'WITHOUT PREJUDICE'AFTER OCEANBULK SHIPPING: A COMPARISON BETWEEN THE ENGLISH AND INDIAN POSITIONS OF LAW

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ABSTRACT

The scope of the "without prejudice" rule has expanded prodigiously over the years, but so have the exceptions, permitted to the enforcement of the rule. Oceanbulk Shipping & Trading v. TMT Asia Ltd. &Ors introduces an unprecedented and seemingly drastic exception which shall facilitate the admission of "without prejudice" communications to aid the interpretation of contractual terms that they gave rise to. This paper critically analyzes the Oceanbulk ruling in the context of the evolutionary trend of the rule and submits that when the "without prejudice" rule is stripped down to the essentiality of its original purpose, the reasoning and effect of the judgment are not inconsistent with the objective of the rule. The latter part of this paper is a comparative exercise which asks the question - how would Occeanbulk be decided under Indian law? It is suggested that Section 23 of the Indian Evidence Act 1872, which is the embodiment of this rule in India, is framed in a manner that permits no

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exceptions and therefore, the case would be decided contrary to the United Kingdom Supreme Court's decision. Thus, the Indian "without prejudice" principle remains frozen in its original form, cast in 1872 form whereas in England the rule has evolved greatly.

I. INTRODUCTION

The law of evidence, an adjectival discipline, is intended to facilitate the goals of substantive law. This is why, the underlying objectives of substantive law such as the law of contract, give rise to certain rules of evidence tailored to fit them. The 'without prejudice' rule is one such. By barring the admissibility of evidence given up on the express or implicit condition of non-disclosure in a court of law, it aims to advance the objective of promoting settlement of disputes without litigation. Over the years, however, the expansion of the scope of protection given by the rule was accompanied by the carving out of numerous exceptions to the rule. *Oceanbulk Shipping & Trading* v. *TMT Asia Ltd. & Ors*.[1] tests the limits of such exceptions by introducing an unprecedented and seemingly drastic one; to allow the introduction of "without prejudice" communications to aid the interpretation of contractual terms that they gave rise to.

This paper critically analyzes the ruling in this case, in the context of the evolutionary trend of the 'without prejudice' rule and makes the case that when the 'without prejudice' rule is stripped down to its bare minimum (and original) purpose, the reasoning and effect of the judgment are not as surprising as it might appear to be at first blush. The latter part of this paper is a comparative exercise which asks the

[1]Oceanbulk Shipping & Trading SA v. TMT Asia Ltd. & Ors., [2011] 1 All ER (Comm) 1.

question - how would *Oceanbulk* be decided under Indian law? It is suggested that Section 23 of the Indian Evidence Act 1872 which is the embodiment of this rule in India, is framed in a manner that permits no exceptions and therefore, the case would be decided contrary to the United Kingdom Supreme Court's decision. Thus, the Indian 'without prejudice' principle remains frozen in its original form, cast in 1872 form whereas in United Kingdom the rule has evolved greatly.

The parties to this case, Oceanbulk Shipping and TMT Asia had entered into a series of forward freight arrangements ('**FFA**'), which were a type of contractual arrangement that facilitated hedging against market fluctuation, by enabling the parties to bet on the daily fluctuating rate for time charter of capsize bulk carriers, as per the Baltic Exchange Index. The seller bet that market rates would be lower than the contractual rate and the buyer bet vice versa. The FFAs involved in this case were contracted over May to December 2008 on a monthly basis. At the end of this period, due to unusually high volatility in the market in 2008, TMT Asia had incurred substantial liability under the FFAs. When TMT Asia failed to pay one installment due to Oceanbulk, they sought extra time in order to stave off the huge liquidated damages that were provided for in the agreement. Subsequently, both parties entered into "without prejudice" negotiations in order to amicably resolve the matter. The negotiations were partly in writing and partly oral, in the course of two meetings in June 2008. On 20th June 2008 the parties entered into a written settlement contract in which they agreed:

1. To crystallize 50 per cent of each FFA for 2008 based on the difference between the contracted rate and the average of the ten day closing prices for the Baltic market indices from 26th June 2008;
2. To co-operate to close out the 50 per cent balance of the open 2008 FFAs against the market on the best terms achievable by 15 August 2008.

The dispute in this case arose out of a disagreement between the parties as to the meaning of the second part. Both parties agreed as to the existence of the agreement, its terms and that all terms of the agreement are accurately recorded in the written settlement contract.

The issue that arose pertained to construction of the clause which stated that *"(the parties) will co-operate to close out"*.[2] Oceanbulk's contention was that the defendant had breached the second part of the settlement agreement because it failed to 'co-operate to close out' the balance of 50 per cent of the open FFAs for 2008 as agreed upon. In counter, TMT Asia's contention was that by co-operation, the parties had meant that TMT Asia would, upon Oceanbulk's request, assist Oceanbulk to contract with third parties to close out its opposite market positions, then Oceanbulk would close out those positions and the FFAs between Oceanbulk and Asia TMT would be crystallized at the rates agreed upon between Oceanbulk and the third party. Depending on whose contention is accepted, the closing-out process would be either a bilateral or trilateral process. TMT Asia's contention rested on the usage of the term 'sleeved' in the course of the negotiations, the meaning of which is not contested.

TMT Asia pleaded permission to adduce evidence in the form of two documentary and two oral representations made by Oceanbulk, of which one email and one oral statement were found to be "without prejudice" by the trial court.[3] Oceanbulk pleaded that reliance upon the communications is barred by the legal principle underlying "without prejudice" negotiations. TMT Asia pleaded estoppel against Oceanbulk, stating that the appellants were estopped from denying the *fact* that in the negotiations and the culminating contract, the parties were proceeding on the common assumption that the transactions were to be 'sleeved' by Oceanbulk. Hence, the question of law before

[2]Erich Suter, *The Devil's in the Detail: Interpreting Compromise Agreements After Oceanbulk*, ARBITRATION, 77(2), 274-279, 275 (2011).
[3]*Supra* note 1, ¶12.

the courts was: whether the evidence sought to be adduced by TMT Asia was admissible as an exception to the "without prejudice" rule?

The trial court held for TMT Asia but the Court of Appeal allowed Oceanbulk's appeal, holding the evidence inadmissible on account of the "without prejudice" rule. Hence the appeal to the UK Supreme Court.

II. THE "WITHOUT PREJUDICE" RULE

The "without prejudice" rule is a rule governing the admissibility of evidence which bars the use of communications during the course of negotiations to settle disputes, against the party making them, in circumstances where the parties have either expressly or implicitly agreed that communications in the course of negotiation should be inadmissible in evidence. In *Universal Plc.* v. *The Proctor & Gamble Co.*,[4] the House of Lords held that the rule operates to rule out proof of any admissions made with a genuine intention to reach a settlement in any litigation subsequent to the negotiations pertaining to the same subject matter. There are two principal justifications for the exclusion of admissions made "without prejudice" in evidence:[5]

1. Public policy requires that parties be encouraged to reach an out-of-court settlement through negotiation without fear of their admissions, during the process, later being used against them, for instance on the question of fault, negligence or liability.
2. Out of respect for the parties' implicit or express agreement to keep communications exchanged during negotiations outside the purview of evidentiary use.

Although the rule initially applied only to admissions, over time, the scope of the rule was greatly enlarged, as was evidenced by the House

[4]Unilever Plc. v.The Procter & Gamble Co., [2000] 1 WLR 2436.
[5]CROSS & TAPPER ON EVIDENCE 503 (Colin Tapper ed.) (2010).

of Lords' refusal to restrict its application to identifiable admissions and reinforcing the protection of all communications under the rule, in *Ofulue* v. *Bossert.*[6] As a consequence of the judicial expansion of its scope, once privilege is established, the boundaries between what is protected and what is not, is rather hazy.[7]

III. EXCEPTIONS TO THE "WITHOUT PREJUDICE" RULE

The "without prejudice' rule has been repeatedly stressed for its importance in promoting out-of-court settlement.[8] However, numerous exceptions have been carved out to the rule judicially. In *Universal Plc.* v. *The Proctor & Gamble Co.,*[9] a non-exhaustive list of eight exceptions was given, the relevant one being the first – to decide whether a settlement was reached between the parties. Pursuant to this, the court decides to allow the exception on the basis of a three pronged justification:

A. Analogy with the Rectification Exception

In *Oceanbulk*, the Supreme Court relied upon (and extrapolates from) an unmentioned exception to the without prejudice rule – the exception for the purposes of rectification. Rectification is a process for amending the terms of the contract on the grounds that the terms as they were finally documented, do not reflect the true common intention of the parties. The Supreme Court relied upon two cases, *Pearlman* v. *National Life Assurance Company of Canada*[10] and *Butler* v. *Countrywide Finance Ltd.,*[11] which held that a party to without prejudice proceedings can use those communications to show

[6]Ofulue v. Bossert, [2009] WLR (D) 91.
[7]*Supra* note 3, at 505.
[8]*Supra* note 4.
[9]*Supra* note 4.
[10]Pearlman v. National Life Assurance Company of Canada, (1917) 39 OLR 141.
[11]Butler v. Countrywide Finance Ltd., (1992) 5 PRNZ 447.

that the agreement should be rectified. Imparting rationale to these two decisions, the court stated that the first exception in *Unilever*[12] cannot but mean that rectification is a ground for exception, because no real boundary could be drawn between admitting "without prejudice" communications in order to resolve the issue of whether an agreement was reached and admitting it to prove what the agreement was (for the purpose of rectification). Building on this assertion, Lord Clarke opines that no meaningful distinction can be made between admissibility of the impugned evidence for rectification and in order to interpret the terms of the contract. This cannot be discounted, for the purpose of both the exercise is the same – to give effect to the parties' real intentions. It is when the language of the contract cannot support a construction amenable to the true intention of the parties that rectification is sought. In this light, rectification subsumes the process of identifying the parties' true intentions.

B. Rule of Contractual Interpretation

The general rule for the construction of contracts is that the language of the contract should be construed as it would be by a reasonable person having all the background knowledge that is available to the parties.[13] Although pre-contractual negotiations were not admissible in evidence to interpret contracts even in non "without prejudice" transactions, they were admissible to prove estoppel or rectification. The condition for admissibility in such cases is that the facts must be part of the "factual matrix". The phrase refers to the set of objective facts surrounding the contract which provide the context within which it was entered into. Classifying facts as such is deeply subjective to each particular case and can sometimes be a labored distinction. This is acknowledged in the judgment itself, but the Court nevertheless ruled that the rule for admissibility of negotiation-communications to interpret the contract should be the same irrespective of whether the

[12]*Supra* note 4.
[13]Chartbrook Ltd. v. Persimmon Homes Ltd., [2009] A.C. 1101.

negotiations were without prejudice or not, because the fundamental objective was to enable the court to form an objective opinion of the intention of the parties.[14] The implicit rationale was that using 'without prejudice' communications to give effect to the true intention of the parties cannot count as using them *against* either of the parties, and when this condition is satisfied there is no reason why the modern principles of contractual interpretation should not be applied to without prejudice negotiations.

C. The Furtherance of Policy Objective

Addressing the policy angle, the court underscores the importance of the rule, in enabling free communication bereft of fear of legal backlash later. The importance of this fundamental premise of the rule is effectively portrayed in *Ofulue* v. *Bossert*, where it was stated, *"It is the ability to speak freely that indicates where the limits of the rule should be."*[15] The court in this case reasons that the evidence of objective facts would make parties confident that their true intentions as evidenced by objective facts during negotiations would be given effect to; settlement through negotiation would only be encouraged. The Court's assertion seems to be that if parties can be confident that the fruits of negotiation would be given effect as truly intended by them, they will be more willing to negotiate a settlement. Considering the net effect of allowing the exception facilitates further clarity on what the decision holds:

1. Statements made in the course of negotiation will not be used against the party making them.
2. Objective facts (such as knowledge, contemplation of both parties etc.) can be used to contextualize the text of the contract.

Given that the first, fundamental protection is still available, the admissibility of negotiation-communications does not seem to

[14] *Supra* note 1, ¶40.
[15] *Supra* note 6, ¶12.

infringe upon the crux of the rule and may even encourage genuine attempts to settle through negotiations culminating in a contract.

Therefore, Lord Clarke decided for TMT Asia and the six other Justices concurred with him in reasoning and conclusion.

IV. CRITICAL APPRECIATION OF OCEANBULK

Several gnawing issues arise when this ruling is given full import. *Oceanbulk* has opened up a judicial maze of questions that will arise in future, of which there would be no easy answer. However, this author would respectfully agree with the conclusion reached by the bench.

A. The Factual Matrix Question

The judgment itself recognizes the difficulties in identifying what is included within the ambit of "factual matrix". What constitutes an "objective fact" in the context of 'without prejudice' negotiations is fraught with ambiguity.[16] For instance, a party stating that goods were damaged at the destination port and not at sea is a fact, however the fact that one disputant asserts the fact to another undermines its 'objectivity'. The judgment contemplates that 'objective facts communicated by one party to another' may fall within the factual matrix or background knowledge required to construe the contract.[17] However, this fails to take into account that what is relevant is not either party's subjective intention but shared intention. An instinctively convincing argument is that only the written contract can signify common intent.[18] However, the facts in *Oceanbulk* demonstrate that even where parties agree that the contract reflects

[16]Adrian Zuckerman, *Without prejudice interpretation - with prejudice negotiations: Oceanbulk Shipping and Trading SA v. TMT Asia Ltd*, E. & P., 15(3), 232-244, 234 (2011).
[17]*Supra* note 1, ¶40.
[18]Adrian Zuckerman, *supra* note 16, at 232-244, 236.

common intention, the content of that intention may be ambiguous and the only way to fairly construe the contract is in line with the factual context of the contract, determined as objectively as possible.

But the process of determination of objective facts is fraught with difficulty. Despite the judgment's reliance on *Chartbrook,*[19] which matter-of-factly differentiates between objective facts and subjective statements, in practice, the line between admissible fact and inadmissible statements is fickle and blurry as the judgment itself acknowledges.[20] But to rule out the use of pre-contractual negotiations for interpretation of contract absolutely,[21] might be too drastic. It is implausible, at least to this author that limiting the burden of the court in having to sift through evidence over-rides the objective of giving effect to the true intention of contracting parties. The latter is what underlies rectification as well as interpretation. Would the solution be to rule out all rectification and interpretation that rely upon pre-contractual negotiation? In my humble opinion, no. The objectivity of the fact referred to in the judgment may mean not so much 'fact evident independent of subjective interpretation or representation' but may be closer to 'fact as would seem to a reasonable observer, going by parties' conduct or words'. If the expansive interpretation of the protection that 'without prejudice' proceedings give has led to uneasiness with the proposition that parties should be held to what they represent in the negotiations, we must remind ourselves that the purpose of the rule is *not* to give immunity to parties to say or represent anything in without prejudice negotiations without any consequences attaching thereto, for instance by way of estoppels. That would defeat both purposes of the without prejudice rule – public policy and private agreement.

[19]*Supra* note 6.
[20]*Supra* note 17.
[21]Paul S. Davies, *Negotiating the Boundaries of Admissibility,* C.L.J. 70(1), 24-27, 27 (2011).

B. Disregarding Parties' Covenant to Negotiate 'Without Prejudice': The Whittling Down of the Rule

As the Court itself pointed out, one of the bases for the 'without prejudice' rule of exclusion is the implicit or explicit agreement between parties to exclude the negotiation communications from evidence. However, the Supreme Court failed to consider this covenant, justifying its decision on the basis of public policy instead.[22] It is important to remember that the fundamental purpose of the 'without prejudice' exclusionary rule is not to 'exclude admission of negotiations as evidence' but more fundamental – to 'exclude the use of statements made in the course of negotiation from being used against the party'. The latter does not always necessarily require the former.

C. Harming the Underlying Public Policy Goal?

It has been suggested that this decision harms the public policy objective of encouraging negotiated settlement rather than encouraging it, for now parties will have to be guarded in what they say during negotiations.[23] In my view, this is not entirely correct. While this judgment does mean parties will have to be more careful about what they say in negotiations, this is only to the extent that they do encapsulate in the contract exactly what was settled by negotiation. The how's and why's of negotiation will ordinarily have no place in an enquiry as to what parties meant by a certain clause of the contract. Why a party might have agreed to pay half the amount of liquidated damages claimed by the other party is unnecessary to the determination of whether this would include interest calculated from the date of the cause of action or not. This becomes relevant in light of the fact that the 'without prejudice' rule was originally designed to protect a party against disclosure as to the former kind, which might disadvantage them in legal proceedings and not the latter, which is

[22] *Supra* note 16, at 235.
[23] *Supra* note 16, at 237.

merely a means to hold the party to what they agreed as a result of the negotiations. This is not to simplify the difficult process of sifting facts essential and relevant to interpretation of the contract. Indeed, the court itself has recognized the inherent problems with this exercise in practice.[24] But within the factual context of each case, it is not impossible.

There is no gainsaying that the Supreme Court of UK has widened the admissibility of "without prejudice" statements greatly. However, whether this widening negates the very purpose of the "without prejudice" rule ought to be answered only after a re-evaluation of the original goal of the rule and the enormous expansion in scope of the rule. In my view, the final result of this decision does not negate the original premise of the rule. The rule was conceived in order to encourage parties to agree; what was agreed upon is still an interpretive exercise that must be carried out in the context of the entire process of agreement. The public policy based reasoning of the court seems to have worked at least in the instant case, where the parties settled all differences even before the Supreme Court's decision was published.[25]

In any case, the argument that *Oceanbulk*will change the way parties negotiate is feeble, because in practice, even before this case, parties knew that their statements could be used to prove the existence of the contract, for rectification, for estoppel etc.[26] The assertion that the kind of enquiry contemplated by this case is not analogous but completely different from the kind undertaken in rectification or in estoppel does not seem to be tenable.

Oceanbulk is one step in a long series of changes that the 'without prejudice' rule has undergone in the UK, in response to new situations

[24]*Supra* note 1, ¶39.
[25]*Supra* note 2, at 279.
[26]*Supra* note 21.

brought before courts of law. The final part of this paper examines how *Oceanbulk* would have been decided in India.

V. OCEANBULK AND THE INDIAN POSITION OF LAW

The respondent in this case had sought to adduce two statements, one contained in an email and another orally made at a meeting, which were made without prejudice. In order to determine where such a quest would stand in light of the Indian law of evidence, the effect of two provisions of the Indian Evidence Act,1872 becomes crucial – Section 92 and Section 23. The latter embodies 'without prejudice' protection in the Indian statute.

A. Admissibility, Outside the Ambit of the "Without Prejudice" Rule

It is first considered whether there is anything to bar the admission or relevancy of the evidence sought to be produced outside the ambit of the "without prejudice" rule. Since there are two kinds of evidence sought to be adduced, oral and documentary, a question arises, as to whether the oral evidence is made inadmissible by Section 91 or 92 of the Act. Section 91 applies where the content of certain types of documents are sought to be proved, which is not the case here. The object is only to clarify the scope of a clause of the document. It is clearly on record that the terms and content of the contract are not contested by either party and there is consensus that the document fully records all terms agreed upon.[27] Hence neither the email nor the oral statement is excluded by the action of Section 91. Section 92 follows the logical sequence of Section 91, which bars the admission of any extrinsic evidence to prove the terms of a transaction which has been reduced to documentary form.[28] Section 92 bars the

[27]*Supra* note 1, ¶6.

[28]SIR JOHN WOODROFFE & AMEER ALI, LAW OF EVIDENCE, 2408 (S.V. JogaRao ed., 17th ed.) (2001).

admission of oral evidence to contradict, vary, add to or subtract from the terms of a contract. It does not matter whether the oral evidence was spoken before, during or after the transaction.[29] However, does the use of oral statements to prove that 'cooperate' necessarily included the 'sleeving' of transactions by Oceanbulk amount to 'contradict, vary, add to or subtract from'? Arguably, it does not. What is attempted is only to give the court the meaning of 'cooperate' in the context of the parties' negotiation. Therefore this does not fall within the ambit of the prohibition under Section 92. The Supreme Court has also held that "the construction of a document so as to ascertain the intention of the parties is in no way controlled by the provisions of Sections 91 or 92 of the Evidence Act. The document has to be interpreted applying the known principles of construction and/ or canons."[30] Therefore, the oral statement sought to be produced is not barred by the action of Section 92. The email falls under documentary evidence, as per the definition of "Evidence" given in Section 3 in the second clause and is not barred by any provision of the Act.

Alternatively, the action of section 92 can be explained through proviso (6) to the section, which states, "Any fact may be proved which shows in what manner the language of a document is related to existing facts." In the opinion of the author, the proviso's wording coupled with illustration (c), suggests that it cannot be used to prove facts which are not strictly in existence, but were, at some earlier point. However, the proviso is worded very generally and is often used by the court when extrinsic evidence is required to ascertain the real meaning.[31] It has also been used to admit evidence to show the circumstances in which a document was executed, in order to arrive at the true effect of the transaction is embodied, at the Bombay High

[29]SARKAR, SARKAR ON EVIDENCE 1720 (16th ed., 2009).
[30]Hindustan Fasteners Private Limited v. Nashik Workers Union, (2007) 11 SCC 660, 667.
[31]*Supra* note 29, at 1804.

Court.[32] The true meaning was held to comprise of the enquiry into what the words meant, or how they were to be applied to the circumstances of the writer or the facts existing at the time of making of the document.[33] It has repeatedly been held that the effect of Section 92 and its provisos must be construed with respect to Sections 93 to 98.[34] Due to the action of Section 93, only latent ambiguities may be resolved by extrinsic oral evidence. In this case, the ambiguity arises not because of a patently ambiguous construction of the document but because of latent ambiguity arising as to the scope of 'cooperation'. Hence arguably, proviso (6) to Section 92 allows the production of the oral evidence.

B. The "Without Prejudice" Rule in the Indian Evidence Act

Since the above section prompts the conclusion that neither the oral nor documentary evidence would be barred from admission by Sections 91 or 92 in the absence of the without prejudice rule, the effect of the without prejudice rule now comes into question.

Section 23states that an admission which was made upon the express condition that evidence of it is not to be given, or in circumstances from which it is inferable that the parties agreed as such, is not relevant. This Section corresponds to Article 20 under the head "Admissions Made Without Prejudice" in Sir James Fitzjames Stephen's "A Digest of the Law of Evidence", which includes an additional ground of duress.[35] Section 23 therefore, embodies the without prejudice rule in India and its basic contours greatly draw from English law.

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[32]John Claro Fernandes v. Luizinha Azavedo and Anr., (2005)107 BOM. L.R. 711; *See also* P.B. Bhatt v. R.Thakker, AIR 1972 Bom 365.

[33]*Id.*, ¶3.

[34]Belapur Co. Ltd. v. Maharashtra State Farming Corporation, AIR 1969 Bom 231, distils this from the preceding body of Section 92 jurisprudence. Followed in John Claro Fernandes v. Luizinha Azavedo and Anr., (2005)107 BOM. L.R. 711.

[35]SIR JAMES FITZJAMES STEPHEN, A DIGEST OF THE LAW OF EVIDENCE 52 (G.Chase ed., 1887).

The section ought to be read in the context of Section 17 of the Act, which defines admissions as:

An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances, hereinafter mentioned.

The definition of admissions itself is so broad that potentially, all statements made in the course of compromise negotiations can be brought within the "without prejudice" protection.

Both the statements made by Oceanbulk's representative which were sought to be admitted would fall within the protectionof Section 23 because they were made in pursuit of a compromise to resolve a dispute and pertained to a relevant fact, i.e., what the terms of the contract meant in the context of the negotiations.

Therefore, they shall be protected by Section 23. What remains is the question of exceptions to the bar of Section 23 and whether they would apply in this case. The wording of the section is such that no exceptions are conceivable. The section states, *"In civil cases no admission is admissible..."* Hence within the meaning of the statute, there is no space for exceptions. This is perhaps why, despite extensive use of English cases to lay down the scope of the protection under Section 23, there has been extremely limited importation of the exceptions permitted under English law into Indian jurisprudence.[36] Another pointer to the absolute nature of section 23 bar, is the 185th report of the Law Commission on the Evidence Act,[37] which recommends the addition of a proviso creating the presumption that

[36]For instance, the presumption of without prejudice protection to negotiations of compromise is not mentioned in the statute, but has been incorporated into Indian jurisprudence. *See,* Bauribandhu Mohanty v. Suresh Chandra Mohanty, AIR 1992 Ori 136.

[37]185th Report of the Law Commission of India, Indian Evidence Act 1872, (March 13, 2003) Part II, 118 (2003).

compromise negotiations are without prejudice in general and in respect of exceptions, that a proviso be added to this effect- "evidence as to the admission becomes necessary to ascertain if there was at all a settlement or to explain delay where a question of delay is in issue". The recommendation to except the bar of Section 23 to prove fact of settlement was based on the now well entrenched exception carved out in *Tomlin* v. *Standard Telephone.*[38] The recommendations of the Law Commission clearly establish that the section does not admit any exceptions in its current form. And even amendments were to be in the form of very limited, specific grounds which stop far short of any point from where it might be possible for the judiciary to extrapolate and decide along the lines of the *Oceanbulk* decision. Even these recommendations of the Law Commission have not been given effect to.

Therefore, the inevitable conclusion is that as the Indian law of evidence currently stands, TMT Asia will not be allowed to adduce the "without prejudice" communications as evidence because such use is barred by section 23 of the Indian Evidence Act 1872.

VI. CONCLUSION

Oceanbulk Shipping & Trading v. *TMT Asia Ltd. & Ors*. represents perhaps the final frontier of exceptions allowable to the "without prejudice" rule. Any further expansion would undermine the bare essentials of the rule – inadmissibility of statements which attach liability or adversely affect the interests of parties in compromise negotiations. The nature of the exercise of contractual interpretation is necessarily contingent on the facts and circumstances of each case. The ambiguity that is inherent in the practical application of the *Oceanbulk* ruling is inevitable but necessary to preempt parties who manipulate negotiations to obtain an advantageous compromise and

[38]Tomlin v. Standard Telephone, [1969] 1 WLR 1378(CA).

then seek to fulfill less than their full obligation using ambiguous drafting of the contract. The Indian position on "without prejudice" evidence permits absolutely no exceptions, one-off judicial decisions[39] softening the application of Section 23 notwithstanding. It is therefore submitted that on the question of whether Indian law should be changed to reflect the English position in light of the jurisprudence on Section 23 in India so far, retention of the absolute nature of the rule is a plausible option, even though a strong one. In the absence of uncertain judicially created exceptions, unlike in the United Kingdom, the best option would be to retain the simplicity of the rule and not open up a conceptual Pandora's box.

[39] *Supra* note 36.