

IN THE MATTER OF PROCEEDINGS BEFORE A DISPUTE PANEL OF THE ICC
DISPUTE RESOLUTION COMMITTEE

BETWEEN:

PAKISTAN CRICKET BOARD ("PCB")

-and-

BOARD OF CONTROL FOR CRICKET IN INDIA ("BCCI")

Award

Preface

This contractual dispute between the Pakistan Cricket Board ("PCB") and the Board of Control for Cricket in India ("BCCI") has attracted media attention for reasons relating to political tensions extraneous to the field of play; indeed suggestions have been made that its outcome could generate a precedent of significance for international relations. The Panel therefore wishes to make it clear that, in its firm view, the officials of both the PCB and the BCCI have in this matter acted in the legitimate pursuit of the welfare of their two sporting institutions and that this award does no more than to establish legal rights and obligations in the case before it in light of the law, the rules governing the administration of the sport and the specific evidence adduced by the parties.

Introduction

1. The PCB seeks declaratory relief and substantial damages from the BCCI for breach of an alleged agreement dated 9 April 2014 (the "**April Letter**"), which it asserts, and BCCI denies, recorded the enforceable commitment of the PCB and BCCI (together, the "**Parties**") to compete in seven senior men's bilateral cricket series to take place between 2014 and 2023. Of these tours, those designated as Pakistan home tours to take place in November 2014 and December 2015, did not go ahead. The PCB claims damages for the losses that it claims arise from the BCCI's omission to play those tours. By reason of a

direction of the Panel, the issues of liability and quantum were bifurcated, and this Award accordingly is concerned with liability only.

2. The April Letter, proffered by and written as from Mr Patel, Honorary Secretary to the BCCI, to Mr Sethi, Chairman of the PCB, provided as follows:

“Re: Future Tour Program 2014-2023.

Further to our meetings and discussions over the past few weeks regarding the Bi-lateral tours between India and Pakistan, the Board of Control for Cricket in India (BCCI) and Pakistan Cricket Board (PCB) hereby agree that the Senior men's cricket teams of India and Pakistan will play each other as per the schedule in the formats set out below. Indian team's tour of Pakistan will be at UAE or at mutually agreed venue.

<i>Dates</i>	<i>Tour</i>	<i>Format</i>
<i>Dec 2015</i>	<i>India tour to Pak</i>	<i>2 Tests, 5 ODIs, 2T20</i>
<i>Nov-Dec2017</i>	<i>Pak tour to India</i>	<i>3 Tests, 5 ODIS, 2 T20</i>
<i>Dec 2019</i>	<i>India tour to Pak</i>	<i>2 tests, 5 ODIS, 2T20</i>
<i>August 2020</i>	<i>India tour to Pak</i>	<i>2 tests, 5ODIs 3 T20</i>
<i>Nov-Dec 2021</i>	<i>Pak to India</i>	<i>3 tests, 5 ODIS, 3 T20</i>
<i>Nov-Dec 2022</i>	<i>India tour to Pak</i>	<i>5 ODIs</i>

BCCI will make all efforts to engage in a limited over format short tour to Pakistan in November of 2014 based on the availability of possible dates

(together the “Future Tours”).

BCCI and PCB agree that the rights for the tour will be assigned to a fit and proper person and will be detailed in the Master FTP agreement

The BCCI and PCB will enter into a long form FTP Agreement in respect of the above Future Tours.

The BCCI and PCB acknowledge that this letter has arisen in the context of the resolutions which have been tabled at the ICC Executive Board Meeting on 8

Feb 2014 relating to a new financial model and governance structure for the ICC, including the third in a series of six resolutions relating to all Full members entering into a series of agreements with one another providing for agreed FTP content between 2015-2023 and, as such, if those resolutions are not passed at the ICC Annual Conference in June 2014 by directors nominated by Full Members of the ICC at that meeting and the representatives of Associate Members and the 4 ICC Zonal representatives, then this letter shall be of no effect.

Please counter-sign this letter where indicated below to confirm your agreement to, and acceptance of the terms of this letter".

Both Mr Patel and Mr Sethi respectively signed and countersigned the April Letter.

3. The following liability issues arise out of the pleadings:

- (1) Whether the April Letter signed by the BCCI and countersigned by the PCB was, without more, a legally binding agreement (the "**Legal Status Issue**");
- (2) The extent to which such an agreement falls to be interpreted in the context of the resolutions proposed by representatives of the BCCI, Cricket Australia ("**CA**") and the England and Wales Cricket Board ("**ECB**") (together the "**Big 3**") pursuant to which, inter alia, the structure of world cricket would be overhauled, and a greater distribution of revenue and power of the International Cricket Council ("**ICC**") would be allocated to the Big 3 (the "**Big 3 Resolutions**") (the "**Big 3 Resolutions Issue**");
- (3) Whether, if the April Letter was a legally binding agreement, the BCCI was in breach thereof by (as is common ground) not touring Pakistan in November 2014 and/or December 2015 ("**Breach**");
- (4) Whether, if (quod non.) the April Letter was contractual, it was subject to a condition subsequent i.e. that the Parties enter into a long form FTP Agreement (which they did not) (the "**FTP Issue**");

- (5) Whether any obligation on the BCCI, under the April Letter or otherwise, was subject to the BCCI's receipt of the necessary approvals, commissions or clearances from the Government of India or otherwise which the BCCI did not receive (the "**Approvals Issue**").
4. The BCCI, in its skeleton argument, foreswore the argument that the April Letter's terms were conditional upon the Parties entering into a long form FTP Agreement but contended rather that, absent such agreement, the BCCI was under no legal obligation in respect of the future tours.
5. The PCB, in oral submission, expressly and explicably foreswore any claim based on an allegation that the BCCI were in breach of an obligation qua ICC Member arising out of the Big 3 Resolutions as passed in February 2014 (as to which see paragraph 15 below) to enter into an FTP agreement with the PCB.

Background

6. During the previous ICC commercial cycles from 2001 to 2015 ("**the previous cycles**") ICC Members would agree bilaterally to play one another, home or away and in whatever format they chose i.e. Tests, ODIs or T20Is. On such evidence as there was before the Panel, it appears that there was no uniformity as to how such agreements would be or were reached. Nonetheless on the basis of the arrangements so contemplated, the ICC compiled a Master FTP schedule ("**the Previous Schedule**") and a Master FTP agreement ("**the Previous FTP Agreement**"), agreed by the ICC Board in 2001 and approved again in 2004 and 2007. The Previous FTP Agreement contained a force majeure clause which provided that non-compliance with the Previous Schedule would be acceptable if caused, inter alia, by non-grant of a government approval. There was also a Members Participation Agreement ("MPA") to record Members' participation in ICC events.
7. The BCCI had expressly never accepted that the BCCI was committed in point of law either to tour (although BCCI tours did in fact take place in accordance with that schedule) or to participate in ICC events (although it did, in fact, participate in them).

8. Successful Indian tours of Pakistan had taken place in 2004 and in 2006, when the documentary record shows that Indian government permission was both sought for and approved, but no such approval had been given for a tour, nor had any tours actually taken place, since the latter date.
9. During the period 2012-13, there were continuing discussions between the Members of the ICC regarding the ICC's commercial cycle scheduled for 2015-2023 ("**the new cycle**") as well as a new MPA.
10. These discussions had to take into account the following financial factor. The Big 3 earned substantial revenues from bilateral tours by virtue of the support for the game in their home countries (it being common ground that it was the host country in such tours that reaped the financial benefits such as the revenue from broadcasting rights). Those revenues they had to forfeit as a result of their participation in ICC events in lieu of the financially more lucrative bilateral events. The Big 3 requested that these issues be addressed by the ICC before the new MPA was finalised.
11. The ICC itself recognized the need to review the then existing structure of the ICC and world cricket, in the interest of improving efficiency as well as addressing the Big 3s concerns. Accordingly, the ICC's Finance and Commercial Affairs Committee (the "**F&CA**") mandated the constitution of a working group to prepare a Position Paper proposing reforms to several aspects of international cricket, including a re-organisation of its financial model, governance structure and bilateral cricket arrangements.
12. In order to assist the Working Group, a standard form letter was devised by one of CA's lawyers, a member of that Group, covering agreements between Members to organise bilateral tours between them (the earliest version produced to the Panel was dated 27th January 2014).
13. The BCCI later made use of such standard form¹ in its dealings with the Bangladesh Cricket Board ("**BCB**"), Cricket West Indies ("**CWI**"), Cricket South Africa ("**CSA**") and New

¹ The standard form was also presented to the PCB by at least one other cricket board

Zealand Cricket ('NZC') (which for its part proposed the initial draft to the BCCI); and the standard form, as and when utilized, was adapted to reflect concerns particular to the signatories as well as containing the following pro forma sections

- *Further to our meetings and discussions over the past few weeks regarding the bi-lateral tours between [] and [], [] and [] hereby agree that the senior men's cricket teams of [] and [] will play each other as per the schedule in the formats set out below (the "Future Tours"):*
- *[] will enter into a long-form FTP Agreement in respect of the Future Tours.*
- *[] acknowledge that this letter has arisen in the context of Resolutions approved at the ICC Executive Board Meeting on [__ February 2014] relating to a new financial model and governance structure for the ICC, including the third in a series of six Resolutions relating to all Full Members entering into a series of agreements with one another providing for agreed FTP content between 2015-2023 and, as such, if those Resolutions are not passed at the ICC Annual Conference in June 2014 by the requisite number of ICC Members at that meeting, then this letter shall be of no effect.*
- *Please counter-sign this letter where indicated below to confirm your agreement to, and acceptance of, the terms of this letter.*

14. On 9 January 2014 a draft of the Position Paper was presented by the F&CA's working group to the ICC Board at a Special Meeting in Dubai and included, in addition to various financial and governance proposals designed, inter alia, to alter the balance of power within the ICC and address the financial concerns of the Big 3, a proposal that individual mutually agreed and binding bilateral agreements would be executed between respective Member Boards in relation to bilateral tours ("**FTP Agreements**"). The binding nature of a Member Board's obligations under an FTP Agreement would, inter alia, be subject to the occurrence of 'Force Majeure events'.

15. On 8 February 2014, the proposals described in the Minutes at p5 thereof as "*Proposed Resolutions contained in Appendices A-E, together with the amendments that were detailed and discussed during the meeting*" were considered by the ICC Board and validly passed by the requisite majority ("**February Resolutions**").

16. Appendix C of the February Resolutions provided, inter alia, as follows:

“FTP Arrangement Changes

1. That all Full Members will enter into a series of pro forma, contractually binding bi-lateral agreements with other Full Members they wish to play against (“the FTP Agreement”) that will aim to include previously agreed series.

.....

5. That...the BCCI, the ECB and CA committing to enter into FTP Agreements from 2015-2023

.....

8. That the FTP Agreement obligations are to be legally binding in an agreed jurisdiction between the Members, subject to:

- i. Force Majeure events to be defined in the FTP Agreements;*
- ii. No Material breach by other party; and*
- iii. Agreement being reached by the parties on any changes to the applicable ICC playing conditions made after the date of the FTP Agreement”.*

17. The PCB, Sri Lanka Cricket (“SLC”) and one of the Associate Member Directors abstained from voting because they wished further to discuss the issues internally. The minutes record that the ICC Board expressed a preference for unanimity on the February Resolutions, so that a unanimous front could be presented to the public. It was therefore agreed that the February Resolutions would be “reconfirmed” (sic) at the ICC Board Meeting scheduled to be held in April 2014.

18. On 8 February 2014, Mr Clive Hitchcock the ICC Cricket Operations Manager, wrote to the Member Boards stating:

"Following on from the recently concluded Board meeting in Singapore and the passing of the resolutions relating to bi-lateral FTP agreements, the Board accepted that an FTP/Scheduling Meeting needed to be staged as soon as possible to give all Members the opportunity to secure their bilateral arrangements through to 2023, and sign corresponding legally binding agreements that are required as part of the approved resolution."

19. On 19 February 2014, Mr Geoff Allardice, ICC General Manager - Cricket, wrote to the Member Boards requesting them to send through their respective schedules of agreed tours from 2014-23 in order that a draft version of the FTP Schedule could be prepared. The email contemplated de facto, if not eo nomine, a three step process. Step 1 involving Members proposing periods when they might undertake a tour series against each other. Step 2 involving multilateral discussions designed to arrive at an agreed FTP Schedule for all Members for the commercial cycle 2015-2023. Step 3 involving Members entering into bilateral FTP Agreements in accordance with that schedule. It was so understood by Mr Ahmad, Chief Operating Officer of the PCB.
20. The PCB acknowledged the need to engage in such a process and indeed participated in it from the outset; as exemplified by the email dated 20 February 2014 from Mr Zakir Khan, PCB Director of Cricket Operations to Professor Shetty of the BCCI referring expressly to Geoff Allardice's email and requesting that the two Boards discuss and pencil in possible dates for bilateral matches between India and Pakistan as the other Member Boards had already started "*firming up their FTP commitments.*" .
21. On 9 April 2014, an ICC Board Meeting was duly held in Dubai. The minutes of this meeting are in the Panel's view ambiguous as to whether the unanimous vote, there recorded, was to reconfirm the contents of the February Resolutions as well as to confirm the additions thereto on the agenda for the April meeting (concerned with ICC governance reorganization) or merely to confirm those additions. The relevant extract states "*a clean copy of the final set of resolutions (i.e. the February 8 resolutions, as amended by the clarifying Amendments and further amendments as agreed in this 9 April meeting..is attached as Appendix A to this minute*". Appendix A itself (describes "CONSOLIDATED AND APPROVED ICC BOARD RESOLUTIONS (i) PASSED on 8th FEBURARY 2014 AND (ii) AMENDED ON 9TH April 2014." In so far as it is necessary to do so, the Panel prefers the former interpretation which would be consistent with the Board's previous wishes and more administratively coherent.
22. Also on 9 April 2014, following the ICC Board Meeting, a discussion was held between Mr Sethi and Mr Ahmad on the one hand and Mr Srinivasan, President of the BCCI, and Mr Raman, Chief Operating Officer of the Indian Premier League, on the other, which

resulted in the joint signature of the April Letter, pursuant to which the PCB started to seek specifically to rearrange tours with other Boards so as to accommodate the BCCI/PCB series referred to in it.

23. On 7 May 2014, Mr Clive Hitchcock sent a further email to the Members, including the PCB and the BCCI, which stated:

"At the April CEC meeting Members indicated their desire to finalize the details of the FTP prior to the June meeting.

The three steps to finalizing the new FTP will be:

- 1. Negotiate each bilateral tour (timing, number of matches)*
- 2. Ensure enough time has been allowed for the agreed number of matches, and that there are no clashes with other tours.*
- 3. Agree the terms of each binding bilateral agreement (and sign the agreement).*

It is now apparent that Members have made substantial progress with their FTP discussions, with the first step almost complete.

To work through the second step as quickly as possible, some Members have indicated their willingness to attend a scheduling meeting to ensure all Boards agree with the schedule of matches, before the binding commitments are made in the form of the bilateral agreements that are negotiated between Members.

It is proposed that a scheduling meeting be staged in Dubai on June 10+11 to try to finalize a matrix of tours as described in Step 2 above".

24. On June 10-11 2014 the CEC scheduling meeting was duly held in Dubai at which the new Master FTP schedule was confirmed. It included express reference to the 2015 (but not a 2014) BCCI tour of Pakistan.
25. On 26 June 2014, at a meeting of the ICC Full Council held in Melbourne, the constitutional changes agreed by the Board in April were approved, by way of a Special Resolution, as required by the ICC Constitution.

26. In consequence of these two features, the confirmation of the Master FTP schedule and Full Council's acceptance of the Big 3 Resolutions, two potential impediments to the future tours were removed.
27. Accordingly, on 26 June 2014 Mr Ahmad sent to the BCCI a draft long-form FTP Agreement. It referred to a 2015 tour, but not to a 2014 tour. It also contained, inter alia, a force majeure provision similar to those in the previous FTP Agreement i.e. that non grant of government approval could justify non-compliance with an otherwise agreed tour, with the following wording included in the definition of force majeure "*any written instruction by a government...not granting an... approval.*"
28. Ultimately, however, no FTP Agreement between the PCB and the BCCI was ever signed, nor, despite continuing dialogue between the Boards, did either a 2014 or 2015 tour take place - the *casus belli*. The Panel must now consider whether this outcome constituted a breach of a contract, namely a breach of the April Letter

Legal Principles

29. Under its terms of reference ("**T/R**"), and Article 9.10 in particular, the Panel must determine the substantive law of the dispute. The Parties have agreed that the April Letter is governed by, and shall be construed in accordance with, English law, and the Panel will proceed on that basis.
30. The Panel can summarize the principles relevant to the issues it has to determine as to the interpretation of the April Letter and its classification as a contract *vel non* as follows:
- (i) The meaning of a contract is not ascertained by consideration of the parties' subjective intentions but by what a reasonable person with the background knowledge available to the parties would have understood it to mean. See, inter alia, *Chartbrook Ltd v Persimmon Homes Ltd* (2009) AC 24 per Lord Hoffmann at para 14. *Arnold v Britton* 2015 UKSC 36 2015 AC 1619, (the latest learning on the topic) per Lord Neuberger paras 14-22 and (more succinctly) Lord Hodge at para 76-77.
 - (ii) The context (or factual matrix as it is often known) must also be viewed objectively as referring only to what a reasonable person in the position of both parties would

have known: *Reardon Smith Line v Hansen-Tangen* 1976 AC28 per Lord Wilberforce at p 99; *BCCI v Ali* 2001 UKHL8 2002 1 AC 251. per Lord Hoffmann at p 269.

- (iii) The primary focus of the objective enquiry is upon the language used by the parties. Lord Hoffmann in *BCCI v Ali* op cit. at p 269 said “*the so called golden rule*”, is that “*the words of a contract should be interpreted in their grammatical and ordinary sense in context, except to the extent that some modification is necessary in order to avoid absurdity, inconsistency or repugnancy*”.
- (iv) A document, if ambiguous, will be construed contra proferentem i.e. against the party which tenders it. Chitty on Contracts 32 ed para 7.08.
- (v) In case of any ambiguity, a commercial contract is to be construed in the light of business common sense: *Rainy Sky SA v Kookmin Bank* (2011) UKSC 50 2011 1WLR 2900 per Lord Clarke at para 29.
- (vi) The subsequent conduct of or statements by the parties to a contract are inadmissible as an aid to the interpretation of the contract, as Lord Reid stated in *James Miller & Partners Ltd v Whitworth Street Estates Ltd* (1970) AC 583 at p 603.
- (vii) A contract may not become binding if it is uncertain or incomplete. However the fact that some terms have not been agreed does not necessarily prevent it coming into effect: *Pagnan SPA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 (“Pagnan”) per Lloyd LJ at 619, approved in *RTS Flexible Systems Ltd v Molkerei Alois Muller gmbh & co.* 2010 UKSC 14 2010 1 WLR 753 per Lord Clarke at para 49. The principle *ut magis valeat quam pereat* applies. Chitty op cit para 2-179. In particular, bilateral performance will “*make it difficult to submit that the contract is void for vagueness or uncertainty*” *Trentham Ltd v Archital Luxfer* 1993 1 LLR 25 per Steyn LJ at p27. “*There is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later*”.
- (viii) Where a document, said to be contractual, contemplates the execution of a further contract between the parties, it is a question of construction as to whether the execution of the further contract is a term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will, in fact, proceed. In the former case there is no enforceable contract, in the latter case there is, *per* Parker J in *Von Hatzfeldt-Wildenstein v Alexander*: [1912] 1 Ch 284 at pp288-289.
- (ix) An agreement to negotiate is not enforceable *Barbudev v Eurocom Cable Management Bulgaria EOOD and others* [2012] EWCA Civ 548.2012 All ER (Comm) 963. However

“businessmen do not, any more than the Courts, find it easy to say precisely when they have reached agreement, and may continue to negotiate after they appear to have agreed to the same terms. The Court will then look at the entire course of negotiations to decide whether an apparently unqualified acceptance did in fact conclude the agreement” Chitty op.cit para 2-028.

- (x) Where, in a commercial setting, parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts, the Courts will ordinarily infer that the parties intended to enter into legal obligations. It is therefore not normally necessary to prove that the parties to such an agreement in fact intended to create legal relations. The onus of proving that there was no such intention in principle *“is on the party who asserts that no legal effect is intended, and the onus is a heavy one”*. Megaw J in *Edwards v Skyways Ltd.* (1964) 1 WLR 349 at p355.
- (xi) In deciding whether the onus has been discharged, the courts will be influenced by the importance of the agreement to the parties, and by the fact that one of them acted in reliance on it: Chitty op cit para 2-168. However, neither feature compels such conclusion. The Panel prefers the more nuanced approach of Steyn LJ in *Trentham Ltd v Archital Luxfer* op cit. at p27 *“The fact that the transaction was performed on both (sic) sides will often make it unrealistic to submit that there was no intention to enter into legal relations”*.
- (xii) However *“the question of contractual intention is in the last resort a question of fact and in doubtful cases its resolution depends upon in particular on the incidence of the burden of proof and the objective test which is generally determinative of the issue”* Chitty op cit para 2-179. Treitel too notes that *“the cases which there is no intention to create contractual relations cannot be exhaustively classified”* Contract 14th ed para 4-023 and *“the context in which an agreement is made may negative contractual intention”* ditto para 4-025.

31. There was ostensibly no material dispute between the parties as to those principles of English law. As so often in contractual disputes, the issue before the Panel is less as to what were the governing principles, themselves often inherently fact sensitive, but more as to how they should be applied in the circumstances before it. The Panel would observe that the threshold question in this case is not what the April Letter meant but whether it amounted to a binding contract at all.

The April Letter

32. In the Panel's view the parties were at continuous cross purposes as to the effect of the April Letter. On the one hand, the BCCI considered it to be a document which represented the first step of a three step process, and which was not in itself legally binding, in contrast to the FTP Agreement which, if signed as the third step, would be. On the other hand, the PCB considered the April Letter to be, in itself, legally binding, and any subsequent FTP Agreement to be no more than a formality required by the February Resolutions, "*a routine matter*", as Mr Sethi for the PCB put it in his oral evidence.
33. The Panel, with the benefit of sight and sound of the witnesses, considers that their respective views were genuinely held. Which was the correct view, a distinct question, it will consider later. The Panel accepts that there were copious references in later interchanges from the PCB officers describing the April Letter as a memorandum of understanding (MOU), notably one from Mr Ahmad to Mr Patel on 15th April 2014 proposing a joint press release referring to the PCB and the BCCI having signed "*an MOU with regard to the Future Tours Programme 2015-2023*". As a matter of legal principle, such subsequent characterisation would be inadmissible as an aid to classify or construe the letter; the BCCI's ingenious submission that the interchanges were only introduced to illustrate what the parties thought at the time of the April Letter appears, when deconstructed, to be inconsistent with that principle. In any event, those references were not uniform and could plausibly be interpreted as consistent with the party's respective perspectives as outlined in the previous paragraph. A fortiori a use of similar terminology by the CEO of the ICC in November 2014 casts no light on the status of the April Letter.
34. The Panel notes too that, for example, the minutes of the fourth meeting of the PCB management committee record "*Members were also briefed that an MOU had been signed with BCCI and a legally binding agreement will subsequently be signed to formalise these arrangements*". The BCCI contended that this was an acknowledgement, a kind of admission against interest, that only an FTP Agreement would create binding obligations. Mr Sethi however stated "*The critical word here is to formalise these arrangements which is look at the nitty gritty to dot the Is and cross the Ts and so on and so forth.*" The Panel makes the same comment mutatis mutandis as in the previous paragraph. The key question is not how the parties would classify the April Letter on the one hand and the putative FTP Agreement on the other, but what in point of law was the correct classification of each.

35. The PCB argued that the April Letter was a quid pro quo for its agreement to make unanimous in April the resolutions agreed by a large majority of ICC Members in February. The Panel cannot accept that. It assesses the PCB evidence to that effect as the product of wishful thinking for the following reasons:

- (i) The Resolutions, once passed in February, subject only to their later rejection by Full Council, bound all ICC Members. Unanimity was not required for them to have that effect. Accordingly, the PCB had no leverage in so far as it might decline to support them.
- (ii) While the ICC might, for presentational reasons, desire unanimity among its members, the BCCI was and predictably would have been at most agnostic on the issue.
- (iii) The Minutes of a PCB Management Committee Meeting held on 16 April 2014 (post-dating the April Letter) record that it was, in fact, the ECB and CA, not the BCCI, who had said that they would not sign FTP agreements with PCB unless the latter accepted the February Resolutions.
- (iv) In terms of any Indian tour to Pakistan, it was the PCB which was the suppliant. It was the host country which benefitted from the revenues in respect of such a tour. Bankrupts cannot be choosers, and while the PCB was certainly not bankrupt, at the very least sacrifice of such a tour would, as Mr Ahmad put it, “*definitely make a dent in our financial reserves*”. The prospect of bilateral tours with India as tourist was, in the PCB’s own words, “*the most valuable prize in world cricket*” but ex hypothesi for other ICC Members, not the BCCI itself. By contrast there was no necessity for the BCCI, the dominant force in world cricket in the modern era, to play away against Pakistan. The BCCI may have had the wish, but it was the PCB which had the need.
- (v) The record shows unequivocally that it was the PCB which, from 9 January 2014, the date of the ICC meeting in Dubai, took the initiative in seeking to agree future matches with the BCCI, not vice versa, although it is common ground that, as Professor Shetty put it, “*India-Pakistan matches are the best possible games that can happen and neither of these two boards would not like to have that*”.
- (vi) The April Letter made no mention of a quid pro quo of the kind contended for by the PCB – nor, contrary to the PCB’s submission, could the provision

contemplating the possibility that Full Council might, in June, refuse to approve the constitutional changes reflective of the February Resolutions be construed to reflect the same.

- (vii) No witness for the PCB went so far as to say that anyone from the BCCI said expressly and directly to him that unanimity was required before the BCCI would agree to tour.
- (viii) The shape and general content of the April Letter was not initiated by the BCCI but, as noted above, was based on a format adopted by other parties as well.

36. Much evidence was given, both in skeleton arguments and final submissions, and no little ink (metaphorically) spilt on what may or may not have been said at the April meeting, and what either sides' witnesses thought the April Letter meant, in particular but not only in its reference to a future FTP agreement. The Panel does not intend to succumb to the forensic blandishments to spend time on such matters. The April Letter is a written instrument to which each side was party, and must, according to hallowed principles, as set out in paragraph 30 above, be allowed to speak for itself.

37. Viewed from that perspective, the April Letter, albeit not required by the February Resolutions as such, on its face bore all the emblems of a contract, as the BCCI, albeit with heavy conditionality, conceded. In particular:

- (i) At its outset, it stated that identified tours had been "*agreed*".
- (ii) It stated that the teams "*will*" (sic) play each other and that imperative word 'will' recurs throughout its text.
- (iii) It therefore had a defined subject matter, namely the scheduled tours for the cycle 2015-2023, with the matches to be played in UAE (i.e. the default location) unless otherwise agreed, and in respect of which the obligation appeared to be unqualified.
- (iv) It contained a '*best efforts*' obligation in respect a 2014 tour, which appeared to differentiate between that diluted obligation and the unqualified obligation in respect of the later tours.
- (v) It dealt expressly with the issue of broadcast rights so critical to tour finances.
- (vi) It contained a provision in the form of a condition subsequent which stipulated that in certain possible future circumstances i.e. Full Council's rejection of the

February/ April Resolutions, it would be of no effect, suggesting that otherwise it would be of effect.

- (vii) It did not purport to be or state that it was a comfort letter or conditional contract or mere MOU, and it bore no affinity in terms of its vocabulary or structure to other MOUs which the Panel was shown.
- (viii) There was clearly no express provision negating contractual intention. Chitty op. cit 2-171.
- (ix) The consideration was supplied by the mutual obligation of the host (PCB) and the guest (BCCI) in respect of the scheduled tours.
- (x) The letter was said to be the product of "*previous meetings and discussions*" which is more consistent with it being a final as opposed to a merely provisional arrangement; indeed an earlier draft dated 9th March 2014, also tendered by the BCCI, had clearly undergone several iterations since then, given that it did not contain several elements of the April Letter e.g. any reference to a 2014 tour or to broadcast rights.
- (xi) At its conclusion it was signed and accepted by both parties acting by senior office holders.

In so far as the BCCI took issue with these specific points, the Panel does not agree with its challenge.

38. There is, in the Panel's view, considerable force in the PCB's concluding submission that "*presented with a copy of the PCB/BCCI letter on 9 April 2014, the reasonable person would quickly have discerned that this was a binding and enforceable agreement.*" (Though it rejects the ancillary PCB submission that the April Letter was itself any form of FTP Agreement as being wholly inconsistent with its language, which itself unambiguously differentiates between the two).

39. The BCCI argued that the April Letter was uncertain and incomplete and therefore could not be contractually binding. This is a difficult argument to sustain (and one which the Panel rejects), for four main reasons.

- (i) The number of tours, their dates and location were plausibly described by Mr Sethi as "*the core issues*", especially when reinforced by a provision dealing with broadcast rights, albeit one for future final resolution. The basic framework being

in place, agreement on other issues within that framework could reasonably be postponed till later.

- (ii) During the previous cycle, it appeared that the BCCI played many tours without the backing of even a two page document like the April Letter.
- (iii) It is common ground that, in the context of the previous cycle, MOUs were documents containing detailed arrangements for tours which had been previously, if informally, agreed would take place, i.e. they were consequent on, rather than constitutive of, an agreement to tour.
- (iv) Moreover, within the new cycle, Mr Raman noted that the BCCI continued to tour without any executed FTP Agreements, (as did the PCB with, inter alios, CA) albeit, he suggested, as a matter of grace and without legal obligation. There were, he surmised, MOUs in the sense described in (iii) above for such tours on the previous model which he suggested, attractively, if anachronistically, of a sort "*which would have been the same since Charles Dickens time*". This suggests that there was no a priori reason in the world of international cricket why a succinct document such as the April Letter would be incapable of creating legal obligations.

40. There are, however, countervailing factors which the Panel must take into account and which were in the forefront of BCCI's chief contention that the April Letter was not objectively intended to create legal relations.

- (i) While it is clear that the effect of the February Resolutions was to ensure that, whatever might have been the status quo ante which the BCCI, whether rightly or wrongly, considered imposed on them no legal obligation to tour, thereafter the BCCI and all other Members would indubitably become subject to such obligations. Non sequitur that it was a document in the form of the April Letter as distinct from an FTP Agreement which would impose such obligations.
- (ii) The April Letter fits neatly into the first step of the three step process rather than the third, which would be signalled by the signature of an FTP Agreement. The first step was, as explained below, a necessary precursor of both the second and third steps; but again non sequitur that it was itself binding.
- (iii) Although the PCB is correct in stating that Geoff Allardice's email of 7 May, 2018, the first document which refers expressly to the three step process, cannot be used as an aid to construction of the (earlier) April Letter, the Panel is satisfied that such

process was inherent in the February Resolutions. For ICC Members to enter into legally binding FTP Agreements, it was necessary for them to negotiate inter se their desired tour programmes and then to inform the ICC as the co-ordinating body. Absent these prior steps, FTP Agreements could never have been reached at all, and the certainty, which was a key objective of the February Resolutions, could never have been achieved.

- (iv) The content of such FTP Agreements as set out in paragraph 6 of Appendix C could not be finalised and committed to by Members unless and until a Master FTP Schedule had been agreed, given that until final agreement had been reached, any Member could change its position in respect of dates agreed in earlier discussions (as, for example, the PCB did with four other Members, following the discussions with the BCCI on 9 April 2014.)
- (v) Appendix C of the February Resolutions (which bound, inter alios, both parties) unambiguously envisaged that it was only a signed FTP Agreement containing the specific provisions as set out in its eighth paragraph which would be legally binding upon the signatories.
- (vi) The fact that the obligation to enter into FTP Agreements appears, in the event, to have been as honoured in the breach as in the observance by Members does not impair the above analysis or detract from the FTP Agreements status as the only legally binding agreement in contemplation on 9 April 2014. The Panel is concerned in terms of the factual matrix with what preceded, not with what succeeded the April Letter.
- (vii) The use of the term "*FTP Agreement*" in the April Letter can only be a reference to that expression as defined in Appendix C of the February Resolutions. Further confirmation to that effect is provided by the acknowledgment by both parties of the matrix in which the April Letter was sourced, i.e. the express reference to Appendix C within it ("*the third in a series of six Resolutions*" – i.e. Appendix A to Appendix F.)
- (viii) An FTP Agreement (as required by Appendix C) cannot be downgraded to a mere formalisation of an agreement already reached. Pursuant to Appendix C, the FTP agreement **had**, inter alia, to contain a force majeure clause. It could not, accordingly, co-exist with an alleged agreement i.e. the April Letter which contained on its face no such clause. Even if in theory there can be a sequence of contracts between the same parties all of which were binding, such later contracts

can amplify the earlier ones but cannot (unless by way of agreed variation) contradict them. Of the choices of construction postulated by Parker J in *Von Hatzfeldt-Wildenstein v Alexander* cit sup the Panel concludes that, for the purposes of the April Letter, the former is to be preferred. The parties would be bound only when the FTP Agreement, itself contemplated in the April Letter, was signed.

- (ix) Moreover, the PCB's own schedules as at 9 April 2014 were such that there were no less than six clashes between the dates for which the BCCI was in a position to offer bilateral series and the dates pencilled in by the PCB following its discussions with other Members during the first step of the three step process between January and April 2014. The PCB could not have known on 9 April 2014 that the potential clashes with NZC, ECB, CSA and SLC could all be resolved so as to enable it to maintain the dates set out in the April Letter itself, as was realistically acknowledged by Mr Ahmad in his evidence. Optimism is one thing; certainty another. It is of course trite that, as the PCB pointed out, the mere fact that a contract once concluded is capable of amendment does not deprive it of its status as a contract. But the notion of an arrangement, susceptible to continuous amendment, and whose destiny depends upon the attitude of persons not parties to it cannot sit with the concept of a binding contract.
- (x) It is, in the Panel's view, inconceivable that the BCCI would ever have agreed to a contract without a force majeure clause enabling it to resile, by reason of absence of government approval, from what might otherwise be a binding commitment; see further paragraph 46 below

41. The BCCI assert, through Mr Raman, that it was made clear to the PCB on 9 April 2014 that the BCCI had to obtain approval for its proposed FTP Schedule with the PCB from the BCCI's Working Committee. The PCB deny, through Mr Ahmad, that it had any such knowledge until 15 April 2014. The need for such approval was not mentioned in the April Letter. Moreover, the Panel would have been disposed to categorise it, whenever the issue was raised, as a matter of form rather than substance, given the seniority of the BCCI participants in the 9 April meeting. The BCCI do not, however, need to make good the existence of any such condition subsequent.

42. The Panel concludes that, looking at the April Letter, in isolation, as it were through a microscope, the PCB's argument that it was a contractually binding document burns bright. If, however, a telescope is deployed, which brings into perspective the circumstances out of which that letter arose, the argument is extinguished. In the Panel's view, the reasonable observer apprised of all the facts would conclude that the April Letter was no more than a declaration of intent, albeit an intent sincerely held by the BCCI (and of course by the PCB) at most, as Mr Manohar (President of the BCCI from October 2015 to May 2016) put it, creating a "*moral obligation*" but not a legal one. Context trumps text.
43. It follows inexorably that the PCB's claim must fail. If there was no obligation on the BCCI to engage in the tours in either 2014 or 2015, its omission to do so was no breach and gave rise to no damages claim.

Governmental approval issue

44. In the light of the Panel's above conclusion, the Government Approval Issue is moot. Out of deference to the detailed arguments advanced on both sides, however, the Panel will nonetheless deal with it, but only briefly, noting by way of preface that the evidence before the Panel was far more extensive than that which led the ICC Technical Committee in 2017 to reject the assertion by the BCCI that the failure by India to play Pakistan in Round 6 of the ICC Women's Championship of 2014-2016 was the consequence of an inability to obtain requisite government approval .
45. It was common ground that there was no domestic law or any express directive which imposed any such requirement, nor any provision for sanction were the BCCI to undertake a tour without government approval. The BCCI was not, in the taxonomy of Indian law, 'a National Sports Federation' and subject to the particular duties incumbent on such bodies, but rather, as Professor Shetty, General Manager of the BCCI put it, followed the protocols of seeking such approval, if not the specific procedures which fleshed them out, as a "*responsible sports federation*". The documentary record was incomplete and inconsistent, if partly explained by a transfer between offices of relevant files in 2006, which may have resulted in their loss or destruction. Precisely which Ministry's consent had to be approved for such tours, the time at and the manner in which

such approval had to be sought and obtained, appeared to the Panel more a patchwork quilt than a seamless robe.

46. However, the Panel was ultimately persuaded by the evidence of the BCCI witnesses, notably Professor Shetty, the maker of such requests for approval over a number of years, and Mr Kurshid, a former Foreign Minister of India, who were both subject to strenuous and painstaking challenge by the PCB's counsel but never disavowed that such approval was a sine qua non. Mr Kurshid, with an eloquence befitting his recent high office, described this as "*an oral tradition*".
47. The Panel's conclusion is that what varied was the readiness with which such approval for an Indian tour of Pakistan would or would not be granted, which itself, was a reflection of the state of relations between the two Governments and peoples, informed by security and political considerations rather than whether there was any need for such approval in the first place.
48. The more difficult question was not whether Indian governmental approval was required but how, if at all, it, as an aspect of force majeure, it became part of a contract, if any, between the parties, given that there was no express mention of it in the April Letter itself.
49. The Panel accepts that the awareness of the BCCI's claimed need for government approval was indeed reflected not only in PCB emails but also in minutes of PCB board meetings, all of which were aggregated in the BCCI's helpful schedule to its written submissions. However many of the items in those documents said to reflect such awareness post date 9 April 2014 and the coming into office in that month of a new administration. Prior awareness is not by itself dispositive of whether Indian government approval was part of any contract between the parties as at that date. Subsequent awareness is simply irrelevant to that issue.
50. The BCCI relied on an implied term. To imply such a term requires, according to the principles vouched for in *Marks and Spencer v Bank Paribas* 2015 UKSC 72 esp per Lord Neuberger at paras 21-23, see too *Ali v Petroleum Co of Trinidad and Tobago* 2017 UKPC 2

per Lord Hughes at para 7, establishment of its need for business efficacy, its obviousness (goes without saying), or trade usage - what the BCCI called in this context "*the invariable custom and practice*" or "*continuous course of dealing*".

51. The Panel cannot find that any of these criteria were satisfied. A contract to tour can, of course, be effective without any such term; nor did the BCCI contend otherwise. As to the two for which BCCI finally opted, they were, in the Panel's view, and in the context of this particular controversy, two sides of the same coin. What may have been obvious to the BCCI on 9 April 2014 (i.e. the need for government approval) would not have been obvious to the PCB (which knew what the BCCI claimed to be the position but not what the position actually was). Neither (materially) would it have been obvious to the notorious officious bystander, who would have had to be aware not only that the BCCI always sought approval for overseas tours (and for political, not merely security, reasons) but also that this fact, i.e. consistent practice, was known generally to senior officials in member countries of the ICC, particularly in the PCB. On this latter aspect, the relevant evidence is not so compelling.
52. The matter is also complicated by the further fact that in February 2011 (i.e. since the most recent refusal of approval for a BCCI tour of Pakistan in 2009) the ICC had enacted amended Articles including Article 2.9(B)² banning government interference in the administration of cricket, whose true interpretation the Panel was specifically asked by both parties not to consider, but might objectively have raised doubts in the mind of that bystander as to its impact on any previous Indian practice.
53. The debate has in any event an aroma of artificiality, since from the BCCI's perspective the April Letter was not contractual at all, and hence provided no platform whatsoever for importation of an implied term. The Panel concludes that, in reality, the absence from the April Letter of any force majeure clause (including absence of government approval for an overseas tour as a basis for non-compliance) was from the BCCI's standpoint neither adventitious nor accidental. It reflected the fact that, as the Panel has already determined, the April Letter was not binding and, had an FTP Agreement been (as it should have been)

² Article 2.4(D) of the current ICC Constitution

entered into later, it was that agreement which would have been the source and site of a force majeure clause and the consequent need for governmental approval to tour. (The Panel would add in respect of the other way in which the BCCI put its case on such an implied term, that the parties' duty to adhere to the mandatory Appendix C cannot result in its importation into the April Letter. Rather it imposes an autonomous obligation.)

54. Returning to the factual narrative there is no evidence that any approvals were sought by the BCCI from the Indian government for tours in 2014 or 2015 until Mr Thakur (a member of the political party colloquially known as BJP, the leader of the coalition which took office in April 2014, and Secretary of the BCCI from March 2015) did so on 23rd November 2015, the day after Sri Lanka had been agreed by both parties as a venue (in lieu of the UAE). It is common ground that such approval was not obtained; hence the cancellation of the 2015 tour.

55. The PCB advanced an argument that the application for approval was made too late. The Panel is, however, confident that, even had it been made earlier it would not have been granted. The political relations between India and Pakistan at the time were generally tense, for several reasons recounted without challenge in Professor Shetty's second affidavit. There were reports of terrorist strikes and heavy exchanges of fire between the security forces of both countries at the border, which had resulted in several losses of life, including of civilians. In October 2014, statements were made by the then Defence Minister of India urging Pakistan to stop unprovoked firing, with a warning that India's response would be "*unaffordable*", provoking the response from the Defence Minister of Pakistan who stated that Pakistan would be able to respond "*befittingly*" to the "*Indian aggression*".

56. In March 2015, there was a major terrorist attack on a police station in Jammu and Kashmir, which led to the deaths of several security personnel. In July 2015, there was another attack in Gurdaspur, Punjab which led to several security personnel and civilians losing their lives. In August 2015 there was a further incident in Udhampur in Jammu and Kashmir. Such attacks were said to have been perpetrated by Pakistan-based terrorist organisations.

57. The PCB was well aware of the potential impact of these circumstances upon the proposed tours. The PCB Chairman's letter to the Pakistan Prime Minister dated 20 August 2015 stated:

"The Indian government has seemingly withheld its permission for India to play Pakistan stating that the cricket series would be inappropriate in the current atmosphere of tension at the borders, Lakhvi's release, Gurdaspur incidents. Accordingly, there is a possibility that India would not agree to honour its commitment to play its series with Pakistan."

His pessimism was justified.

The 2014 tour

58. The Panel gave separate consideration to the 2014 tour. Again on the premise (quod non) that the April Letter was legally binding, the obligation on the BCCI was to make "all effort" ("**the obligation**") which was arguably a more onerous duty, and certainly no less a duty, than one to use "best endeavours" "based on the availability of possible dates" ("**the proviso**").

59. The PCB contended that the obligation on the BCCI was to seek to make dates available. The BCCI contended that the obligation was only triggered if there were possible dates available. The Panel prefers the argument of the BCCI which is more consonant with the language, and with the fact that as of 9 April 2014 neither it's nor the PCB's schedule could readily accommodate such a tour. Moreover this particular part of the April Letter was introduced at the behest, indeed insistence, of the PCB.

60. The Panel declines to accept that the reference to a 2014 tour was purely cosmetic; but considers that the inclusion in the April Letter of reference to such a tour was founded more on the PCB's hope, than its expectation, that a small window of opportunity might present itself, for example, with a tweaking of the prearranged schedules before India played its first meaningful matches on its tour of Australia in December 2014. (It is common ground (i) that India was scheduled to play the West Indies at home between 8th October and 19th November 2014 and was to travel to Australia for a first (warm up) game on 24 November 2014; and (ii) the PCB was committed to play matches against New Zealand over that same period.)

61. The Panel accepts the BCCI's evidence that it was not in fact possible to truncate the India tour to Australia - which it acknowledges to have been a highly important prior commitment and that the PCB had, by the time of the Melbourne meeting in June, become resigned to that fact (Mr Sethi said that by then he had "*to take at face value*" what Mr Srinivasan of the BCCI said as to such efforts and pressed him no further.)
62. In fact, given the premature conclusion of the West Indian tour to India on October 17, such window unexpectedly opened up but at that stage the PCB were still committed to their matches with New Zealand (see email of 12th September 2018 Zakhir Khan to Dr Sridhar : "*Many thanks all well here. Busy with Pakistan versus Australia and NZ series to be held in the UAE from 1 October to 20 December*") and never approached New Zealand to grant it leave of absence from their scheduled matches.
63. In the event, the BCCI chose to approach Sri Lanka to fill the gap rather than Pakistan given, as it was plausibly explained, that the possibility of obtaining government approval for away matches against Pakistan at such short notice was unrealistic.
64. No case was put forward by the PCB, on whom the burden lay, that the BCCI did not make any requisite efforts. In the Panel's view, given the unavailability of dates already referred to, the best efforts obligation on the BCCI (if, the Panel repeats, the April Letter was binding at all) was exiguous and its breach unproven.

Envoi

65. The Panel was forcibly impressed by the sincere desire of witnesses for both sides, who displayed much mutual respect and even friendship, for the resumption, were it feasible, of bilateral tours between teams representing these two proud cricketing nations. The Panel expresses the hope that political considerations will not long prevent that desire from being fulfilled.

Order

For the reasons given above, the PCB's claim is dismissed. Costs are reserved.

Michael J Beloff QC

Michael J Beloff QC (Chairman)

A Bennett

Dr Annabelle Bennett AO SC

Jan Paulsson

Jan Paulsson

Dubai

20 November 2018