THE ISSUE OF ‘ARBITRABILITY’ AND ITS COMPARATIVE STUDY

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Introduction

Ever since India adopted economic policies fostering globalization, foreign investment and liberalization, there has been an unprecedented upsurge of Indian parties becoming more and more involved in international commercial conflicts which desire legal resolution schemes that would boost the probability of conciliation and preservation of the commercial relationship between the parties. Consequently, the past few decades have seen an immense growth in the realm of arbitration being the preferred dispute resolution mechanism to settle commercial disputes between transnational parties.1 Concurrently, India has also been committed at attempting to establish itself as a global arbitration hub.2 However, not every conflict is capable of being resolved through arbitration and there are complications as well as dilemmas that often arise with respect to the ‘arbitrability’ of the disputes between the parties as per the applicable law.3 This paper will talk about the concept of arbitrability while examining the interpretation and scope of consideration of this issue in the Indian legal landscape. Additionally, this paper will provide an insight of how other jurisdictions have described and determined the scope of this issue.

What is ‘Arbitrability’?

The obvious reason for parties preferring to submit their issues to arbitration is that the very intent of this method of conflict resolution is to give effect to party autonomy allows them to choose the applicable laws which would govern their arbitration agreement, the contract, the seat of arbitration, etc. The interaction of laws from more than one jurisdiction in such a manner often leads to ‘conflict of laws’, and this may eventually cause hinderance in enforcement of those arbitral awards in countries that proscribes submission of that category of disputes to arbitration.4

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There exist certain areas of laws in nearly every country’s legal system which must necessarily be adjudicated by the national courts and thus, such issues deal with the question of ‘arbitrability’ because if deemed as ‘non-arbitrable’ then the arbitration agreement itself may be pronounced as invalid on the basis of the subject matter. This poses as a restriction on the whole idea of ‘party autonomy’ associated with this process of dispute resolution however such restrictions round up being well justified in the interest of public policy of both domestic and foreign state. The Supreme Court in the case of Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. while illustrating over the term ‘arbitrability’ noted this interplay with the public policy and very efficiently deciphered this entire concept for having three facets: (i) whether the subject matter of the conflict itself is capable of being adjudicated by arbitration or do the national courts hold exclusive jurisdiction to such disputes, (ii) whether the arbitration agreement dictate for that particular conflict to be resolved through private dispute resolution mechanism or not, and (iii) whether that dispute was submitted to the arbitral tribunal and added to the list of issues pleaded before/referred to the tribunal.

Additionally, the apex court in this case had also put down a test to determine the arbitrability and had explained that if the disputes are concerned with rights in rem (i.e., rights against the world at large) then they shall be non-arbitrable and must be submitted for ruling by public tribunals and courts; however, if the disputes are concerned with rights in personam (i.e., rights against specific individual) then they may be resolved through arbitration. Although it clarified that disputes pertaining to “subordinate rights in personam arising from rights in rem have always been considered to be arbitrable”.

The initial tests of arbitrability in the India

The judgement in the case of Booz Allen was a pro-arbitration move taken by the Indian courts as it certainly provided the much-needed clarity on the question of law pertaining to the subject matters of disputes which could be resolved through arbitration. But since the court in this judgement had laid out a generic test, it is obvious that challenges soon arose which demanded deeper analysis and interpretation of the issue and the judgement itself in order to be able to rule a decision.

The Bombay High Court has particularly made active efforts in the past towards unraveling the complexities tied up in relation to this issue as well as the test associated with it. The judgement pronounced by this court in two of its notable cases had eventually led to setting down a deeper understanding on how such issues.
The first was the judgement ruled in the case of Rakesh Kumar Malhotra vs. Rajinder Kumar Malhotra which questioned the arbitrability of disputes concerned with the shareholders’ claims against the company for oppression and mismanagement under the Indian Companies Act. The court here noted that the arbitral tribunal actually lacked the authority to settle the disputes in this case, as the proper statutory jurisdiction to the same lay with the Company Law Board. It further explained that the dispute here involved certain actions breaching specific shareholders’ interest and that this shall qualify as being arbitrable as per the Booz Allen test. Although, the final conclusion actually rested upon the reasoning that some aspects of the relief sought in this case would end up classifying as reliefs in rem and so they were deemed to be non-arbitrable.

The other Bombay High Court judgement which ruled on a similar understanding was Eros International Media vs. Telemax Links, where the courts dealt with the question of arbitrability in context of intellectual property conflicts. If this case were to be decided as per the Booz Allen test, all intellectual property cases would be considered as action in rem thereby being incapable of settlement through arbitration. However, it was once again observed that the relief sought in this case necessitated a ruling which deviates from the Booz Allen test in order to meet the ends of justice, as here the relief was basically a relief in personam that was capable of binding only the particular parties.

On the basis of the above discussion and judgements, an inference can be drawn out that the Booz Allen test basically determined the arbitrability of disputes on the basis of the rights which are subjected to the conflict, as opposed to the relief-based test adopted by the Bombay High Courts in its above-mentioned two judgements. However, both these tests appear to be inadequate for the purpose of determining arbitrability as both of them eventually leave us with the conclusion that the arbitrability of dispute is a question that shall be dealt on a case-to-case basis.

The current position of India on ‘arbitrability’ and recent case laws

The above judgements have influenced and provided the guiding principles for the determination of arbitrability of disputes for many years now, even though both the tests chalked out by these judgements are flawed. However, Supreme Court’s recent judgement in the case of Vidya Drolia and Ors. vs.

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Durga Trading Corporation\textsuperscript{13} has contributed towards a deeper understanding on this topic. The case was regarding a tenant-landlord dispute under the Transfer of Property Act and it settled the question of whether tenancy disputes can be resolved through arbitration or not. The judgement in this case overruled the previous stance taken by the Supreme Court with respect to tenant-landlord disputes in Himangni Enterprises vs. Kamaljeet Singh Alhuwalia\textsuperscript{14} case where it was held that despite issues pertaining to leased premises not coming under the purview of Delhi Rent Act (1995), the tenant-landlord conflicts shall not be submitted to arbitration as they come under the jurisdiction of being adjudicated and resolved by the civil courts as per the Transfer of Property Act.

Although in 2019, the Vidya Drolia\textsuperscript{15} case concerning the arbitrability of tenancy disputes was brought before the apex court in hopes that the three judge bench might rule in favor of party autonomy with regard to arbitrability of tenancy disputes\textsuperscript{16} The Supreme Court in 2020 finally overruled the Himangni Enterprises judgement by explaining that the judgement here was ruled on the basis of a faulty reasoning and that the Transfer of Property Act poses no restriction on subjecting such disputes to arbitration, even though the disputes being governed by the rent control legislation shall remain non-arbitrable because their jurisdiction rests exclusively with a specific court/forum. It further even explicated that the disputes that are governed by the Transfer of Property Act shall be arbitrable only based on the logical understanding that those disputes are arising out of subordinate rights \textit{in personam} resulting from rights \textit{in rem}, which as per the observations made in the Booz Allen judgement have always remained arbitrable and binding only on the particular parties involved.\textsuperscript{17}

The Supreme Court in addition to providing an understanding on arbitrability of tenancy disputes in the Vidya Drolia judgement had also laid out a comprehensive test to determine arbitrability of a dispute based on its subject-matter and cause of action. According to this test, conflicts shall be regarded as non-arbitrable if – (i) they involve rights \textit{in rem}, but not subordinate rights \textit{in personam} that result from rights \textit{in rem}; (ii) if they impact and affect the will and rights possessed by an individual not party to the dispute or has an \textit{erga omnes} effect; (iii) if they disputes that necessarily need adjudication from central public authority of courts/tribunals and it would be inappropriate to subject them to arbitration or any form of mutual adjudication mechanism; (iv) the dispute in question is of state’s interest in context to some sovereign and public purpose; and (v) if any legislation deems such disputes to be non-arbitrable, either expressly or impliedly. These factors are not exactly set within strict parameters which could not possibly overlap or interlink between each other. In fact, the court clarifies that this test is meant to be applied in its entirety and is supposed to be practically

\textsuperscript{13} (2021) 2 SCC 1.
\textsuperscript{14} (2017) 10 SCC 706.
\textsuperscript{15} Vidya Drolia and Ors. vs. Durga Trading Corporation 2019 SCC OnLine SC 358.
\textsuperscript{16} Radhika Dubey and Aman Singhania, 'Arbitrable Or Not – India At Crossroads?' (Cyril Amarchand Mangaldas, 2021)
\textsuperscript{17} Vidya Drolia and Ors. vs. Durga Trading Corporation (2021) 2 SCC 1.
administered based on the different factual circumstances of different cases.\(^{18}\)

Furthermore, there was also a great deal of confusion with respect to arbitrability of cases of fraud. The apex court in 2016 laid down a very significant judgement in *A Ayyasamy vs. A Paramasivam & Ors.*\(^{19}\) which primarily dealt with the arbitrability of fraud related disputes, thereby settling the dilemma in regard to whether a mere allegation of a fraudulent act would render the arbitration agreement between parties null and void. The court considered its position in terms of whether it even possessed the jurisdiction to resolve this issue and further observed that the only circumstances under which it must abstain from referring such disputes to arbitration would be when the allegations raised in the conflict are of complicated and serious nature. Here, they had actually categorized fraud as ‘serious fraud’ and ‘not serious fraud’ in order to determine arbitrability based on varied facts and circumstances of different cases and stated that ‘not serious fraud’ cases can be referred to arbitration if agreement between the parties prescribe it as the preferred dispute resolution mechanism.\(^{20}\)

Previously in 2010, the division bench in *N. Radhakrishnan vs. Maestro Engineers*\(^{21}\) had similarly placed a categorization over fraud related disputes and held that cases involving complex question of law and intense allegations of fraud are better left to be adjudicated by the public forums of resolution. However, in 2014 this ratio was rejected by a single judge at Supreme Court in the case of *Swiss Timing Ltd. vs. Organizing Committee 2010 Commonwealth Games*\(^{22}\) where it stated that the arbitral tribunal possesses the jurisdiction to consider fraud cases in light of the powers the tribunal is entrusted with by the Section 16 of the Arbitration and Conciliation Act of 1996. The decision of the apex court in *Ayyasamy* case had finally wrapped up this matter by taking a pro-arbitration step after careful and extensive deliberation on the legislature’s intent behind various provisions of the Act that were involved in such cases and therefore had provided the final conclusion with regard to the question of arbitrability of fraud.\(^{23}\)

**Contrasting positions on ‘arbitrability’ in other jurisdictions**

One of the major rationales behind the phenomenon of arbitrations becoming the most favorable form of dispute resolution between two transnational parties is that the award, which is rendered in such a private

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\(^{19}\) (2016) 10 SCC 386.

settlement procedure that operated largely through party autonomy, also holds the capability of being enforced in most of the countries, and the larger credit to that shall be placed on the ‘New York Convention’. Currently, more than 160 countries are signatories to this convention which was drafted with the intention of eliminating minor hurdles that fell in the way of recognition and enforcement of arbitral awards.

The Convention under Article V(2) has identified two reasons that may lead to refusal of enforcing the international arbitral award by a nation, and one of them is that the dispute itself is found to be incapable of being submitted to arbitration as per the rules of the legal system of that nation. The parallel provisions to the same also exists under Article 34(2)(b) and Article 36(1)(b) of the ‘UNCITRAL Model Law on International Commercial Arbitration’. Therefore, an award made under either the UNCITRAL Model Law or the New York Convention can be enforced as long as the subject matter of the dispute was arbitrable as per the national laws of that country. This means that arbitrability is actually a restriction posed by the national laws of a country, and naturally every nation in accordance with its separate legal system prescribes for a different scope for arbitrability. Such as, in Hong Kong the legislature has included Section 3(2)(a) (in lieu of Article 1(5) of the UNCITRAL Model) in its Arbitration Act which carves out a single exception (i.e., protection of public interest) in reference to arbitrability. The Arbitration Act there endorses complete party autonomy in regard to how they prefer to settle their conflict while keeping in account the sole exception of public interest. In fact, Ribeiro P J in a case law described that arbitrability of any issue is to be determined by considering the public policy as well as the question of whether the arbitral tribunal was the competent forum to resolve that particular conflict according to the legal norms of that country. Like here in this case,

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30 The Hong Kong Arbitration Ordinance, S 3(2)(a) https://www.elegislation.gov.hk/hk/cap609
district courts were observed to be the exclusively authorized forums as per relevant legislation to adjudicate over disputes concerning employee compensation contentions, thus confirming their non-arbitrability.\textsuperscript{31}

Other than Hong Kong, London (United Kingdom) and Singapore are two of the most well-known arbitration hubs around the world.\textsuperscript{32} In the United Kingdom, there is no statutory provision describing the concept of arbitrability which in consequence ends up creating some confusions about what category of disputes are capable of being subjected to arbitration.\textsuperscript{33} They have however set some significant precedents that provide a certain degree of clarification over the extent of arbitrability of various category of disputes. For example – (i) in 1998, the court of appeal observed in a case that an awarded which was issued in a dispute prescribing Jewish law as the applicable law, was in fact unenforceable due to public policy reasons as it was discovered that the dispute itself was concerned with a company norm that was illegal as per the UK laws.\textsuperscript{34} (ii) the UK court in another one of its cases had ousted the jurisdiction of arbitral tribunal to decide over an issue due to the reason that the issue under dispute was beyond the scope of legal rights and obligation of the party, and the civil courts was the forum having the rightful jurisdiction to rule over such disputes.\textsuperscript{35}

Further, even though Singapore is another one of the most arbitration friendly nations around the globe, they too have foregone any express mention or discussion of the concept of arbitrability in either of the two arbitration statues.\textsuperscript{36} However, they too have deliberated over the issue of arbitrability multiple times in their courts itself, just like the above-mentioned and a lot of other nations. For example – the Singapore Court of Appeal in 2011 pronounced a judgement in context to arbitrability of insolvency disputes and concluded that particular category of insolvency disputes can be settled through arbitration, provided that they shall not be in contravention with the national insolvency rules and also must not affect any creditors’ rights other than the ones who are party to the dispute.\textsuperscript{37} In addition to this, the legislative amendment of 2019 has confirmed that all intellectual property disputes can be subjected to arbitration and that the award issued at the end of such arbitral proceedings bind only the parties’ rights and privileges to that intellectual property.\textsuperscript{38}

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\textsuperscript{33} Leonardo V. P. de Oliveira, 'The English Law Approach To Arbitrability Of Disputes' [2016]

\textsuperscript{34} Soleimany vs. Soleimany, (1998) 3 WLR 811.

\textsuperscript{35} O’Callaghan vs. Coral Racing Ltd., 1998 WL 1044030 (CA).


\textsuperscript{37} Larsen Oil and Gas Pte Ltd v Petroprod Ltd., [2011] 3 SLR 414.

\textsuperscript{38} Singapore Intellectual Property (Dispute Resolution) Act 2019.
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Conclusion

In light of the above discussions, a conclusion can be drawn in context to how the concept of arbitrability is understood around the world. The first and the foremost point to be noted is the fact that India can constantly be witnessed to have evolved in the past few decades in terms of demystifying the meaning of ‘arbitrability’ and devising somewhat a litmus test to determine if a particular dispute is arbitrable or not. More obviously, as mentioned previously the reason behind all such efforts taken is in fact the bigger goal of having a robust arbitration mechanism placed in India.\(^{39}\) By bringing clarity on the subject of arbitrability and creating a test to ascertain which disputes are arbitrable is definitely a major positive step towards bringing some certainty on important questions of law in the realm of arbitration. The above discussion regarding the position of London, Singapore and Hong Kong, the three most popular seats elected for international arbitrations,\(^ {40}\) gives a better comparative understanding of whether India’s pro-arbitration measures are in fact reaping the rewards so desired or not.
