand on a different footing because the NCLT – the forum adjudicating oppression and mismanagement claims – has been vested with special statutory powers that were not exercisable by regular civil courts. For instance, the NCLT can pass orders to regulate the affairs of the company, supplant the management, assess damages on delinquent directors, managers and officers of the company for fraudulent conduct, misfeasance, fraud, etc., or any other relief deemed fit to bring an end to oppression and mismanagement. Thus, given the fact that an arbitral tribunal does not enjoy such wide powers, courts and tribunals in

<sup>155</sup> See generally *Rakesh Malhotra v. Rajinder Kumar Malhotra*, 2014 SCC OnLine Bom 1146 : (2015) 2 Comp LJ 288; *Das Lagerway Wind Turbines Ltd. v. Cynosure Investments (P) Ltd.*, 2007 SCC OnLine Mad 280 : (2008) 1 Arb LR 97; *Sporting Pastime India Ltd. v. Kashthuri and Sons Ltd.*, 2006 SCC OnLine Mad 551 : (2008) 141 Comp Cas 111).

India usually treat oppression, mismanagement and prejudice claims as incapable of settlement by arbitration.<sup>156</sup> In this regard, it may be noted that, an arbitral tribunal, being a creature of a contract, can only adjudicate disputes in accordance with the terms of the contract.<sup>157</sup> Further, in case of India seated arbitrations, the arbitral tribunal cannot adjudicate dispute applying principles of equity unless such powers are specifically conferred by the parties.<sup>158</sup>

Interestingly, in one reported judgment, a NCLT bench seems to have taken a view that the jurisdiction of the NCLT/NCLAT cannot be ousted even with the consent of the parties.<sup>159</sup> Therefore, any agreement that seeks to oust the jurisdiction of the NCLT/NCLAT is void to that extent.

## 2. Bifurcation of Claims Test

While the Indian Arbitration Act, 1996, requires a judicial authority seized of an action covered by the arbitration agreement to be mandatorily referred to arbitration, it does not permit bifurcation of claims.<sup>160</sup> In this regard, it is pertinent to note that, in terms of §8 and §45 of the Indian Arbitration Act, judicial authorities in India are under an obligation to mandatorily refer the parties to arbitration if the subject matter of the dispute is covered by the arbitration agreement.<sup>161</sup> However, if the subject-matter of the dispute is partially covered by the arbitration agreement, there is no provision in the Indian Arbitration Act, 1996, requiring the claim covered by the arbitration agreement to be bifurcated and referred to arbitration.<sup>162</sup> Thus, the Indian Arbitration Act, 1996, does not permit bifurcation of claims or splitting of the parties for reference to arbitration under §8 and §45 of the Indian Arbitration Act, 1996. Given this settled position of law, courts and other judicial authorities in India refuse reference of the dispute to arbitration if (i) the subject-matter of the oppression, mismanagement and prejudice petition is not wholly covered by the arbitration agreement; or (ii) there is no commonality between the parties to the arbitration agreement and parties to the petition.<sup>163</sup>

However, Courts and judicial authorities are sensitive to the fact that parties may resort to filing vexatious, malicious and ‘dressed-up’ oppression,

<sup>156</sup> See generally *Jugnar Processors (P) Ltd. v. Rohtas Jugalkishore Gupta*, 2014 SCC OnLine CLB 160; *Rakesh Malhotra v. Rajinder Kumar Malhotra* 2014 SCC OnLine Bom 1146 : (2015) 2 Comp LJ 288.

<sup>157</sup> See generally *The Arbitration and Conciliation Act, 1996*, § 28(3).

<sup>158</sup> See generally *The Arbitration and Conciliation Act, 1996*, § 28(2).

<sup>159</sup> *Punita Khatter v. Explorers Travels and Tours (P) Ltd.*, (2017) 136 CLA 0034 (plz chk) ¶¶ 10-11.

<sup>160</sup> *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya*, (2003) 5 SCC 531, ¶¶ 12-17.

<sup>161</sup> *P. Anand Gajapathi Raju v. P.V.G. Raju*, (2000) 4 SCC 539, ¶ 8; *Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleum*, (2003) 6 SCC 503, ¶¶ 13-16; *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641, ¶ 69.

<sup>162</sup> *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya*, (2003) 5 SCC 531, ¶¶ 12-17.

<sup>163</sup> See generally *Punita Khatter v. Explorers Travels and Tours (P) Ltd.*, (2017) 136 CLA 0034(plz chk), ¶ 10-11.

mismanagement and prejudice petitions to oust *bona fide* arbitration clauses.<sup>164</sup> Thus, they have cautioned against a straight-jacket formula being adopted while adjudicating §8 or §45 applications. In this regard, it is pertinent to note that a two-pronged test could be deciphered from the decisions of Indian Courts and judicial authorities for determining whether an oppression, mismanagement and unfair prejudice claim has been initiated *bona fide*. They are:

### 3. Necessary Parties Test

As noted earlier, courts and judicial authorities will ordinarily refuse to refer the disputes to arbitration if there is no commonality between the parties to the dispute and parties to the arbitration agreement. Thus, in many oppression, mismanagement and prejudice claims, legal strangers to the cause of action are added as parties to defeat the arbitration agreement. For instance in some cases, the directors of the company, who are not parties to the arbitration agreement, are added as parties to the oppression, mismanagement and prejudice petition solely to avoid reference of the dispute to arbitration. In order to check such despicable methods adopted by some of the parties, courts and judicial authorities in India have adopted the ‘necessary parties’ test.<sup>165</sup> As per this test, the courts and judicial authorities examine whether (i) an effective order can be passed in an oppression, mismanagement and prejudice petition; and (ii) a complete and final determination be made without the presence of the party which is not party to the arbitration agreement. Unless a party to the oppression, mismanagement and prejudice dispute (not party to the arbitration agreement) satisfies the ‘necessary parties’ test, the dispute will be referred to arbitration.

However, the legality of the ‘necessary parties’ test is debatable. In this regard, it is pertinent to note that, the Law Commission of India had recommended an amendment to §8 of the Indian Arbitration Act, 1996, which in effect gave express legislative sanction to the ‘necessary parties’ test.<sup>166</sup> However, the recommendation of the Law Commission of India was not accepted. Given the fact that the proposed amendment was neither clarificatory nor intended to codify existing law, one could argue that the ‘necessary parties’ test is not sanctioned by the Indian Arbitration Act, 1996. Thus, if there is no commonality between the parties to the dispute and the parties to the arbitration agreement, the oppression, mismanagement and unfair prejudice petition need not be referred to arbitration.

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<sup>164</sup> Rakesh Malhotra v. Rajinder Kumar Malhotra, 2014 SCC OnLine Bom 1146 : (2015) 2 Comp LJ 288; Sidharth Gupta v. Getit Infoservices (P) Ltd., 2016 SCC OnLine CLB 10.

<sup>165</sup> See generally, Sidharth Gupta v. Getit Infoservices (P) Ltd., 2016 SCC OnLine CLB 10.

<sup>166</sup> Law Commission of India, *Amendments to Arbitration and Conciliation Act, 1996*, Report No. 246, 42, 43 (August 2014).

#### 4. Totality test

While examining whether the petition is dressed up or vexatious, courts and judicial authorities in India have opined that one needs to read the petition as a whole with specific emphasis on the grounds and the reliefs claimed in the petition.<sup>167</sup> If on such holistic analysis, the NCLT/NCLAT comes to the conclusion that the reliefs in the petition could be granted by an arbitral tribunal and the petition was primarily intended to defeat the arbitration agreement, the parties should be referred to arbitration.<sup>168</sup>

Thus, from the aforesaid analysis, it is clear that disputes relating to oppression, mismanagement and unfair prejudice are considered to be inarbitrable in India because (i) NCLT/NCLAT are vested with specialized statutory powers that are not ordinarily exercisable by an arbitral tribunal; and (ii) the Indian Arbitration Act, 1996 does not permit bifurcation of the dispute or mandate reference of the parties to arbitration when there is no commonality of parties.

The next Part of the paper will examine the position of arbitrability of oppression, prejudice and mismanagement disputes in Singapore and United Kingdom to determine whether developments in these jurisdictions warrant a re-think of the issue in India.

### IV. ARBITRABILITY OF OPPRESSION AND MISMANAGEMENT CLAIMS IN UNITED KINGDOM AND SINGAPORE

According to the 2018 International Arbitration Survey conducted by the Queen Mary University of London in association with White & Case LLP, London and Singapore continue to remain among the top five preferred seats of arbitration in the world.<sup>169</sup> These two seats are also home to the leading arbitral institutions in the world – the London Court of International Arbitration (‘LCIA’) and the Singapore International Arbitration Centre (‘SIAC’). While India is home to over thirty five arbitral institutions, parties are reluctant to submit their disputes to these institutions mainly on account of issues with their infrastructure, facilities and services.<sup>170</sup> Most of the Indian parties thus choose to arbitrate their disputes

<sup>167</sup> See Rakesh Malhotra v. Rajinder Kumar Malhotra, 2014 SCC OnLine Bom 1146 : (2015) 2 Comp LJ 288 ¶ 86.

<sup>168</sup> Rakesh Malhotra v. Rajinder Kumar Malhotra, 2014 SCC OnLine Bom 1146 : (2015) 2 Comp LJ 288; Jugnar Processors (P) Ltd. v. Rohtas Jugalkishore Gupta, 2014 SCC OnLine CLB 160.

<sup>169</sup> White & Case and Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*, 2018, available at [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF) (last visited 11 July 2018).

<sup>170</sup> JUSTICE B.N. SRIKRISHNA COMMITTEE, *High Level Committee to Review the Institutionalization of Arbitration Mechanism in India*, 49 (July 30, 2017) (‘Justice B.N. Srikrishna Committee Report’).

with the aid of foreign arbitral institutions like the LCIA or SIAC. In fact, in 2017, Indian parties were the top foreign user of SIAC accounting for approximately forty seven percent of the arbitral institution's case load.<sup>171</sup> Even in relation to the LCIA, Indian parties were amongst the top three Asian users of the facility.<sup>172</sup>

Further, as noted earlier, the law relating to oppression and prejudice claims in India has closely mirrored the law relating to oppression and mismanagement in United Kingdom. The Indian Companies Act, 1913 incorporated provisions relating to oppression in 1951 from the UK Companies Act, 1948, which was enacted pursuant to the recommendations of the Cohen Committee. These provisions have been re-enacted in subsequent Indian companies' law legislations, with minor modifications, including the latest Indian Companies Act, 2013. The provisions relating to unfair prejudice that were incorporated in English Companies' law as a result of the recommendations of the Jenkins Committee have also been incorporated in the Indian Companies Act, 2013.

Similarly, the law relating to oppression and unfair prejudice in Singapore also derives inspiration from the provisions of the English companies' law.<sup>173</sup> Therefore, having regard to (i) the similarities between the law relating to oppression and unfair prejudice claims in these three jurisdictions; and (ii) Indian parties being one of the top foreign parties utilising the services of arbitral institutions located in these jurisdictions, it may be worthwhile to examine the law relating to arbitrability of oppression and unfair prejudice claims in England and Singapore while evaluating the arbitrability of oppression, mismanagement and unfair prejudice claims in India. In order to accomplish this objective, the author will briefly summarize the law relating to arbitrability of oppression and unfair prejudice claims in (A) United Kingdom; and (B) Singapore. Thereafter, the author will critically examine whether the principles can be suitably adopted in the Indian context (C).

### *A. ARBITRABILITY OF OPPRESSION AND UNFAIR PREJUDICE CLAIMS IN UNITED KINGDOM*

Given the fact that the purpose of this paper is to re-evaluate the position of arbitrability of oppression, mismanagement and prejudice claims in India, it may be worthwhile to briefly examine the key differences between the law of United Kingdom and India. This will enable us to evaluate the suitability of the principles adopted in United Kingdom ('UK') to the Indian legal position.

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<sup>171</sup> Singapore International Arbitration Centre, *Annual Report 2017*, available at [http://siac.org.sg/images/stories/articles/annual\\_report/SIAC\\_Annual\\_Report\\_2017.pdf](http://siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2017.pdf) (last visited on July 11, 2018).

<sup>172</sup> London Court of International Arbitration, *Facts and Figures: 2017 Case Report*, available at <http://www.lcia.org/lcia/reports.aspx> (last visited on July 11, 2018).

<sup>173</sup> *Tomolugen Holdings Limited & Another v. Silica Investors Limited and Other*, [2015] SGCA 57, ¶ 85.

Provisions relating to ‘oppression’ were first introduced in UK through the UK Companies Act, 1948 as a result of the recommendations of the Cohen Committee. The relief of ‘oppression’ was envisaged as an alternative to the relief of winding-up the company. Thus, in order to successfully prosecute a claim of winding-up, the petitioner had to establish that (i) the company’s affairs were being conducted in a manner oppressive to some part of the members; and (ii) to wind-up the company would unfairly prejudice that part of the members, but otherwise the facts justified winding-up of the company on ‘fair and equitable’ grounds. These provisions were imported into Indian law in 1951 and have been re-enacted in subsequent Indian companies’ law legislations,<sup>174</sup> albeit with the following modifications: (i) the Indian companies’ law provided a separate and independent right to the members to petition the courts if there was ‘mismanagement’ of the company; (ii) the Indian companies’ law empowered the court to assess damages against delinquent directors, managers, officers and others; (iii) the courts were empowered to grant interim orders pending the making of a final order factoring in the considerable delays in the Indian legal system; and (iv) the power to present a petition, which was available even to a single shareholder under the UK Companies Act, 1948, was restricted to persons holding a certain threshold of shares.<sup>175</sup>

In 1959, the Jenkins Committee was constituted to review and report on the working of the English Companies Act, 1948.<sup>176</sup> The Committee noted that the provisions relating to ‘oppression’ had failed to achieve the desired results. Accordingly, various amendments were suggested. First, it recommended that there should be no requirement to prove that there were ‘fair and equitable’ grounds for winding-up the company in order to prosecute an ‘oppression’ petition.<sup>177</sup> Second, it recommended that the term “oppression” be replaced by the word “unfairly prejudicial” in §210 of the UK Companies Act, 1948. In this regard, it may be noted that, §210 of the UK Companies Act, 1948, earlier only seemed to cover a course of conduct as distinct from an isolated act.<sup>178</sup> Further, in order to successfully prosecute an ‘oppressive’ petition, it was unclear as to whether the petitioner had to prove actual illegality or would it be satisfied by conduct which without being actually illegal could nevertheless be justly described as reprehensible. The term ‘unfairly prejudicial’ were meant to clarify that a claim under §210 of the UK Companies Act, 1948, would cover (i) isolated acts as well course of conduct; and (ii) acts which without being actually illegal were nevertheless reprehensible.

These recommendations were adopted by the British Parliament in §75 of the UK Companies Act, 1980.<sup>179</sup> They have been reproduced in subsequent

<sup>174</sup> See generally The Companies Act, 1956, §§ 397, 241.

<sup>175</sup> Bhabha Committee Report, *supra* note 17, ¶ 200.

<sup>176</sup> Jenkins Committee Report, *supra* note 79.

<sup>177</sup> Jenkins Committee Report, *supra* note 79, ¶ 201.

<sup>178</sup> Jenkins Committee Report, *supra* note 79, ¶ 202.

<sup>179</sup> Re Saul D Harrison & Sons Plc., [1994] BCC 475.

UK companies' law legislations including the present §994 of the UK Companies Act, 2006.<sup>180</sup> These changes recommended by the Jenkins Committee have also found a place in the Indian Companies Act, 2013. It provides that acts '*prejudicial*' to the affairs of the company or members would be actionable under the Indian Companies Act, 2013.<sup>181</sup> Like the NCLT/NCLAT in India, courts in United Kingdom have the right to pass any orders they deem fit to bring an end to unfairly prejudicial conduct of the persons in control of the company.<sup>182</sup> However, unlike India, an order of winding-up cannot be passed by the English courts in unfair prejudice proceedings. Thus, the law in India relating to oppression and prejudicial claims mirrors the development of law in United Kingdom.

As far arbitration is concerned, the Arbitration Act, 1996 ('UK Arbitration Act') is the law governing arbitration in United Kingdom. It does not lay down any criteria for determining the category of disputes that are not capable of settlement by arbitration. §81 of the said legislation simply provides that the UK Arbitration Act will not affect any rule of law relating to matters which are not capable of settlement by arbitration.<sup>183</sup> Thus, like Indian courts and judicial authorities, the determination as to whether a dispute is capable of settlement by arbitration is made by the UK courts as and when they arise.

In *Fulham Football Club (1987) Ltd. v. Richards*,<sup>184</sup> the issue of whether 'unfair prejudice' claims are capable of settlement by arbitration came up for consideration before the Chancery Division of the UK High Court of Justice ('Chancery Division'). The petitioner was a member of the Football Association Premier League Limited ('FAPL'). It presented a petition under §994 of the UK Companies Act, 2006, on the ground that the Chairman of FAPL had conducted its affairs in a manner prejudicial to the interests of the petitioner.<sup>185</sup> The respondents (i.e. FAPL and its Chairman) filed an application for stay of these 'unfair prejudice' proceedings under §9 of the UK Arbitration Act on the ground that (i) there was an arbitration agreement between the parties; and (ii) matters raised in the unfair prejudice petition were covered by the arbitration agreement.<sup>186</sup> Therefore, the unfair prejudice proceedings had to be stayed and the matter referred to arbitration. In this regard, it is pertinent to note that, §9 of the UK Arbitration Act requires courts to stay proceedings in so far as the dispute is covered by the arbitration agreement unless the courts find that the arbitration agreement is null and void, inoperative or incapable of being performed.<sup>187</sup>

<sup>180</sup> The Companies Act, 1985, § 459 (United Kingdom); The Companies Act, 2006, § 994 (United Kingdom).

<sup>181</sup> The Companies Act, 2013, § 241(1)(a).

<sup>182</sup> The Companies Act, 2006, § 996 (United Kingdom).

<sup>183</sup> The Arbitration Act, 1996, § 81(1)(a), (United Kingdom).

<sup>184</sup> *Fulham Football Club (1987) Ltd. v. Richards*, (2011) 2 WLR 1055.

<sup>185</sup> *Fulham Football Club (1987) Ltd. v. Richards*, (2011) 2 WLR 1055, 1057-58.

<sup>186</sup> *Fulham Football Club (1987) Ltd. v. Richards*, (2011) 2 WLR 1055, 1063, 1069.

<sup>187</sup> The Arbitration Act, 1996, § 9 (United Kingdom).



Opposing the grant of stay under §9 of the UK Arbitration Act, the petitioners contended that the dispute in the unfair prejudice petition was inarbitrable because (i) only courts (and not arbitrators) had the power to grant reliefs for unfair prejudice under §996 of the UK Companies Act, 2006; and (ii) that the invocation of jurisdiction under §994 of the UK Companies Act, 2006, required the Courts to consider the broader picture than simply the relationship between the parties to the arbitration.<sup>188</sup> In other words, the jurisdiction required public interest, rights of employees, creditors, other members and third parties alongside other extraneous factors to be taken into account.

The Court rejected the contention of the petitioners and allowed the stay application under §9 of the UK Arbitration Act, 1996. The Court noted that, in the present case, the arbitrators had the power to decide the dispute and make the same kind of orders as contemplated under §996 of the UK Companies Act, 2006.<sup>189</sup> Therefore, the apprehension of the petitioner that the arbitrator did not have the power to grant necessary reliefs was misplaced. Further, the Chancery Division concluded that ‘unfair prejudice’ petitions were capable of being submitted to arbitration provided that (i) third parties were not bound by resultant award; and (ii) no *in rem* relief was sought.<sup>190</sup>

Therefore, from the aforesaid analysis, it appears that ‘unfair prejudice’ claims are *per se* not regarded as in arbitrable in United Kingdom. Ordinarily, Courts in UK will stay proceedings and refer the parties to arbitration if (i) the dispute is partly or wholly covered by arbitration agreement; (ii) the resultant award does not affect rights of third parties; and (iii) no *bona fide* relief *in rem* is sought by the petitioner initiating ‘unfair prejudice’ proceedings.

## B. ARBITRABILITY OF OPPRESSION CLAIMS IN SINGAPORE

Like India, Singaporean law on oppression is modelled on §210 of the UK Companies Act, 1948.<sup>191</sup> §216 of the Singaporean Companies Act, 1967 (‘Singaporean Companies Act’) *inter-alia* empowers any member or debenture-holder of a company to file an oppression petition if the affairs of the company or the powers of the directors are being exercised in a manner oppressive to one or more of the members or the debenture-holders.<sup>192</sup> If on such an application, the Court is of the opinion that the affairs of the company have been or will be

<sup>188</sup> Fulham Football Club (1987) Ltd. v. Richards, (2011) 2 WLR 1055, 1065-66.

<sup>189</sup> Fulham Football Club (1987) Ltd. v. Richards, (2011) 2 WLR 1055, 1070.

<sup>190</sup> Fulham Football Club (1987) Ltd. v. Richards, (2011) 2 WLR 1055, 1071.

<sup>191</sup> Tomolugen Holdings Limited & Another v. Silica Investors Limited and Other, [2015] SGCA 57, ¶ 85.

<sup>192</sup> The Companies Act, 1967, § 216(1) (Singapore).

conducted in a manner oppressive to some of the members or debenture holders, it may pass such order as it deems fit including an order to wind-up the company.<sup>193</sup>

As far as arbitration is concerned, two separate regimes govern the conduct of arbitration in Singapore –Singapore Arbitration Act (‘SAA’) and the Singapore International Arbitration Act (‘SIAA’).<sup>194</sup> For the purpose of this paper, it is sufficient to note that the concept of arbitrability finds legislative expression in §11 of the SIAA.<sup>195</sup> It stipulates that there will ordinarily be a presumption of arbitrability so long as a dispute falls within the scope of the arbitration clause. This presumption will be rebutted if it is established that: (i) Parliament intended to preclude a particular type of dispute from being arbitrated (as evidenced by either the text or legislative history of the statute in question); or (ii) It would be contrary to the public policy considerations involved in that dispute to permit it to be resolved by arbitration.<sup>196</sup>

The arbitrability of oppression claims in Singapore was settled by the Court of Appeal of Singapore in *Tomolugen Holdings Ltd and Another v. Silica Investors Ltd and Other Appeals*.<sup>197</sup> In this case, the respondent, a minority shareholder instituted proceedings claiming that the affairs of the company were being conducted in a manner oppressive to its interest as a member. The appellants filed an application for stay under §6 of the SIAA. In this regard, it is pertinent to note that, like the UK Arbitration Act, §6 of the SIAA stipulates that the court must stay its proceedings in so far they are covered by the arbitration agreement.<sup>198</sup> The only exceptions to this rule are when the court is satisfied that the arbitration agreement is “null and void”, “inoperative” or “incapable of being performed”.<sup>199</sup> The Singaporean courts have taken a view that, if the subject-matter of the dispute is not capable of settlement by arbitration, the arbitration agreement will be regarded as “inoperative” and “incapable of being performed”. Accordingly, the proceedings will not be stayed under §6 of the SIAA. Given this position of law, the respondents prayed for refusal of stay under §6 of the SIAA on the ground that the oppression claims were inarbitrable under Singaporean law.

The Court of Appeal rejected this contention and held that oppression claims were capable of settlement by arbitration because: (i) there was nothing in the legislative history and statutory purpose of §216 of the Singaporean Companies Act which suggested that a dispute over minority oppression or unfair

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<sup>193</sup> The Companies Act, 1967, § 216(2) (Singapore).

<sup>194</sup> Singapore Law Watch, *International and Domestic Arbitration in Singapore*, February 7, 2019, available at <https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-06-the-conflict-of-laws-3> (last visited on July 13, 2018).

<sup>195</sup> *Tomolugen Holdings Limited & Another v. Silica Investors Limited and Other*, [2015] SGCA 57, ¶ 38.

<sup>196</sup> *Id.*; International Arbitration Act, 1994, § 11 (Singapore).

<sup>197</sup> *Tomolugen Holdings Limited & Another v. Silica Investors Limited and Other*, [2015] SGCA 57.

<sup>198</sup> *Id.*

<sup>199</sup> International Arbitration Act, 1994, § 6(2) (Singapore).

prejudice is of a nature which made it contrary to public policy for the dispute to be adjudicated by arbitration; (ii) the nature of statutory oppression claim generally related to regulation of relationship between the shareholders of a company without engaging in further public interest; (iii) there was no other jurisdiction wherein oppression claims were held to be *per se* inarbitrable; (iv) the inability of the arbitral tribunal to grant certain reliefs was not relevant for determining the question of arbitrability; (v) the potential procedural complexity resulting from having to resolve the underlying dispute before an arbitral tribunal and then applying to the court for certain reliefs beyond the powers of the tribunal would not render the underlying disputes inarbitrable.<sup>200</sup> As a result, the Court of Appeal stayed that part of the oppression claim covered by the arbitration agreement between the parties. However, the Court continued to retain jurisdiction over matters not covered by the arbitration agreement.

### C. SINGAPOREAN AND UK ARBITRABILITY PRINCIPLES: NEED FOR RE-THINK IN INDIA?

The issue of arbitrability of oppression, mismanagement and prejudice claims in India arises during pre-arbitral stages in India. In other words, the majority shareholders or persons in control of the company resist oppression, mismanagement and prejudice claims filed by minority shareholders by seeking reference of the underlying dispute to arbitration under §8 and §45 of the Indian Arbitration Act, 1996. As noted earlier, the Indian courts seem to have taken a view that disputes pertaining to oppression, mismanagement or prejudice claims are not capable of settlement by arbitration because: (i) NCLT is vested with special powers not exercisable by an arbitral tribunal; and (ii) Indian Arbitration Act, 1996, does not permit bifurcation of claims.

On the other hand, Singaporean and UK courts seem to take a view that disputes relating to oppression are *per se* arbitrable. According to Singaporean and UK law, the fact that arbitral tribunal is not capable of granting certain reliefs granted by courts in oppression claims is not a relevant criteria for determining arbitrability of oppression claims.<sup>201</sup> Further, (i) the lack of commonality between the parties to the oppression petition and the parties to the arbitration agreement; and (ii) the subject-matter of oppression petition not being fully covered by the arbitration agreement between the parties, are not relevant factors for staying court proceedings and referring the parties to arbitration.

According to the authors, this difference in approach between the Singaporean and Indian courts mainly stems from the different structural design of the Indian Arbitration Act, UK Arbitration Act and the SIAA.

<sup>200</sup> Tomolugen Holdings Limited & Another v. Silica Investors Limited and Other, [2015] SGCA 57; See also L Capital Jones Ltd and Another v. Maniach Private Limited, [2017] SGCA 03.

<sup>201</sup> Tomolugen Holdings Ltd and Another v. Silica Investors Limited and Other Appeals, [2015] SGCA 57; See also L Capital Jones Ltd and Another v. Maniach Private Limited, [2017] SGCA 03.

First, §8 and §45 of the Indian Arbitration Act mandatorily require the parties to be referred to arbitration in terms of the arbitration agreement. Once the dispute is referred to arbitration, nothing remains to be decided in the original action or any appeal arising therefrom. There is no stay of proceedings before the court and all the rights, liabilities and remedies of the parties are governed by the arbitral award of the tribunal.<sup>202</sup> On the other hand, the SIAA and UK Arbitration Act only envisage stay of proceedings.<sup>203</sup> Thus, in the event that, the arbitral tribunal is not empowered to provide certain reliefs, it is always open to the parties to approach the Singaporean Courts or UK Courts (as the case may be) for those reliefs.<sup>204</sup> Therefore, given this structural difference between the Indian Arbitration Act, UK Arbitration Act and the SIAA, the Indian courts necessarily examine whether the arbitral tribunal is capable of granting *bona fide* reliefs sought by the petitioners in an oppression, mismanagement or prejudicial claim.

Second, unlike the Indian Arbitration Act, the SIAA and UK Arbitration Act permit bifurcation of claims and reference of the dispute to arbitration even if there is no commonality between the parties to the dispute and parties to the arbitration agreement.<sup>205</sup> Thus, unlike India, the inability to bifurcate claims does not impede reference of disputes to arbitration in Singapore.

Therefore, on account of these reasons - (i) the remedies that can be provided by an arbitral tribunal; (ii) whether all the parties to the dispute are parties to the arbitration agreement; and (iii) whether the subject-matter of the dispute is entirely covered by the arbitration clause become important considerations while determining 'subject-matter' arbitrability of oppression, mismanagement and prejudice claims in India. Thus, given the stark differences in the structural design of the Indian Arbitration Act, SIAA and UK Arbitration Act, the principles relating to arbitrability of oppression and unfair prejudice claims in Singapore and UK may not be entirely applied in the Indian legal context.

## V. CONCLUSION

At the outset, it may be noted that §2(3) read with §44 of the Indian Arbitration Act, 1996, gives precedence to any law that renders certain disputes incapable of being submitted to arbitration. Thus, before determining whether oppression, mismanagement and prejudice claims are arbitrable under the Indian Arbitration Act, 1996, applying the general tests of 'arbitrability' laid down by courts, one needs to evaluate whether there are any express or implied restrictions under the Indian Companies Act, 2013, that renders such claims inarbitrable. The

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<sup>202</sup> P. Anand Gajapathi Raju v. P.V.G. Raju, (2000) 4 SCC 539, ¶ 8.

<sup>203</sup> International Arbitration Act, 1994, § 6 (Singapore); Arbitration Act, 1996, § 9 (United Kingdom).

<sup>204</sup> Tomolugen Holdings Ltd and Another v. Silica Investors Limited and Other Appeals, [2015] SGCA 57.

<sup>205</sup> See generally International Arbitration Act, 1994, § 6 (Singapore); Tomolugen Holdings Ltd and Another v. Silica Investors Limited and Other Appeals, [2015] SGCA 57.

reference to Indian Companies Act, 2013, is but natural considering that the entire scheme relating to oppression, mismanagement and prejudice claims is contained in the said enactment. Since there is no express bar under the Indian Companies Act, 2013, it is necessary to consider whether there are any implied restrictions against arbitrability of such claims. While determining whether there are any implied restrictions on arbitrability of disputes in legislations, Indian courts, as illustrated above, usually need to examine whether (i) the statute creates any special rights or liability and further confers exclusive jurisdiction on any tribunals; and (ii) whether remedies normally associated with arbitration proceedings are prescribed by the said statute. If either of these tests is satisfied, it is an indication that the statute impliedly prohibits settlement of disputes by arbitration.

In this regard, it may be noted that §430 of the Indian Companies Act, 2013, confers exclusive jurisdiction on the NCLT/NCLAT to the exclusion of civil courts to adjudicate on any oppression, mismanagement and unfair prejudice claims. There is no express provision under the Indian Arbitration Act, 1996, setting out the powers of an arbitral tribunal. However, as shown previously, Indian courts and judicial authorities have taken a view that an arbitral tribunal can adjudicate every civil or commercial dispute, either contractual or non-contractual, which can be decided by the court. Considering that the Indian Companies Act, 2013, bars a civil court from entertaining any suit or proceedings in relation to oppression, mismanagement or prejudice claims, one may take a view that it also impliedly results in a bar on settlement of such claims by arbitration.

Further, the NCLT has been clothed with extensive powers under §242 of the Companies Act, once it finds that the affairs of the company have been mismanaged or are conducted in a manner prejudicial or oppressive to some of the members. For instance under sub-clause 2(e) and 2(f) of the provision, it can modify, terminate or set aside, any contract between the company and its managing director, manager or any other person, under sub-clause 2(a) of the provision, regulate the conduct of the affairs of the company in future, under sub-clause 5 of the provision – to alter the articles of association, and under sub-clause (m) of the provision, to supplant the management of the company and pass such orders that it deems just and equitable to bring an end to the mismanagement, oppressive or prejudicial conduct. All these reliefs are not necessarily associated with arbitration proceedings as they not only bind the parties to the dispute (rights *in personam*), but hold good against the world at large (rights *in rem*). Therefore, on account of the aforesaid factors, one may take a view that oppression, mismanagement and prejudice claims are inarbitrable under Indian law.

However, the Courts and judicial authorities in India must guard against entertaining any frivolous, vexatious and ‘*dressed up*’ oppression, prejudice and mismanagement petitions that are filed by scrupulous parties to avoid arbitration of any *bona fide* dispute. In order to thwart such attempts, the NCLT should consider the oppression, mismanagement or prejudice claim as a whole

with specific emphasis on the reliefs sought in the petition. If it comes to the conclusion that the petition merely seeks enforcement of contractual rights of parties covered by the arbitration agreement and nothing more, it should refer the parties to arbitration and not abet circumvention of the arbitration agreement.

Further, as noted earlier, Indian courts and tribunals often refuse to refer disputes to arbitration because there is no commonality between the parties to the dispute and parties to the arbitration agreement. In order to prevent such a scenario, any shareholder agreements, investment agreements or articles of association can include potential respondents in oppression, mismanagement or prejudice petition as parties to the arbitration agreement. A perusal of the Indian Companies Act, 2013 from §241 to §244 makes it amply clear that apart from shareholders and members, even board members, managing director, manager and other officers of the company could be potential respondents in an oppression, mismanagement or prejudice petition. Therefore, in the event that oppression, mismanagement or prejudice petition is found to be (i) 'dressed up'; (ii) frivolous; (iii) vexatious and (iv) lacks commonality between the parties, it will not act as an impediment to the matters being referred to arbitration.