# *THE RUPALI CASE AND THE THEORY OF CONCURRENT JURISDICTION*

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## I. Introduction

International commercial arbitrations, in contrast to domestic commercial arbitrations, usually involve a number of systems of law or legal rules. This particular issue of the potential, or actual, applicability of a number of potentially conflicting systems of law, or legal rules, to international commercial arbitrations is of fundamental importance because the legal framework within which international commercial arbitrations take place defines and structures both the arbitral relationship as well as the rights and obligations which emerge as a result of this relationship. Unfortunately the matter is not merely of fundamental importance but of an equal degree of complexity. In view of its fundamental importance in understanding international commercial arbitrations, this paper seeks to explore this issue of the applicability of, and the relationship between, the various systems of law or legal rules involved in international commercial arbitrations as well as the interrelated issue of the jurisdiction of different courts during various phases of the arbitral relationship. In particular, it is proposed to do so (a) by focusing on and critically analyzing the law as developed by the Pakistani Supreme Court in the Rupali case' and (b) by critically comparing the Rupali case with the law as developed in England and India.

At the inception, it is necessary to identify the basic questions, which this paper seeks to address in relation to the applicability of various systems of law, or legal rules, to international commercial arbitrations. In order to identify and understand these questions, the context out of which they arise needs to be set out.

Any contractual relationship between parties is governed by a system of law, i.e. the proper, or governing, law of the contract. In addition to the substantive contract governed by the proper law of the contract, there is often an arbitration agreement between the parties for the resolution of disputes arising under the substantive contract. As far as this arbitration agreement is concerned, it is usually contained in a clause within the main contract, although it is, in the eye of law, a contract distinct from it. It is thus a contract within a contract? It is a distinct and separable contract because it is capable of surviving the substantive contract so as to permit the resolution of outstanding disputes thereunder. It is primarily for this reason of distinctness that it is capable of being governed by a different law than the proper law of the main contract. These two o aspects of the arbitral relationship are well recognized as such but it is important to note that they are only two aspects of a very complex arbitral relationship. Apart from the substantive contract and the arbitration agreement, three other important aspects of this relationship which may be identified are the individual reference as distinct from the general agreement to arbitrate, the internal conduct of the arbitration proceedings, i.e. by the arbitrators and most importantly, the external supervision of the arbitration proceedings. Thus, it is possible for as many as five systems of law or legal rules, to be applicable to various aspects of the arbitral relationship. These are:

(a) The proper law of the underlying contract, i.e. the law governing the contract, which creates the substantive rights and obligations of the parties, out of which the dispute has arisen.

1 Hitachi Limited and another versus Rupali Polyester and others 1998 SCMR 1618.

2 Heyman and another v. Darwins, Ltd. [1942] 1 All E.R. 337, Black Clawson international Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. [1081] 2 Lloyd's Law Reports 446 at 452.

(b) The proper law of the arbitration agreement, i.e. the law governing the rights and obligations of the parties arising from their agreement to arbitrate and, in particular, their obligation to submit their disputes to arbitration and to honor an award. This includes, interalia, questions as to the validity of the arbitration agreement, the validity of the notice of arbitration, the constitution of the arbitral tribunal and the question whether the award lies within the jurisdiction of the arbitrators.

(c) The proper law of the reference, i.e. the law governing the contract, which regulates the individual reference to arbitration. This is an agreement subsidiary to, but separate from, the arbitration agreement itself, coming into effect by the giving of a notice of arbitration from which point a new set of mutual obligations in relation to the conduct of the reference arises. This law governs the question of whether by reason of subsequent circumstances the parties have been discharged (whether by repudiation or frustration) from their obligation to continue with the reference of the individual dispute, while leaving intact the continuous agreement to refer future disputes pursuant to the arbitration agreement.'

(d) The rules of law relating to the internal conduct of the arbitration proceedings, i.e. how the parties and the arbitrators are to carry on their proceedings4, or the procedural rules which will apply in the arbitration proceedings e.g. ICC Rules (Rules of Conciliation and Arbitration of the International Chamber of Commerce) which may apply by virtue of the parties agreement to this effects

(e) The proper law of the external supervision of the arbitration proceedings, i.e. the rules governing interim measures, the rules empowering the exercise by the court of supportive measures in relation to an arbitration and the rules providing for the exercise by the court of its supervisory jurisdiction over the arbitration proceedings.'

Sub-categories (d) and (e) are commonly bracketed together as falling under the broad rubric of the curial, or procedural law, of the arbitration proceedings' but this elision fails to capture the dichotomy which exists within this broad procedural legal framework, i.e. the distinction as explained above between the rules of law applicable to the internal conduct of the arbitration proceedings and the law of the external supervision of the arbitration proceedings.

3 For a description of these three systems of laws being applicable to different aspects of the arbitral relationship, See Sumitomo Heavy Industries Ltd. v. Oil and Natural Gas Commission [1994] I Lloyd's Law Reports 45 at 56-7. See also Black Clawson International Ltd. v. Papier Werke Waldhof-Aschaffenburg A.G. [1981] 2 Lloyd's Law Report 446 for the distinction between an arbitration agreement and a individual reference.

4 Union of India v. McDonnel Douglas Corporation [1993] 2 Lloyd's Law Report 48 at 51.

5 Paul Smith Ltd. v. H & S International Holding Inc. [1991] 2 Lloyd's Law Report 127 at 129-30.

6 Paul Smith Ltd. v. H & S International Holding Inc. [1991] 2 Lloyd's Law Report 127 at 12930, Union of India v. McDonnel Douglas Corporation [1993] 2 Lloyd's Law Report 48 at 51.

7 Hitachi Limited and another v. Rupali Polyester and others 1998 SCMR 1618, National Thermal Power Corporation v. Singer Company and others (1992) 2 Com Q 256.

## II. Legal Issues

As is obvious from the above, the arbitral relationship is a complex interaction of different laws relating to various aspects of the arbitral process. Another important dimension, which adds to the; complexity of this relationship, relates to the different phases an arbitration proceeding passes through.` The arbitral relationship can be broadly divided into three separate and distinct phases:

(a) The pre-arbitration phase: before the commencement of the arbitration proceedings.

(b) The arbitration phase: after the commencement of, but limited to the duration of the arbitration proceedings.

(c) The post-arbitration phase: after the rendering of the award.

It is this dimension, **i.e.** the three separate phases, in combination with the different laws governing various aspects of the arbitral relationship, which gave rise to the litigation, which culminated in the decision rendered in the Rupali case. These distinct and separate phases and the different laws governing the various aspects of the arbitral relationship give rise to three basic questions:

(a) How is the proper law(s) of the various aspects of the arbitral relationship to be determined?

(b) What are the issues covered by each phase of the arbitral relationship and the laws governing those various issues?

(c) Which are the courts that have jurisdiction in each phase of the arbitral relationship?

A great deal can be stated about each of the abovementioned issues, but for present purposes, the focal point of the inquiry will be limited to one critical area: does the competent court which exercises supervisory jurisdiction over the arbitration proceedings exercise an exclusive jurisdiction, or a concurrent jurisdiction? This was the central issue in the Rupali case.8

8 Hitachi Limited and another versus Rupali Polyester and others 1998 SCMR 1618.

## Ill. Facts

The facts of the Rupali case[9] can be stated quite simply. A Japanese company Hitachi Ltd. ('Hitachi') entered into a contract with a Pakistani company, Rupali Polyester Ltd., ('Rupali') for the supply of a plant to be erected, installed and commissioned at Sheikhupura, Pakistan. Rupali claimed that the plant was defective. The contract contained an ICC arbitration clause providing that in case the defendant was the seller, the arbitration would take place in London. The contract further provided that it would be "governed and construed by the Pakistan law". Arbitration proceedings commenced in London and an interim award was announced on 28.5.1993. Rupali filed an application under sections 14-17 of the Arbitration Act, 1940, before the Court of the Senior Civil Judge, Sheikhupura, requiring the filing of the interim award in court. Rupali thereafter filed a second, and more important, application under section 5, 11 & 12 seeking to have all three arbitrators removed on the ground of bias." Both applications were dismissed. However, the Lahore High Court allowed revision petitions filed by Rupali. Appeals were filed by Hitachi in the Supreme Court, which succeeded in relation to the application seeking the removal of the arbitrators, the court holding that the Senior Civil Judge had rightly dismissed the same. However, the application requiring the filing of the interim award was held to have been validly made."

The Supreme Court found no difficulty in holding that the proper law of the contract was the law of Pakistan and also, consequentially, that the law of the arbitration agreement was the same as the proper law of the underlying contract, i.e. the law of Pakistan. However, the real question was, what was the curial law governing the arbitration proceedings? Was it the lexi fori, i.e. the law of England? Or, was it the substantive law governing the contract, i.e. the law of Pakistan? Or was it both?. This last possibility is what is known as the theory of concurrent jurisdiction and forms the principal theme of this paper.

9 Ibid, at 1628-30

10 Interestingly, Rupali's arbitrator was an eminent former judge of the Court of Appeals in England, Sir Michael Kerr, who had previously authored some of the most important judgments in this field.

11 Hitachi Limited and another versus Rupali Polyester and others 1998 SCMR 1618 at 1687 (para 19).

## IV. The findings of the Supreme Court

*a. What was the curial or procedural law of* ***the arbitration proceedings:***

The court in its judgment recognized the potential applicability of different systems of law, or legal rules, to international commercial arbitration. It identified four different systems of law that could apply to an international commercial arbitration, namely, (i) the proper law of the contract (ii) the proper law of the arbitration agreement (iii) the curial law and (iv) the proper law of the reference" (Although the court discussed the case of Union of *India v. McDonnel Douglas Corporation [199312 Lloyd's Law Report 48,* the distinction between the law applicable to the internal conduct of the arbitration proceedings and the law of the external supervision of the arbitration proceedings was not noted)."

The court accepted that the proper law of the contract was the law of Pakistan. As to what was the law of the arbitration agreement, it was held that absent an express agreement between the parties as to the law of the arbitration agreement, the law which governed the main contract would also be the law of the arbitration agreement if the arbitration clause was to be found in the main contract. In the present case, it was accordingly held that the law of the arbitration agreement was the same as the proper law of the contract, i.e. the law of Pakistan.'"

As far as the curial law of the arbitration proceedings was concerned, the court initially dealt with the issue of the ICC Rules and their relationship with the procedural law of the competent court. It was held that as far as the legal position in Pakistan and England was concerned, both jurisdictions recognized the ICC Rules but these Rules could not divest the courts of the jurisdiction vested in them by law. Thus, they could decline to exercise their discretionary powers under their respective Arbitration Acts not because of lack of jurisdiction but in order to ensure that the parties should adhere to their contractual obligations."

After dealing with the issue of the ICC Rules and its relationship with the arbitration proceedings, the court moved onto the crucial issue of the procedural law of the proceedings, i.e. whether the Arbitration Acts of Pakistan or England would apply. The court recognized the importance and validity of the determinative role of the 'seat' of the arbitration proceedings in relation to the question of the curial law of the arbitration". Put simply, the legal proposition is that where the parties have failed to explicitly choose the law of the arbitration proceedings, then the law of the country in which the arbitration is held will govern those proceedings. After a detailed discussion of the 'seat of the arbitration' theory, the court then held that "we are inclined to hold in the present case since the arbitration is subject to the I.C.C. Rules and as the seat of the arbitration is London, the procedural matters would be governed by the I.C.C. Rules and *curial laze of England""* (emphasis supplied). Two basic reasons can be deciphered from the judgment for this conclusion. Firstly, since, on the face of it, the English courts would have jurisdiction in relation to arbitration proceedings being conducted in England, therefore, it logically followed that they would be applying the procedural law of England." Secondly, the parties by agreeing to the application of the ICC Rules and London as being the seat of arbitration, must be deemed to have agreed that English procedural law would govern the arbitration proceedings."

12 Ibid, at 1657-1660

13 Ibid, at 1679-80

14 Ibid, at 1681

15 Ibid, at 1643
16 Ibid, at 1657-1659
17 Ibid, at 1684 (pars 15)
18 Ibid
19 Ibid

*(b) What was the scope of the curial law:*

The court held that the application of English procedural law would be limited to matters such as the manner in which the reference was to be conducted, the procedural powers and duties of the arbitrators, questions of evidence, and the determination of the proper law of the contract if not expressly agreed to by the parties.[20]In contrast, matters like the validity of the arbitration agreement, the question whether a dispute lay within the scope of the arbitration agreement, the validity of the notice of arbitration, the constitution of the arbitral tribunal, the question whether the award was within the jurisdiction of the arbitrator, the formal validity of the award, the question whether the parties had been discharged from any obligation to arbitrate future disputes would be issues governed by the (substantive) law of the arbitration agreement and not by the procedural law of the arbitration proceedings.[21]

*(c) Did the English and Pakistani courts have concurrent jurisdiction and, if so, in which categories of cases:*

As stated in the above, the arbitral relationship can be divided into three distinct but separate phases namely (i) the first phase i.e. the pre-arbitration phase (ii) the second phase i.e. the arbitration phase, and (iii) the third phase i.e. the post-arbitration phase. As a first step in understanding how the court decided the issue of the jurisdiction of the English and/or Pakistani courts in relation to each of these three phases, it may be noted that the court appears to have proceeded on the basis of the following propositions (a) As stated in the above, the proper law of the contract was the law of Pakistan (b) the proper law of the arbitration agreement was the law of Pakistan (c) the curial law was the law of England (d) the curial law only dealt with procedural matters like the manner in which the reference was to be conducted etc. (e) matters relating to the validity of the arbitration agreement, the question whether a dispute lay within the scope of the arbitration agreement, the validity of the notice of arbitration, the constitution of the arbitral tribunal, the question whether the award was within the jurisdiction of the arbitrators, the formal validity of the award, and the question whether the parties had been discharged from any obligation to arbitrate future disputes were all issues governed by the law of the arbitration agreement, i.e. the law of Pakistan, and not by the procedural law of the arbitration proceedings, i.e. the law of England, and (f) it was conceded by the counsel of Hitachi that the courts of Pakistan had jurisdiction in relation to the pre-arbitration phase, i.e. before the arbitration proceedings had begun.[21]

On the basis of abovementioned concession, the court presumed that the pre-arbitration phase was within the exclusive jurisdiction of the Pakistani courts. This point was never really discussed by the court because this question of exclusivity in relation to the first phase was not in issue between the parties. It is submitted that this is the correct view for more than one reason. The tribunal had already made the interim award and both the applications filed by Rupali related to the arbitration proceedings and the post-arbitration phase. The law of the arbitration agreement, i.e the law of Pakistan, would clearly govern the issues, which could arise in the pre-arbitration phase. These would include the question of the validity of the arbitration agreement, the question whether a dispute lay within the scope of the arbitration agreement etc. The issues covered by the English procedural law would evidently not relate to the pre-arbitration phase. In addition to this, the Pakistani courts had the closest nexus with the dispute in this case e.g. the fact that the agreement was executed in Pakistan, the plant and machinery were supplied and installed in Pakistan etc. while the only connection with England was that the seat of arbitration was located in London but that connection would attain significance only when the arbitration proceedings actually began`. . Thus, it follows that the Pakistani courts would have exclusive jurisdiction in the pre-arbitration phase, if a dispute had arisen at that time.

20 Ibid, at 1684 (S)
21 Ibid, at 1684 (T)
22 Ibid, at 1631-32, 1685 (para 16)
23 Ibid, p.1686 (para 17)

In relation to the arbitration phase, i.e. after the arbitration proceedings had begun and before the award was rendered, the court after holding that, firstly, the curial law was the law of, England, and, secondly, that the curial law dealt essentially with matters like the manner in which the reference was to be conducted, the procedural powers and duties of the arbitrators, questions of evidence etc., went on to hold that the English courts would have jurisdiction in relation to the arbitration proceedings." On the critical issue of concurrent jurisdiction, i.e. both Pakistani and English courts having jurisdiction in relation to the arbitration phase, the court gave a number of findings." Firstly, Pakistani courts would not have concurrent jurisdiction with English courts merely because the agreement to arbitrate was governed by the law of Pakistan. Secondly, the court 'approved' of the theory of concurrent jurisdiction as being "theoretically... correct" but went on to hold that "it is not practicable." (The reasoning on this point is unfortunately rather exiguous, but the point is further examined below.) Thirdly, the court was of the view that the parties having themselves chosen London as the seat of the arbitration, had impliedly agreed that English curial law would govern the arbitration proceedings and thus by implication, English Courts would have jurisdiction in the matter. The consequence of this rejection of the theory of concurrent jurisdiction was that the order of the Senior Civil Judge, Sheikhupura, dismissing Rupali's application under sections 5, 11 and 12 was upheld and restored[21]

As far as the post-arbitration phase is concerned, i.e. after the award had been rendered, the court held that the Pakistani courts would have exclusive jurisdiction in this phase". (Once again, the reasons given in the judgment are unfortunately rather scanty. Although the judgment runs to as many as seventy (70) printed pages, the reasons on the crucial points are confined to a few paragraphs only and thus require further analysis). However, the following propositions can be deciphered from the judgment. Firstly, English curial law applies, and the English courts have jurisdiction in relation to the arbitration proceedings, i.e. the arbitration phase. Secondly, matters like challenges to the validity or effect of an award were issues governed by the law of the arbitration agreement, i.e. the law of Pakistan and not by the curial law of the arbitration proceedings, i.e. the law of England. Thirdly, in view of section 9(b) of the Arbitration (Protocol and Convention) Act, 1937, the two awards in question were not foreign awards as they were made under an agreement governed by the laws of Pakistan. Therefore, it followed that these would be treated as domestic awards and would be subject to the jurisdiction of the Pakistani courts by virtue of the provisions of the Arbitration Act, 1940. Finally, the Pakistani courts had the closest connection, as already explained above, with the dispute in issue. For these reasons, the court concluded that in relation to the post-arbitration proceedings, the Pakistani Courts would have exclusive jurisdiction and accordingly upheld this part of the order of the Lahore High Court and remanded Rupali's application under sections 14-17 of the Arbitration Act, 1940, to the Senior Civil Judge, Sheikhupura, for further proceeding.

24 [bid, at 1684 (para 15)

25 Ibid.
26 Ibid, at 1687 (para 19).
27 Ibid, at 1684-87

## V. The theory of concurrent jurisdiction:

The theory of concurrent jurisdiction has been set out in the judgment of the Indian Supreme Court in the case of *National Thermal Power Corporation v. Singer Company and others"*. It is this case in which the theory of concurrent jurisdiction was first evolved and applied and it is this theory which requires a close and detailed analysis. The brief facts of the case were that a contract was entered into which provided that "the laws applicable to this contract shall be the laws in force in India. The Courts of Dehli shall have exclusive jurisdiction in all matters arising under this contract."" There was an ICC arbitration clause in the contract, which stated, inter alia, that the arbitration would be conducted at such places as the arbitrators might determine. London was chosen as the place of arbitration. The arbitrators in London announced an interim award and NTPC filed an application under sections 14, 30 & 33 of the Arbitration Act, 1940, in the Dehli High Court seeking a direction that the award be filed in court and then set aside. This application dismissed by a single judge and a division bench maintained that decision. It was held that the courts in England alone had jurisdiction in the matter. It was this judgment, which was set aside by the Indian Supreme Court by relying on the theory of concurrent jurisdiction. The Court accepted that although, in the normal course, the English courts would certainly have jurisdiction, since the place of arbitration was London, but this jurisdiction could not be considered exclusive. The following extract makes clear the point of view of the court:

> "the appropriate courts of the seat of arbitration, which in the present case are the competent English Courts, will have jurisdiction in respect of procedural matters concerning the conduct of arbitration. But the overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement, and the jurisdiction exercised by the Courts of the seat of arbitration is merely concurrent and not exclusive, and strictly limited to matters of procedure. All other matters in respect of the arbitration agreement fall within the exclusive competence of the Courts of the country whose laws govern the arbitration agreement. See Mustil (sic) & Boyd, Commercial Arbitration, Second Edn.; Allen Redfern and Martin Hunter, Law & Practice of International Commercial Arbitration, 1986; Russel (sic) on Arbitration, Twentieth Edn., 1982; Cheshire & North's Private International Law, Eleventh Edn. (1987)"[30]. (emphasis supplied).

This is a remarkable finding. There is no dispute with the proposition that the jurisdiction of the courts of the seat of arbitration is limited to curial matters. It is, therefore, a limited jurisdiction and stems essentially from the fact that if the arbitration proceedings are being conducted in a certain country it is only logical to accept that they will be conducted under the supervisory jurisdiction of the courts of that country. Further, the courts of that country will, and can, only apply the procedural law of that country. It is not possible for parties by a mere agreement to oust the jurisdiction of the courts of the place of jurisdiction, and nor can the courts of that place exercise their jurisdiction in any manner other than that laid down by the procedural laws of that country. However, it is a far cry from this principle to deduce a further principle that a concurrent jurisdiction exists in relation to matters of procedure. To contend that arbitration proceedings being held in London can be controlled by the supervisory jurisdiction of both the English and the Indian courts stretches credulity to the breaking point. The Indian Supreme Court, in support of its point of view, referred to no fewer than four standard and authoritative treatises on the subject. It is, however significant that in not a single case has any specific passage in any of these four works been referred to. A completely generalized reference without particularizing the passage on which reliance is being placed is certainly somewhat surprising. Insofar as the present writer has been able to discern, the theory of concurrent jurisdiction

28 (1992) 2 Comp LJ 256
29 Ibid, at 259
30 rbid, at 264 (pars 25)

has not been approved in any of the texts referred to by the Indian Supreme Court. In fact, as discussed below, if anything, the opposite view has been found in those works. The Indian Supreme Court advanced the theory for the first time. While the court was undeniably entitled to evolve such a theory it is certainly a little surprising to find its paternity being ascribed to texts, which do not even explicitly set it out. The singer judgment is, in point of fact, discussed in a subsequent English case, namely, the case of *Sumitomo Heavy Industries Ltd. v. Oil and Natural Gas Commission".* This case also related to India and the contract in it provided that disputes arising there under were to be subject to the laws of India. The arbitration proceedings, however, were to be held in London in accordance with the provisions of the ICC Rules. A dispute arose between the parties and Sumitomo sought a reference to arbitration. This was opposed by ONGC (Oil and Natural Gas Commission), which commenced proceedings in the High Court of Bombay under section 33 of the Indian Arbitration Act, 1940. A separate set of proceedings was initiated in the High Court in London by Sumitomo, which obtained an order to serve outside the jurisdiction an originating summons on ONGC. Thereafter ONGC unsuccessfully sought injunctive relief from the Bombay High Court restraining Sumitomo from taking any proceeding in any court other than the Bombay High Court. An appeal filed against this order by ONGC also failed. It was only thereafter that ONGC applied in London to have the order passed against it set aside on the ground that the English Court lacked jurisdiction in the matter. The contention was rejected in the following words:

> "Suffice it to say that there is nothing in Mr. Majumdar's submissions, or in the authorities relied on, to indicate to me that Indian law regards the choice of curial law and the implications which arise from the parties' choice of arbitration in London and/or ICC arbitration in any way differently from the English courts. The references contained in the *Singer decision* are to principles of law to be found in Dicey & Morris on The Conflict of Laws and to a number of English decisions."" (emphasis supplied).

Thereafter an extensive quotation from the Singer judgment follows including the passage which has already been reproduced in the above. In conclusion it was held:

> "Accordingly, I find nothing in the evidence of Indian Law which leads me to any conclusion different from that which would result from the application of English law, namely, that *albeit the chosen or proper law of contract and/or the arbitration agreement may be Indian, the procedural (ciirial) law is English law.""* (emphasis supplied).

At first glance it may appear from the above passages that the English court had not differed from the point of view of the Indian Supreme Court in relation to the theory of concurrent jurisdiction. But a closer examination reveals a different picture. The case was being contested before the English court on the ground that it had no jurisdiction whatsoever in the matter. The English court found, firstly, that the views expressed by the Indian Supreme Court in the Singer case were expressly stated to be based on English text books on the subject, and, secondly, that there was nothing in the Singer judgment to exclude the jurisdiction of the English courts. It may be noted that it was sufficient for rejecting the challenge to the jurisdiction of the English court to rely on the fact that the Indian Supreme Court in the Singer case had expressly accepted that the courts of the country in which the seat of arbitration was located would have the jurisdiction to decide matters in accordance with their procedural law, albeit this would be a concurrent jurisdiction. It may be noted that the English court explicitly held, in conclusion, that the evidence of Indian law laid before it led it to the conclusion that although both the proper law of the contract and/or the arbitration agreement might be Indian law, the procedural (curial) law would indubitably be English law. It

is also correct that both the Indian court and the English court had agreed that the curial law would be English law.

31 [1994] 1 Lloyd's Law Report 45

32 Ibid, at 58

33 Ibid, at 59

However, the English court has nowhere specifically considered the question of the validity of the theory of concurrent jurisdiction as such. This, presumably, was because, firstly, it was not necessary for it to render a finding in relation to the theory of concurrent jurisdiction since that theory itself explicitly accepted the jurisdiction of the English court in relation to curial matters, which finding was sufficient by itself to lead to a rejection of ONGC's contention about the alleged lack of jurisdiction of the English court. Secondly, one can understand the reluctance of an English court to criticize a foreign court's finding, (especially in view of the fact that it was not necessary to do so) on the basis of the principle of the comity prevailing between courts of different countries. It is submitted that the fact that the theory of concurrent jurisdiction has not, in explicit terms, been either accepted or rejected leads to the conclusion that the judgment in the *Sumitomo* case was not intended to depart from the well established principles of English law in relation to such matters.

As accepted in both the *Singer* case as well as the *Sumitomo* case, the law in England on the question of curial law is well settled and the English courts have consistently held that in arbitration proceedings all matters which the law regards as procedural are governed by the lexi fori or the law of the seat of arbitration. For example in *Naviera Aniazonica Peruana S.A. V. Compania De Seguros Del Peru',* Kerr, Q. described the legal position in English law as being that "English law does not recognize the concept of a 'de-localised' arbitration... or of 'arbitral proceedings' floating in the transnational firmament unconnected with any municipal system of law... Accordingly, every arbitration must have a 'seat' or locus arbitri or forum which subjects its procedural rules to the municipal law which is there in force"". Further in *James Miller & Partners Ltd. V. Whitworth Street Estates (Manchester) Ltd",* Lord Wilberforce made the following observations "it is a matter of experience that numerous arbitrations are conducted by English arbitrators in England on matters governed by contracts whose proper law is or may be that of another country; and I should be surprised if it had ever been held that such arbitrations were not governed by the English Arbitration Act in procedural matters ... such proceedings as regards to all matters which the law regards as procedural are governed by the lex fori has been accepted at least since Lord Brougham's judgment in *Don v. Lippinann .... In* my opinion, the law is correctly stated by Professor Kahn-Freud and Dr. Morris in Dicey, Conflict of Laws, 8th ed. (1967), at p.1048, where they say-.....Thus, if parties agreed on an arbitration clause expressed to be governed by English law but providing for arbitration in Switzerland, it may be held that, whereas English law governs the validity, interpretation and effect of the arbitration clause as such (including the scope of the arbitrators' jurisdiction), the proceedings are governed by Swiss law..."37 . Similarly, Potter, J. observed in the *Sumitomo* case "There is, it is true, no express choice of curial law. However, there is a clear requirement that the arbitration proceedings be held in London. In the absence of express agreement, there is a strong prima facie presumption that the parties intended the

curial law to be the law of the 'seat' of the arbitration.....Lord Justice Kerr described the rule that the procedural (or curial) law governing arbitrations is that of the forum of the arbitration as a - ... fundamental principle ... in the absence of any contractual provision to the contrary. I do not see any reason to depart from that rule"" Interestingly, he goes even further and relies on the case of Union of *India v. McDonnell Douglas`* which is clearly significant because in that case the possibility arose as to whether the curial law of the seat of arbitration would not apply if there was an express provision to the contrary and Saville, J. had no problem in rejecting this argument but went on to explain that in such a case the express choice of the parties as to the procedural law being the law of a state other than the law of the seat of arbitration, would be treated as governing only the *internal* conduct of the arbitration proceedings while the curial law would be the lex fori insofar as the supervisory jurisdiction of the court was concerned.

34 [19881 1 Lloyd's Law Report 116

35 [bid, at 119

36 [1970] 1 Lloyd's Law Report 269

37 [hid, at 280

38 Op.cit., at 57
39 [1993] 2 Lloyd's Law Report 48 at 51. Reference in the Sumitomo case is made on p.58

This impracticality of the theory of concurrent jurisdiction was the rationale given by the Pakistani Supreme Court for, in effect, rejecting the theory of concurrent jurisdiction. In relation to the practical problems arising out of a concurrent exercise of jurisdiction, Mustill & Boyd", a leading authority on the law of commercial arbitration, observe that if there has been an express choice of a foreign seat of arbitration with an express choice of English curial law an "English court would be highly unlikely to assume jurisdiction to intervene in the reference or to set aside or remit the award. Any attempt to exercise powers to appoint arbitrators or to give ancillary relief ... would in fact present formidable difficulties of enforcement. Moreover the prospect of two courts exercising supervisory powers over the same reference at the same time would appear unacceptable"". As noted above, the Indian Supreme Court in the Singer case, in support of its point view, referred to a number of authoritative treatises on international commercial arbitration including Mustill & Boyd. As is obvious from the aforementioned paragraph, Mustill & Boyd instead of supporting the concurrent exercise of jurisdiction clearly reject such a view. Furthermore, it should be noted that the sheer impracticality of this theory is only one of a number of reasons, which can be adduced for rejecting this theory. A more serious and real danger arising out of an acceptance and application of such a theory is the danger of conflicting orders and/or judgments. This problem was at the heart of the comments made by Mustill, J. when he observed in *Black Clawson International Ltd. V Papierwerke Waldhof-Aschaffenburg A.G. [198112 Lloyd's Law Report 446* "Common sense suggests this provision cannot have been intended to apply the whole of the 1950 Act to an arbitration which was from the outset designed to take place abroad. For otherwise, the arbitrators would be obliged to state a special case from their Zurich arbitration to the English Court; and the latter Court would have had power to set aside or remit the award, and to make interlocutory orders for discovery, security for costs, interim preservation and so on; *all in potential conflict with the powers exercisable by the local Court. Such a result would be absurd.""* (emphasis supplied). These observations of Mustill, J. were quoted with approval by Kerr, Q. In the case of *Naviera Amazonica Peruana S.A. v. Compania International De Seguros Del PerU*[43]. Contrary to the impression created by the judgments in the Rupali case as well as in the *Sumitomo* case, the aforementioned observations clearly show that the English Courts instead of accepting a theory that allows the concurrent exercise of jurisdiction have pointed out the real danger of conflicting orders and/or judgments as a consequence of the application of this theory. *In fact, this theory, properly understood is a theory not of concurrent jurisdiction but of conflicting jurisdiction.* It is potentially destructive of the principle of the comity prevailing between courts. A case, which brings out.the potential dangers in this theory is the *Sumitomo* Case. According to this theory of concurrent jurisdiction, the Bombay High Court in the Sumitomo case clearly had the jurisdiction to grant an interim injunction restraining the arbitration proceedings. In point of fact it refused, but on the basis of the theory of concurrent jurisdiction it clearly had the power to pass such an order. It will be recollected that in the *Singer* case, the Indian Supreme Court had described it as an 'overriding principle' that the courts of the country whose substantive laws governed the arbitration agreement should have jurisdiction over 'all matters' arising under the agreement. If the Indian court had passed an order in favour of ONGC, and the English court had passed a contrary order, Would not a very peculiar position have arisen? How could the Indian court enforce its orders against the arbitrators sitting in England? Would they not obviously act in compliance with the orders of the English court and disregard those of he Indian court?

40 The Law and Practice of Commercial Arbitration in England, Second Edition.
41 Ibid, at 91-92
42 At 453
43 [1988] 1 Lloyd's Law Report 116 at 120

**V1. Post arbitration phase**

The final phase relates to the period after the arbitrator has delivered the award. The question as to which court, and which system of law, will have jurisdiction in relation either to the enforcement of the award, or to the setting aside of the award, is the last stage. It will be recollected that the Pakistan Supreme Court in the *Rtipali* case had held that in this phase the Pakistani courts would have jurisdiction". The view expressed in standard works of international commercial arbitration to the effect that in general a challenge to the validity of an award would be made before a court at the place in which the arbitration is held, was referred to but not accepted". The reason for this has been stated to be that in view of the provisions of section 9(b) of the Arbitration (Protocol and Convention) Act, 1937, the award in question could not be treated as a foreign award since the laws of Pakistan governed the arbitration agreement. The conclusion, which was drawn from this premise, was that the award should be treated as a domestic award and accordingly the provisions of the Arbitration Act, 1940, would be applicable. This is the reason on the basis of which the application filed by Rupali under sections 14-17 of the Arbitration Act, 1940, was held to have been validly instituted with the Court.

There are two questions, both conceptually distinct, which unfortunately have been conflated by the court without drawing a clear line of demarcation between them. Although the point deserves a detailed analysis, since the scope of present paper is confined essentially to the theory of the concurrent jurisdiction, it is proposed to deal with, very briefly, with only one aspect of it. The Arbitration Act, 1940, is stated to extend, in terms of section 1 thereof, to the whole of Pakistan, i.e. it has no extra-territorial effect. The word 'award' is defined in terms of section 2(b) of the Arbitration Act, 1940, without any reference to the question as to whether an award is a domestic or a foreign award. Further, section 27, which confers the power on arbitrators to make an interim award, clarifies that in terms of sub-section (2) thereof, all references to an award will include references to an interim award. This is an important provision since it logically follows from it that an interim award can be challenged in the same manner as a final award. It has been argued in the above, that, generally speaking, in the phase in which the arbitration proceedings have not finally concluded the appropriate court will be of that country in which the seat of the arbitration is located and the curial law of that country will apply. It would seem to follow ex hypothesis that since an interim award is given during the continuance of the arbitration proceedings all matters pertaining thereto ought to fall within the jurisdiction of the court exercising curial powers in the matter. But, as has been pointed out in the above, section 27 carries a different connotation. In effect, it transposes an interim award and places it on the same pedestal as a final award. Thus the methodology for challenging an interim award will be the same as at for impugning a final award. This however, it should be clearly recognized flows directly from the provisions of the Arbitration Act, 1940, and not from any generalized rule of law. In other words, it is confined to the law of Pakistan (and India), although of course other legal systems could have similar provisions.

Was the court right in impliedly criticizing the view expressed by standard textbooks on the subject? It is submitted not. That view proceeds on a completely different basis. There can be no doubt that in the presence of the provisions of the Arbitration Act, 1940, these views would not be applicable in the context of a Pakistani domestic award. But this does not necessarily deny validity to the correctness of that view. Most foreign awards fall either within the ambit of the Geneva Convention or the New York Convention. Both those Conventions apply a different rule of law in relation to enforcement. In terms of both those Conventions, the court of a country before which an award is filed is authorized to enforce it save and unless

44 Op. cit., at 1685-7.

45 Op. cit., at 1684-5.

*"the award has been annied in the country in which it was made"* The language used is precise and not open to any ambiguity. The only question before the court would be as to whether the award has been annulled in that country alone in which it was made. If it has been annulled in any other country that annulment would not be relevant and would not stand in the way of the enforcement of the award. Thus it can be seen that although the view of the court in relation to domestic awards (on the assumption that the award in the present case was a domestic award) is correct in the context of the present case but it has failed to note, in its implied criticism, that a different principle would apply in cases of convention awards and perhaps in certain other cases as well depending on the law of arbitration prevailing in the country in question.

It may also be noted that the Indian Supreme Court in a subsequent decision (also involving Sumitomo similarly held that once an award had been rendered it could be challenged in India." This view is in line with the above analysis of the court in the Rupali case.

46 See e.g. sub-section 2 (a) to section 7 of the Arbitration (Protocol and Convention) Act, 1937.

47 Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and others AIR 1998 SC 825 at 830 (para 15-16).

## VII. Dicey's Views:

The *Rupali* case has been discussed in the 13" edition of Dicey and Morris on The Conflict of Laws under Rule 63[48]. Unfortunately, the discussion does not advance the cause of clarity for reasons, which are given below. The discussion is in the context of clause (4)(f) of the aforesaid Rule which states that an English court may refuse recognition or enforcement of a New York Convention award if the person against whom it is sought to be enforced proves "that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made"." The entire discussion is reproduced in the following paragraph:

> "The paradigm case which brings clause (4) (f) into play is one where an award is set aside in the country where the seat of the arbitration was located. In addition, this ground is intended to encompass the exceptional cases where, an arbitration having been conducted in one country under the law of another country, the award is set aside by the courts of the latter. The reference to the law of the country under which the award was made signifies the procedural law of the arbitration not the substantive law governing the contract out of which the dispute arose nor the law governing the arbitration agreement. So, where a dispute arising out of a contract governed by Pakistani law is referred to arbitration in Switzerland, if the resulting award were set aside by the Pakistani courts, 64 the English court would not be able to refuse recognition or enforcement under clause (4) (f).
>
> 64 See Rupali Polyester Ltd. v. Bunni [1995] 3 L.R.C. 617 (in which the Supreme Court of Pakistan held that the Pakistani courts have supervisory jurisdiction over an award made in another country if the arbitration agreement is governed by the law of Pakistan". [50]

Rather surprisingly, the reference to the *Rupali* case, although brief to the point of being cryptic, suffers from more than one error. In ascending order of importance these are, firstly, the arbitration in the Rupali case took place not in Switzerland but in England. Secondly, the decision referred to is not that of the Supreme Court of Pakistan but of the Lahore High Court. The decision of the Supreme Court was given in the year 1998 while it is the decision of the Lahore High Court given in the year 1994, which is printed in the 1995 volume of the Law Reports to which reference has been made. Thirdly, since the Supreme Court subsequently set aside a major finding of the Lahore High court, *as well as the reasoning on which it was based,* the Lahore High Court ruling is now of hardly any relevance. Fourthly, and importantly, since the concept of the supervisory jurisdiction of a domestic court over an arbitration being conducted abroad, which had been borrowed by the Lahore High Court from the decision of the Indian Supreme Court in the *Singer* case on the basis of the theory of concurrent jurisdiction, has, for all practical purposes, been rejected y the Supreme Court of Pakistan (as explained above) any reliance on this decision is clearly misplaced, and finally, the discussion of the *Rupali* case under the rubric of the New York convention is hardly conducive to the interests of analytical clarity in view of the fact that Dicey has tacitly (but erroneously) assumed that Pakistan is a party to the New York convention of 1958. The convention has certainly been signed by the Government of Pakistan but has not yet been ratified. Thus the only law on the subject in Pakistan is The Arbitration (Protocol and Convention) Act, 1937, which relates to the enforcement of the Geneva Protocol and Convention.

48 At 634
49 At 640
50 At 640

The above comments are of course not intended to cast any doubt on the great authority which Dicey deservedly enjoys amongst legal practitioners in this field, but rather to illustrate that the above quoted passage provides an apt illustration of the maxim that even Homer can nod - the mantle of Homer, of course, in the present case resting on the shoulders of the learned editors of the current edition of Dicey.

At this point, it may perhaps be pertinent to take note of another standard and authoritative work on arbitration, namely, the 21st Edition of *Russell on Arbitration*. This treatise does not deal with the *Rupali* case, but it does discuss, very briefly, the *Singer* case. Surprisingly this discussion also is not free from error. It has been stated that:

> "The availability of interim and procedural remedies from the court, and the exclusion of such remedies, is also governed by this law, [i.e. the curial law] as are challenges to the award""

In support of this proposition, Russell has made reference to certain English cases as well as the *Singer* case:

> "5 *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd [1970]* A.C. *583; Bank Development Co. of Nigeria [1984]* 2 Lloyd's Rep. *77;* K/S A/S *Bani v. Korean Shipbuilding and Engineering Corp. [1987]* 2 Lloyd's Rep. *445* CA; *Bank Mellat v. GAA Development and Construction Co. [1988] 2* Lloyd's Rep. *44;* cf. the approach taken by the Supreme Court of India in setting aside an ICC award made in London, on the basis that the contract, including the arbitration clause, was governed by Indian Law, with exclusive Jurisdiction given to the courts of Delhi: *National Thermal Power Corp. v. Singer Co. J.T. 1992 (3) S.C. 198, (1993) 18* Yb. Com. Arb. *403.* ,12

This comment unfortunately is not entirely accurate. Firstly, the Supreme Court of India did not set-aside the award in the *Singer* case. It merely held that the application for filling the award in the High Court of Delhi was validly made. Secondly, as has been clarified in the above, the Supreme Court did not proceed on the basis of exclusivity, but on the basis of the theory of concurrent jurisdiction, which has been exhaustively discussed in the above. This particular point does not need to be pursued any further. However, what is important is that Russell very clearly recognizes that the views of the English and Indian courts are to be considered in contrast to each other rather than as being identical. This, therefore, supports the thesis which has been put forward in this paper.

51 Russell on Arbitration, 21st Edition. At p.78

52 Ibid.