



**ARBITRABILITY OF  
CONTEMPORARY COMMERCIAL  
DISPUTES ARISING FROM UPMOST  
REVENUE GENERATING SECTORS:  
EXAMINING THE POSITION IN  
INDIA**

*By Mir Shatil*

**Research Scholar**, Dept. of Legal Science, Techno India University, West Bengal

*By Dr. Arjun Kumar Mandal*

**Dean**, Dept. of Legal Science, Techno India University, West Bengal

*By Dr. Kana Mukherjee*

**Professor**, Dept. of Legal Science, Techno India University, West Bengal

**Abstract**

The research paper explores the analytical research carried out to test the hypothesis formulated and finds out the result of the test. In order to carry out the test, the objective has been set to analyse in details about the commercial nature of disputes arising in India in present times from various sectors engaged in international trade and commerce through commercial contracts. This research investigation has taken into account the diverse commercial disputes arising from different sectors of the nation engaged in commercial activities within and outside the territory of the nation. Each of the diverse kind of disputes has been examined in details ranging from the kind of contracts entered into, role of Indian judiciary in adjudicating the disputes, applicability of the Arbitration & Conciliation Act, 1996, and overall, the present scenario in India. Therefore, the analytical study finds out that the Arbitrability scope of resolving

contemporary commercial disputes of diverse nature arising out of international trade and commerce is narrow and underdeveloped in India; imposing hindrance to make India- a global hub of arbitration and the most preferred seat of arbitration.

**Keywords:** Commercial, Disputes, Arbitrability, India, diverse nature, global hub of arbitration.

**1. INTRODUCTION**

The conceptual philosophy upon which ‘Arbitrability of disputes’ is based upon is well explained by Professor Loukas A. Mistelis, who stated that ‘the issue of arbitrability involves the simple question of what types of issues can and cannot be submitted to arbitration and whether any specific classes of disputes are exempt from arbitration proceedings.’<sup>1</sup>

The concept of Arbitrability as enshrined in Article 34(2) of the UNCITRAL Model law which permits the court to set aside arbitral awards for the reason that the subject matter of the dispute is not capable of resolution under arbitration. The New York Convention also elaborated the concept of arbitrability vide Article II(1) which states that each Contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any difference in opinion which have arisen or which may arise between them in respect of a defined Legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration’, and “Article V (2) (a) states that the subject matter of the dispute is not capable of settlement by arbitration under the Law of that Country.”<sup>2</sup>

In the Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd & Ors decision, the Supreme Court discussed a number of arbitrability-related topics and established three different types of tests to decide

<sup>1</sup> Loukas A. Mistelis and Stavros L. Brekoulakis, *Arbitrability: International and Comparative Perspectives* (Netherlands: Kluwer Law International, 2009).

<sup>2</sup> Convention on the Recognition and Enforcement of

Foreign Arbitral Awards art. V(2)(a), June 10, 1958, 330 U.N.T.S. 3, available at New York Convention 1958, [https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=727&opac\\_view=-1](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=727&opac_view=-1)



whether a dispute can be arbitrated. These Tests are as follows:

- Nature of disagreement-

These tests are recommended to assess if a disagreement should be resolved in a private setting, such as arbitration, or in a public one, such as a court of law. The Court declared that a dispute would be deemed arbitrable in both situations if it concerned "right in personam" and if it concerned subordinate rights in personam that resulted from rights in rem.

- Remedy test-

The second type of test established by the highest court focuses on whether the parties requested relief can be granted by an arbitrator. The court said in this regard that "the type of remedies which the arbitrator can award are limited by considerations of issues like public policy and by the fact that he is appointed by the parties and not by the state. For example, an arbitrator cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a public order; nor can make an award which is binding on third parties or affects the public at large, such as a judgement in rem like an assessment of the rateable value of land, a divorce decree, a winding-up order.

- Jurisdiction test-

The third test laid down is to determine whether an exclusive jurisdiction has been vested by the statute upon a tribunal to deal with the adjudication of such disputes brought before arbitration. If any specific jurisdiction is bestowed upon a tribunal, then such disputes are also not arbitrable. Thus, it

can be said that Booz Allen case does not recognises only 'nature of rights test'.

In case of Vidya Drolia & others v Durga trading Corporation<sup>3</sup>, the Supreme court of India aimed to make legal system a Pro-arbitration system in order to deal with position of arbitrability of IP disputes. In this case the Supreme Court propounded a four-fold test for determining the circumstances of Non arbitrability of IP disputes although subject matter mentioned in arbitration agreement:

- In case the cause of action and subject-matter of the IP dispute relates to 'right in rem'. A right in rem is a right exercisable against the world at large<sup>4</sup>. Any judicial decision related to action in rem determines the status of a person or thing as a whole applicable upon all whether parties, privies or strangers of the matter actually decided<sup>5</sup>. This kind of judgement decides the fate for public at large and binds them in spite of their absence<sup>6</sup>. But in case of right in personam, an arbitrator whose powers are derived from a private agreement between the two disputing parties has no jurisdiction to bind anyone else apart from the disputing parties by a decision, for no-one else has mandated him to make such a decision, and a decision which attempted to do so would be useless. In Suresh Dhanuka v. Sunita Mohapatra<sup>7</sup>, it was held that a dispute concerning a right in rem shall be incapable of being arbitrated upon and shall lie under the exclusive jurisdiction of the courts of the land. The Supreme Court has pronounced that the right in rem comprises right in patent and copyright. In the case of Emaar MGF Land Ltd. v. Aftab Singh<sup>8</sup> categorically stated that disputes related to patents, copyright and other Intellectual Properties are beyond the scope of arbitration.

<sup>3</sup> *Vidya Drolia v. Durga Trading Corp.*, 2020 SCC OnLine SC 10 (India).

<sup>4</sup> Ramanathan Aiyar, *Advanced Law Lexicon* (3d ed.).

<sup>5</sup> *Booz Allen & Hamilton Inc. v. SBI Home Fin. Ltd.*, MANU/SC/0533/2011 (India).

<sup>6</sup> G.C. Cheshire & P.M. North, *Private International*

*Law* 362 (12th ed. Butterworths 1992).

<sup>7</sup> *Suresh Dhanuka v. Sunita Mohapatra*, (2012) 1 S.C.C. 578 (India).

<sup>8</sup> *Emaar MGF Land Ltd. v. Aftab Singh*, (2019) 12 S.C.C. 751 (India).



- In *Eros International v. Telex*<sup>9</sup> the issue appertained copyright infringement, the Court opined that where there are matters of commercial disputes and parties have consciously decided to refer these disputes arising from that agreement to a private adjudication forum like arbitration, no doubt shall be there regarding non-arbitrability of such disputes. Such actions shall get treatment of actions in personam, wherein one party is supposed to be seeking a specific relief against his opposite party only and not against the world at large.
- In case the cause of action and subject-matter of the IP dispute have erga omnes effect. The approach towards international commercial arbitration for resolving IP disputes shall not be admitted when the subject matter to the dispute has erga omnes effect as it affects the rights and liabilities of persons not related to that arbitration and its award. However, the Court observed that certain areas of intellectual property rights such as grant and issues of patents, registration of trademarks falls under interest of governmental functions and had an erga omnes effect. Since the grant of such rights conferred monopoly rights, they were non-arbitrable<sup>10</sup>, and thus it requires centralised adjudication mechanism and any sort of mutual adjudication like Arbitration would not be appropriate and enforceable.
- In case the cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.
- In case the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

### 1.1. Research Problem

Deficiency in Adoption of Arbitration Practices Related to Modern-Day Perspectives:

Modern commercial activities generate complex disputes that often transcend traditional contractual claims. However, arbitration practices in India and several other jurisdictions exhibit deficiencies in adequately addressing these contemporary disputes:

- Construction & Infrastructure Disputes – Large-scale infrastructure projects involve multi-party, multi-jurisdictional agreements, yet standard arbitration frameworks sometimes fail to address evolving contractual complexities, including delay claims, force majeure, and liability allocation.
- Investment Treaty Disputes – Disputes under Bilateral Investment Treaties (BITs) and multilateral investment frameworks may involve state immunity or public law considerations, limiting their arbitrability.
- Insolvency Disputes – The Insolvency and Bankruptcy Code (IBC) prioritize statutory processes; disputes relating to corporate insolvency may not always be suitable for private arbitration.
- Intellectual Property (IPR) Disputes – While IP disputes can be arbitrated, certain disputes involving patents, trademarks, and copyright require statutory filings or enforcement through courts.
- Maritime Disputes – Modern shipping and maritime commerce generate disputes under international conventions, insurance claims, and environmental regulations, some of which courts have classified as non-arbitrable.
- Sports Disputes – Regulatory and disciplinary matters in sports often involve statutory bodies or federations, restricting arbitration under purely private rules.

<sup>9</sup> *Eros Int'l v. Telex*, 2016 SCC OnLine Bom 2179 (India).

<sup>10</sup> *Vidya Drolia v. Durga Trading Corp.*, MANU/SC/0939/2020 (India).



- Art & Cultural Property Disputes – Disputes involving heritage, cultural property, and art transactions frequently touch on public interest, provenance laws, or governmental restrictions, impacting their arbitrability.

## 1.2. Hypotheses

- Arbitrability purview in adopting modern day concepts is narrow and underprovided in International Commercial Arbitration landscape in India.
- The existing scenario of ‘International commercial arbitration’ in India requires major developments to emerge as the most favoured arbitration nation worldwide.

## 1.3. Objectives

- To analyse the scope of resolution of the commercial disputes in India arising out international trade & commerce in modern times which are diverse and dynamic in nature.
- This analytical study shall aim to verify the deficiencies persisting in the practicality of International commercial arbitration redressal mechanism in India and recommend suitable suggestions to overcome the shortcomings.

## 1.4. Methodology

The methodology adopted in the entire research work to develop and test theories and hypotheses is basically classified as ‘Theoretical Legal Research’ as it involves the development of models, frameworks and theories based on ‘Doctrinal approach’ of existing knowledge, data and assumptions. The researcher has followed Bluebook (21<sup>st</sup> Edition) Citation mode to maintain uniformity throughout the work.

The primary data collected for doctrinal study is based on a thorough study on existing national and international instruments, statutes, reports, Case Laws, News, interviews. Whereas, for doctrinal study, the secondary data have also been very beneficial which includes publication of various reports and notifications, Legal research articles, unpublished dissertation and unpublished thesis having relevance to the topic of study through both online and offline platforms.

## 2. DISPUTES RELATED TO CONSTRUCTION AND INFRASTRUCTURE ACTIVITY

The real estate sector in India is one of the major developing sectors contributing enormously to the development of India’s economy as a large number of infrastructure related activities are being undertaken by the government and private sector as well. As per information the current economic position of India’s real estate market is \$ 120 billion and the nation will be heading towards for achieving the position of the third-largest construction market in the world by 2030 and to uplift the economic position to \$ 650 billion by 2040.<sup>11</sup>

In this large and dynamic sector disputes would be arising undoubtedly as they are inevitable. The disputes in this sector generally arises from violations of the terms of the agreement, defaults in payment to the contractor/ employer, stipulations for materials and workmanship, etc. The disputes related to construction and infrastructure are quite unique in nature due to involvement of multiple parties among which some of them are not even closely related to the disputes but are being affected by the dispute. The variations of parties’ involvement may range from infrastructure, residential and commercial construction sectors.<sup>12</sup>

<sup>11</sup> Press Trust of India, *Size of the Real Estate Market to Grow to USD 650 Billion by 2040: NITI Aayog*, ECON. TIMES (Feb. 22, 2019), [https://realty.economicstimes.indiatimes.com/news/industry/size-of-the-real-estate-market-to-grow-to-usd-](https://realty.economicstimes.indiatimes.com/news/industry/size-of-the-real-estate-market-to-grow-to-usd-650-billion-by-2040-niti-aayog/68114021)

650-billion-by-2040-niti-aayog/68114021

<sup>12</sup> Nancy Patel, *Construction arbitration: How is it different from generic arbitration*, Ipleaders (31 July 2019), available at <https://blog.ipleaders.in/construction-arbitration->



### 2.1. Engineering and Procurement Contracts (EPC)

As per the meaning of Accounting Standard (AS) 7, construction contracts mean any contract made for construction of an asset or a combination of assets that are closely interlinked or interdependent with respect to their technology/design/ function or the nature of their ultimate purpose or use.<sup>13</sup> This construction contracts includes in it a special form of contracting agreement known as ‘Engineering and Procurement Contracts’ which mainly involves an employer, a project consultant, a designer and multiple contractors. Among all these parties the contractor primarily carries out engineering design of the project with limited assistance by the subcontractor and the designer and thereafter the supplier helps in procuring equipment and all the raw materials necessary to deliver a functioning facility. These EPC in India is governed by the Indian Contract Act, 1872 and thus the contracts must satisfy the essentialities of the Act to make it valid and enforceable.<sup>14</sup>

### 2.2. Nature of Disputes Arising Out of EPC:

The work of construction and infrastructure are considered as nation-building tasks which are generally complex, lengthy and continuous process and thus giving birth to several kinds of disputes from the beginning of the formation of contracts. The various forms of disputes generally take place between contracting parties due to several activities which are identified as:

- a. Unjustified construction delays
- b. Non-payments
- c. Fraud tenders and bank guarantees
- d. Fuzzy milestones and payment schedules

genetic-arbitration/.

<sup>13</sup> Accounting Standard (AS) 7, available at [https://www.mca.gov.in/Ministry/notification/pdf/AS\\_7.pdf](https://www.mca.gov.in/Ministry/notification/pdf/AS_7.pdf).

<sup>14</sup> Sumet Kachwaha and Dharmendra Rautray, India: Construction & engineering law, Mondaq (05 September 2017), available at <https://www.mondaq.com/India/construction-planning/616518/construction-engineering-law>.

<sup>15</sup> Hilal Itani, Construction and Contract disputes-

- e. Interpretation of key provisions of contract
- f. Battle of documents, project plans and specifications.<sup>15</sup>

The disputes mainly arise from the delays specially during the engineering stage, procurement/ sub-contracting phase as well as during the erection and commission of projects. The disputes when arises due to delays they are being assessed by way of preparing a report known as ‘Delay Analysis Report’ (DAR) wherein all the evidences and activities of the parties involved are noted and finally this report becomes the ultimate document for the basis of all claims, damages and penalties regarding the project. The Indian Contract Act, 1872 comes into scenario when such kind of delay arises resulting to disputes between the parties. “The period of time is usually fixed by the parties and when such promise is not fulfilled the contract or so much of it has not been performed, becomes voidable at the option of the promise, if the intention of the parties was that time should be of essence of the Contract.”<sup>16</sup> However, if the scope of the project is undefined and time is not explicitly fixed, even then sections 46 to 50, specifying rules regarding reasonable time and place of performance of the contract are attracted.<sup>17</sup>

### 2.3. Arbitrability of Construction and Infrastructure Disputes:

In general, the construction contracts include a dispute resolution clause to address for various kinds of disputes which may arise. The dispute resolution mechanisms must not be multiple in accordance to the different stages of construction as it may provide non

Reasons, Avoidance and Resolution, Corporate Live Wire (11 January 2018), available at <https://www.corporatelivewire.com/top-story.html?id>.

<sup>16</sup> Indian Contract Act, 1872, S.55, No. 9, Acts of Parliament, 1872.

<sup>17</sup> Srishti Chawla, Time and Performance of Contract, Ipleaders (22 March 2019), available at <https://blog.ipleaders.in/importance-of-time-in-the-performance-of-a-contract/>.



flexible framework for dispute resolution.<sup>18</sup> Therefore the contract drafted must be clear and unambiguous. To minimise the burden of litigation the use of ADR techniques like Arbitration, mediation, negotiation, dispute review boards are boards are prevalent in construction dispute adjudication. However, among all these techniques arbitration seems to allows the best flexible method and party autonomy in the adjudication process and takes into consideration the technical expertise required in construction disputes and as such Arbitration is highly valued in the construction industry.

### 3. DISPUTES RELATED TO INVESTMENT TREATY

#### 3.1. Model BITs

Whereas India has decided not to become a party to the ICSID convention due to several factors like the Convention's leaning towards the developed countries and lack of scope prevailing for reviewing award by Indian Courts on ground of public policy violations. "India became the first signatory of BITs with England in 1994 and signed a total of 86 BITs but as per source lastly on November, 2021 India remains with only 12 active BITs."<sup>19</sup> The governmental measures of India have been challenged several times since 2011 and as of now, India is the respondent in fifteen BIT arbitrations and as such India has considered to analyse the Investment arbitration landscape of the country with a revised vision.

In view of the increasing numbers of Investor-state dispute settlement (ISDS) claims filed against India, an adoption of a Model BIT has been unveiled in January 2016 considering it to be the base model for the future international investment agreements (IIAs) replacing the old 2003 BIT. Herein, an analysis has

been made of some of the key aspects of the 2016 Model BIT, which are as follows:

- i. 'Investment' definition- "following the criteria set in the case of *Salini*, the term investment included the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance of development and also excluded the pre investment activities from the scope of investment."<sup>20</sup>
- ii. Fair and equal treatment- Article 3.1 of the model BIT has aimed to bring customary international Law in place of autonomous standard wherein the investor's protection would be limited to the breach of customary international Law.
- iii. Most-favoured nation- this clause has been inserted to protect the foreign investors against any discrimination by the host states through Article 4.2 whereby level-playing field for foreign investors has been assured at state government level in India and that too with equal treatment accordingly.
- iv. Transparency- Article 10 has been inserted mainly to focus on investor's protection from the cases of corruption and bribery to ensure a transparent treatment for ensuring investor's confidence.
- v. Local remedy vis-à-vis Arbitration- It is considered to be the most important clause in the Model BIT where the spirit of arbitration for resolving investment disputes has been tried to upheld. As the Indian Courts are stuck with backlogs and delays it caused harm to investor's protection within a reasonable time period which

<sup>18</sup> Nicolas Bremer Rechtsanwalt, Dispute resolution in construction contracts, Alexander & Partner (2015), available at [https://www.alexander-partner.com/fileadmin/downloads/alexander-partner\\_ag\\_yearbook\\_2015.pdf](https://www.alexander-partner.com/fileadmin/downloads/alexander-partner_ag_yearbook_2015.pdf).

<sup>19</sup> Ministry of Finance, Department of Economic Affairs, Government of India, Bilateral Investment

Treaties, Department of Economic Affairs (MoF India), <https://www.dea.gov.in/index.php/documents-bilateral-investment-treaties>

<sup>20</sup> *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction ¶¶ 52–58 (July 23, 2001).



has been proved from the case of *White Industries Australia Ltd. v. India*.<sup>21</sup> Article 15.2 has restricted the delay period to maximum 5 years after which the investor may initiate International Commercial Arbitration upon serving a notice of dispute to the defending party. The maximum period of 5 years to exhaust local remedies is oppressive and backwards as it differs from the thirteenth to eighteenth month worldwide standard period. More importantly in absence of any local remedy that can give relief to dispute, the obligation to exhaust local remedies does not apply and as such, it imposes a burden on the foreign investors to prove the lack of an adequate domestic remedy.

### 3.2. Role of Indian Judiciary in BIT -Arbitrations

In this context the role of Indian Courts in the matter of BIT Arbitrations has been analysed in the light of three landmark cases discussed below:

- i. In the case of *Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures*<sup>22</sup>:

It is the first Investment treaty Arbitration in India where the Calcutta High Court decided in favour of the plaintiff with an anti-arbitration injunction application involving the 1997 India-France BIT. According to the High Court, it had a jurisdiction over International Investments agreements (IIAs) which was authorized by the Arbitration and Conciliation Act, 1996, but it has not reviewed whether the Act had afforded it the authority to interfere with the BIT arbitration. The court ruled that no arbitration proceedings can be invoked against the Port of Kolkata because Port Trust is one of the bodies of the State.

- ii. In the case of *Union of India v. Vodafone Group Plc*<sup>23</sup>:

UPA government has made an amendment on the Income Tax Act, 1961 to tax the indirect transfers against the order of the 2012 Supreme Court in the case of *Vodafone International Holdings B.V v. Union of India*, and during the period the case was pending, the Holding company of Vodafone (Vodafone Plc) filed request of Arbitration in accordance with the India-UK BIT. Later, the Union of India went to the Delhi High Court to challenge the invocation of arbitration but the Court permitted the Counsels to appoint a presiding arbitrator under the India-U.K. BIT. The Indian government petitioned in front of the Supreme Court once again to no avail and eventually, in 2018, the Delhi High Court denied the application of anti-arbitration injunction against Vodafone to proceed with the case under the India-U.K. BIT. Nevertheless, the subsequent judgement of the Court was overridden by the Amendment in the Income Tax Act, 1961 to reimburse tax liability of the Vodafone, thereby initiating an international arbitration proceeding on the breach of the provisions as stipulated in Article 4(1) of the India Netherlands BIT. Vodafone Group Plc won the case against its long pending demand on paying taxes on a sum of Rs. 22,100 Crore in its case against the Permanent Court of Arbitration.

- iii. *Union of India v. Khaitan Holdings (Mauritius) Ltd.*<sup>24</sup>

“In this case the Khaitan Holdings of Mauritius issued a notice of arbitration to India under the India-Mauritius BIT in lieu of losses suffered due to cancellation of 2G telecom spectrum licenses made by Supreme Court in reference to judgement given in the case of *Centre for PIL v. UOI*.”<sup>25</sup> Union of India raised

<sup>21</sup> *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Final Award, IIC 529 (Nov. 30, 2011).

<sup>22</sup> *Bd. of Trs. of the Port of Kolkata v. Louis Dreyfus Armatures SAS*, G.A. No. 1997 of 2014 in C.S. No. 220 of 2014 (Cal. H.C.).

<sup>23</sup> *Union of India v. Vodafone Group PLC United Kingdom & Anr.*, CS (OS) 383/2017 & I.A. No.

9460/2017 (Del. H.C.).

<sup>24</sup> *Union of India v. Khaitan Holdings (Mauritius) Ltd. & Ors.*, CS (OS) 46/2019 & AS 1238/2019 (Del. H.C.).

<sup>25</sup> *Centre for Pub. Interest Litig. v. Union of India*, (2012) 3 S.C.C. 1 (India).



objections regarding commencement of arbitration under India-Mauritius BIT and the Delhi High Court opined that BIT arbitrations are totally different from commercial arbitrations and thus not governed by the Arb & Conc. Act, 1996 and also stated that except for compelling circumstances the Court would not interfere and pass anti-arbitration injunctions.

### 3.2.1. Whether the Indian Courts have Jurisdiction in International BIT Arbitrations?

The scenario regarding the jurisdiction of Indian Courts has been different in the cases regarding this important issue of BIT arbitrations. The above discussed case of Vodafone showed that Delhi High Court applied the 'doctrine of single economic entity' and declared that there is no inherent jurisdiction to adjudicate upon Investor-state arbitrations as India has not ratified ICSID conventions which restricts the role of domestic Courts and as such the domestic Courts would not have power to execute an award applied by a foreign investor against the state.

Later, in Khaitan Holdings, as has been mentioned above, the Delhi High Court held its jurisdiction based on the argument that the case concerned the economic transactions of the Indian company which was owned by the Indian nationals. In a different case, the courts had gone against the stand of McDonald India v. Delhi High Court where the court previously held that a domestic court had a jurisdiction to grant anti-arbitration injunction even in international arbitration. Such a supervisory or suppressed jurisdiction by the domestic courts is of great concern to be exercised anymore. It runs the risk of endowing the excessive powers to national courts in BIT arbitration, which is contrary to the Arbitration and Conciliation Act, 1996, under which BIT arbitrations are not addressed. Also, as observed in the Port of Kolkata case above, the assumption that Part I of the 1996 Act would apply to arbitrations seated in India and Part II would apply to arbitrations seated outside India has caused a doctrinal confusion. This judicial practice is further and more

undermined by the statutory restrictions placed by the 1996 Act on the authority of domestic courts.

### 3.2.2. Whether the provisions of Arbitration & Conciliation Act, 1996, applies to BIT Arbitrations?

In reference to the above discussed case of Port of Kolkata, the Court presumed the application of 1996 Act on 'Investor-State arbitration'<sup>26</sup>. In the subsequent case of Khaitan Holdings, the Delhi High Court denied the notion of the Calcutta High Court regarding the applicability of section 45 of the Arbitration & Conciliation Act, 1996 in 'BIT arbitrations' for granting anti-arbitration injunction. Moreover, the Delhi High Court again stood on same understanding even in the case of Khaitan Holdings affirming the non-application of Arbitration & Conciliation Act, 1996 in Investor-State arbitrations on the ground of nature of disputes without examining the prevalence of 'commercial relationship' between the disputant parties and in this manner differentiated the BIT arbitrations and International Commercial Arbitrations. However, it is to be noted that the UNCITRAL Model Law, based upon which the 1996 Act has been enacted, involves 'Investment disputes' as commercial in nature between the two parties.

## 4. DISPUTES RELATED TO INTELLECTUAL PROPERTY RIGHTS (IPR)

In this present day we are witnessing the phenomenal growth of globalisation which is leading the world into an integrated marketplace yielding a cut-throat competition among the market players. The time when India adopted new economic policy in 1991, it gradually removed the trade barriers and opened its market for foreign business enterprises in order to flourish international trade in India. To keep up to the shifting trends in the world economy, the commercial and business laws of India were forced to assume new terrain and hence the emerging scenario of Intellectual property slowly started casting doubts on the aspect of

<sup>26</sup> *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & Ors.*, G.A. No. 1997 of

2014 & C.S. No. 220 of 2014 (Cal. H.C. Sept. 29, 2014) (injunction restraining BIT arbitration).



settling international IP disputes. In this situation a dispute resolution mechanism for resolving commercial disputes became very popular worldwide among the corporate and business sectors. It is International commercial arbitration which became widely accepted in almost every aspect of business, commerce and investments as it has evolved as a convenient method for resolving international commercial disputes.

**4.1. Legislative Framework Regarding Arbitrability of IP Dispute**

Arbitrability scope of IP disputes in India can be ascertained through observing legislative approach towards it:

- i. ‘Section 2(3) of the Arbitration and Conciliation Act, 1996 provides that certain disputes may not be submitted to arbitration’<sup>27</sup>
- ii. ‘Section 34(2)(b)(i) provides that courts may set aside arbitral awards where the subject matter of the dispute was not capable of settlement by arbitration.’<sup>28</sup>
- iii. ‘Section 10 of the Commercial Courts Act provides for arbitration of commercial dispute without specifically ejecting arbitration of IPR disputes from its purview.’<sup>29</sup>

**4.2. Judicial Interpretation:**

“In the case of Vidya Drolia, the Indian court reinforced its adherence to a pro-arbitration legal system especially in elucidating the arbitrability of intellectual property cases. In this precedent case, the Supreme Court established a four-pronged test that

would be applied to decide whether a matter not previously subject to arbitration by an agreement would be non-arbitrable”<sup>30</sup>:

Sl. No.	Ground of non-Arbitrability	Explanation
i.	Rights in Rem	‘The cause of action’ or ‘subject matter’ involves rights enforceable against the world at large, rather than between specific parties.
ii.	Erga omnes effect	The dispute affects the rights and obligations of the public or third parties beyond the disputing parties.
iii.	Sovereign or public interest functions	The dispute relates to inalienable sovereign powers or matters of public interest of the State, making private adjudication unenforceable.
iv.	Statutory non-arbitrability	The subject matter is either expressly or by necessary implication declared to be non-arbitrable under

<sup>27</sup> Arbitration and Conciliation Act, 1996, § 2(3), No. 26 of 1996, India.

<sup>28</sup> Arbitration and Conciliation Act, 1996, § 34(2)(b)(i), No. 26 of 1996, India.

<sup>29</sup> Commercial Courts Act, 2015, § 10, No. 4 of 2016, India.

<sup>30</sup> Vikash Kumar Jha & Ena Kapur, *Arbitrability of Disputes: Indian Jurisprudence (Part 2)*, Cyril Amarchand Mangaldas Dispute Resolution Blog (June 27, 2024), <https://disputeresolution.cyrilamarchandblogs.com/2024/06/arbitrability-of-disputes-indian-jurisprudence/>



		mandatory provisions.	statutory
--	--	-----------------------	-----------

Table 1.1.

**4.3. International Perspective:**

- a. In International arena both the ‘New York Convention, 1958’ and the ‘UNCITRAL Model Law (International Commercial Arbitration), 1985’ provides for settlement of international IP disputes by way of Arbitration.
- b. World Intellectual Property Organisation (WIPO) initiated major steps to institutionalize the arbitration of IPR disputes by establishing WIPO Arbitration and Mediation Centre.
- c. The Countries which have adopted UNCITRAL law like Australia, Germany, Japan, Canada have all validated arbitration of patent infringement and some even of patent validity.
- d. The ICC Commission has stated arbitration to be the "most desirable method for settling disputes arising out of intellectual property transactions." The ICC Final Report on Intellectual Property Disputes and Arbitration even states that "There are no substantive differences in arbitrations arising from intellectual property disputes as from other areas.

- ii. Party autonomy feature of arbitration can help Parties to decide between themselves how they want their dispute to be resolved and they do not require to follow the conventional way of litigation.
- iii. Neutrality exists in arbitration procedure as neither of the party can enjoy its home litigation advantages.
- iv. Expertise facility is the best part of this untraditional way of resolving disputes is that the parties can choose the arbitrator who are expert in their field.
- v. Confidentiality: The best and most secure way to maintain the confidentiality is to resolve the disputes through ADRs. Being parties centric it gives immense importance to secrecy and confidentiality.
- vi. Finality and enforceability of arbitral awards: Generally arbitral awards are not normally subject to appeal. They can be enforced immediately without and undue delay.

**4.4. Advantages Of Using Arbitration in Resolving IP Disputes**

- i. A single procedure system through which parties can agree to resolve IP dispute whereas a Court litigation can involve a multitude of procedures especially in case of dispute arising from different jurisdictions with a risk of inconsistent results.

In consideration of the above-mentioned facts and cases, it can be ascertained that this paper aims to analyse the scope of resolving IP disputes through International Commercial Arbitration in India and thus the question regarding the present scenario of settlement of IP disputes through International Commercial Arbitration has been raised. In order to enhance the economic stability of Nation through trade and commerce it is desirable that the disputes related to Intellectual property rights must be solved by the arbitration just like any other private rights that can be solved through settlement under the arbitration. As per the “consensual nature of the arbitration”, the arbitral award would be applicable on the disputed parties (parties involved) only and will not affect the third party. The successful implementation of arbitration mechanism in resolving IPR disputes is surely going



to be a great success for the disputed parties of IPR and help the business community as a whole. As our nation India has an aim of becoming a global-hub of international commercial arbitration so the scope of arbitration has also to be widened, the scheme of arbitrability of IP disputes has to be implemented efficiently. The position on arbitrability have to make sure that a balance of rights between inventor/ author and the general public will be maintained, with inventor/ author retaining the right to arbitrate contractual rights and courts keeping mind jurisdiction over matters where the public's right to use copyrighted works and patented inventions affected, would also ensure a vigorous public domain, and safeguard the public interest.

## 5. DISPUTES RELATED TO INSOLVENCY

India has been witnessing a tremendous rise in liquidation cases specially from December 2019 with a surge of 30.29% and as per reports there are total 4541 corporate insolvency cases were admitted by courts until July 2021.<sup>31</sup> In India the legislation that provides the provisions for resolution of delay in debt resolution and insolvency of companies, limited liability partnerships, individuals or partnerships is the Insolvency and Bankruptcy Code (IBC), 2016. IBC provides for the effective resolution and maximisation of value of assets and thus time is being considered as one of the essences under the legislation and in case of default in payment the Insolvency Resolution Process (IRP) has to be completed within 330 days from the insolvency commencement date.<sup>32</sup> The growing numbers of insolvency applications creating a possibility of confluence between the IBC and Arbitration & Conciliation Act, 1996 in the coming time in India due to the constant development of both the legislations.

<sup>31</sup> Gireesh Chandra Prasad, *No big jump in bankruptcy admissions in June quarter*, Livemint (06 September 2021), available at <http://www.livemint.com/companies/news.html>.

<sup>32</sup> Insolvency and Bankruptcy Code, 2016, Sec.12, No. 31, Acts of Parliament, 2016 (India).

## 5.1. Arbitrability of Insolvency Disputes in India: Judicial Interpretation

The issue of arbitrability of Insolvency dispute matters has been settled by Supreme Court of India firstly in a case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*<sup>33</sup>, wherein the Supreme Court upheld the existence of Judicial authority like National Company Law Tribunal which can declare the dispute between the parties are non-arbitrable in nature irrespective of prior arbitration agreement made between the parties and as such the insolvency disputes are held as non-arbitrable disputes. In this case the Court considered the overriding effect of Insolvency and Bankruptcy Code (IBC) in pursuance of Section 238 of IBC and held that IBC being implemented later to Act of 1996 shall prevail over it.

### 5.1.1. Initiation of Corporate Insolvency Resolution Process (CIRP) by a Financial Creditor

The Insolvency & Bankruptcy Code, 2016 (IBC), included a provision in section 7 dealing with the requirement and process for initiation of corporate insolvency resolution process by a Financial Creditor against a corporate debtor. Firstly, it is essential to understand about the financial creditor which has been explained under IBC as “a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to”.<sup>34</sup> The explanation of a financial debt has also been included under the code as “a debt along with interest which is disbursed against the consideration for time and value for money”<sup>35</sup>.

Section 7(1) of IBC contains two important terms which needs clarification before dwelling with this part. Firstly, ‘Adjudicating Authority’ herein resembles the National Company Law Tribunal (NCLT) as constituted under Section 408 of the Companies Act, 2013, and secondly, the term

<sup>33</sup> *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited & Ors.*, 2 (2011) 5 SCC 532.

<sup>34</sup> Insolvency and Bankruptcy Code, 2016, S 5(7), No. 31, Acts of Parliament, 2016 (India).

<sup>35</sup> *Id.* S 5(8).



‘default’ has to be interpreted under the proviso of Section 4 of IBC wherein it expresses that ‘the minimum amount of default has to be 1 crore rupees’ for initiating corporate insolvency resolution process. Therefore, the existence of ‘debt’ and ‘default’ on the part of corporate debtor has to be satisfied and merely the existence of a dispute shall not apply for an application under Section 7 before the adjudicating authority i.e. NCLT.

The matter regarding the arbitrability of default under Section 7 has been dealt in the case of *Indus Biotech Pvt. Ltd. v. Kotak India Venture Fund-I*<sup>36</sup> by the National Company Law Tribunal, Mumbai. In this case Kotak India filed an application u/s 7 of IBC for transferring the dispute to the arbitral tribunal. The NCLT being the adjudicating authority clarified that it has the authority to hear application u/s 8 of IBC while entertaining an application u/s 7 of IBC and as such discovered that the essential element ‘default’ is not satisfied in this case giving rise to rights in personam and allowed the matter to be transferred to arbitral tribunal.

#### 5.1.2. Initiation of Corporate Insolvency Resolution Process (CIRP) by an Operational Creditor

The Insolvency & Bankruptcy Code, 2016 (IBC), included a provision in Section 9 dealing with the requirement and process for initiation of corporate insolvency resolution process by an Operational Creditor against a corporate debtor.<sup>37</sup> Firstly it is essential to understand about Operational Creditor which has been explained under IBC as “any person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned

or transferred”<sup>38</sup>, and the meaning of an operational debt has been explained as “a claim in respect of the provisions of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority”<sup>39</sup>.

The main element underlying this provision is the ‘existence of Dispute’ for making an application u/s 9 and thus to mention the provision of Section 5 (6) it states that a dispute may be a suit or arbitration proceedings which is related to the existence or amount of debt, the quality of goods or service or the breach of representation or warranty. The Supreme Court held that if there are pending arbitral proceedings before the tribunal then as a consequence the application filed by the operational creditor u/s 9 of IBC would be rejected due to the presence of a ‘pre-existence of dispute’ as to the debt. However, this position of the Court can also be clarified from the judgement in the case of *Agrocorp International Pvt. Ltd. v. National steel and Agro Industries Ltd.*<sup>40</sup>, wherein the NCLT, clarified that in case of pending arbitral proceedings, initiation of CIRP would be barred under Section 9 of the IBC due to existence of a ‘pre-existing dispute’.

#### 5.1.3. Enforcement of Foreign arbitral award

The main question that arises in this perspective is that whether a foreign arbitral award can be enforced against a corporate debtor. In the case of *Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd.*<sup>41</sup>, the Delhi High Court held that only awards against the corporate debtor related to debt recovery shall be prohibited whereas, other proceedings would continue though moratorium period has been imposed u/s 14 of IBC<sup>42</sup>. This statement signifies that a foreign arbitral award cannot be enforced against a corporate debtor

<sup>36</sup> *Indus Biotech Pvt. Ltd. v. Kotak India Venture (Offshore) Fund*, (2021) 6 SCC 436 (India).

<sup>37</sup> Insolvency and Bankruptcy Code, 2016, S 9, No. 31, Acts of Parliament, 2016 (India).

<sup>38</sup> Id. S 5(20).

<sup>39</sup> Id. S 5(21).

<sup>40</sup> *Agrocorp International Pvt Ltd. v. National Steel*

and *Agro Industries Ltd.*, CP(IB) No. 798/MB/C-IV/2019.

<sup>41</sup> *Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd.* (2018) 246 DLT 485.

<sup>42</sup> Insolvency and Bankruptcy Code, 2016, S 14, No. 31, Acts of Parliament, 2016 (India).



once the insolvency proceedings are initiated and moratorium is imposed under Section 14.

## 5.2. Position in India

India has not yet adopted the UNCITRAL Model Law in the matter of international insolvency disputes as well as the moratorium seemed to be incapable of extending to foreign seated arbitrations. In addition to this issue there are several common problems existing in this scenario such as contradiction of multiple laws, overlapping interests, attachment of assets outside India, accessibility to domestic insolvency proceedings by foreign creditors, enforcement of foreign debt, and stay of international arbitrations involving corporate debtor as a party. There is an urgent requirement for a universal approach of insolvency arbitration and this would have been possible if India decides to adopt UNCITRAL Model Law on international insolvency disputes to pave way for harmonious conjunction of insolvency and Arbitration disputes by balancing the best interest of both the Laws.

## 6. DISPUTES RELATED TO MARITIME

In recent times arbitration has become a popular method for resolving disputes related to maritime such as shipping contracts, cargo claims, and vessels around the world. The meaning of the term 'maritime' has been stated as 'of or relating to navigation or commerce on the sea',<sup>43</sup> which presents it as a highly technical and specialised.

The major growth of shipping industry in India due to its geographic location has made India as a major hub for international shipping trade and as such there is a highly requirement of robust maritime arbitration landscape in India. Earlier maritime disputes were resolved through the Courts but the present rise of international shipping trade activities demands the resolution process to be solved by a special method like arbitration. In this part a comprehensive analysis

of maritime arbitration in India shall be done by examining its legal framework, practical application and existing challenges.

### 6.1. Maritime Contracts

#### 6.1.1. Charter Party Contract

This is a type of contract which is entered between a shipowner and a charterer wherein the shipowner agrees to lease the vessels owned by him and the charterer agrees to hire a ship or all the cargo space, or a part of it, as per terms and conditions stipulated in the charter party.<sup>44</sup> There are mainly three types of Charter Party Contracts which have been discussed below:

##### a. Time Charter contract:

In this category of contract, the charterer party hires the vessel in respect of a particular period limited by time. The charterer party agrees to bear the fuel costs, port dues and payments to agents appointed at port, and the shipowner remains liable for ship management, ship maintenance costs and payments to the crew.

##### b. Voyage Charter contract:

In this category of contract, the charterer part agrees to hire the vessel or cargo for making a particular voyage specifically between the ports by making payment of a specific rate per ton and takes responsibility limited to the onloading and offloading of goods.

##### c. Bareboat Charter contract:

Unlike the above two categories, the shipowner here confers full control of the vessel to the charterer for a specified period stipulated in the charter party and so the charterer takes liability of for all payments

<sup>43</sup> Merriam-Webster, 'Maritime', in Merriam-Webster.com Dictionary (n.d.) available at <https://www.merriam->

[webster.com/dictionary/maritime](https://www.merriam-webster.com/dictionary/maritime).

<sup>44</sup> Tariq Khan, 'Everything you need to know about Arbitration in India', pg. 349, Thomson Reuters, 2022.



including fuel, crew, pilotage, port charges and safety of the vessel hired.<sup>45</sup>

#### 6.1.2. Carriage and Bill of Lading Contract

In this kind of contract, the shipper or the cargo owner forms one side and the carrier on the other side. The carrier makes transportation of goods from one place to another against the payment, and issues an acknowledgement of receipt of cargo for shipment known as a bill of lading. The bill of lading also serves as evidence of the contract of carriage and document of title.<sup>46</sup>

### 6.2. Laws Regulating Maritime Arbitration in India

The legislative framework governing the adjudication mechanism of Maritime Arbitration in India is a mix-match of international conventions, domestic statutes and judicial interpretations which are discussed below:

#### 6.2.1. International regulations

##### a. New York Convention (1958)

India has been a signatory member to the New York Convention in the matter of recognition and enforcement of foreign arbitral award. This convention generally simplifies the procedure of the recognition and enforcement of foreign arbitral award in member states by establishing a uniformity in the standard of enforcement of foreign award passed by another signatory jurisdiction. The convention aims to secure that arbitral awards rendered in International maritime arbitration are respected in India through recognition and enforcement.

##### b. Hague-Visby Rules (1978)

The international convention governing the carriage of goods by Sea known as the Hague-Visby Rules. The main objective set out in this

international rule is to provide uniformity in the matters of the carrier's liability, cargo handling and the legal remedies available in case of loss or damage sustained by the carriers and shippers. The international convention through its standardized rules provokes for a consistent approach to resolve such disputes through arbitration by harmonising the national and international arbitration practice in light of fairness, transparency and accuracy.

#### 6.2.2. Domestic regulations

##### a. Arbitration & Conciliation Act, 1996

The principal legislation based on UNCITRAL model law governing both domestic and international arbitration in India is the Arbitration & Conciliation Act, 1996. This Act provides the legal foundation for maritime arbitration in India both of domestic and international in nature and to ensure the maritime arbitration is conducted maintaining the global best practices along with recognition and enforcement of foreign arbitral awards.

##### b. Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017

This Act has evolved as a reform to the legal provision concerning the admiralty jurisdiction and settlement of maritime disputes in India. Several types of maritime disputes arising from shipping contracts, cargo claims and vessel related disputes has been comprehensively covered under the Act of 2017. The Act laid emphasis on settlement of maritime disputes of several kinds ranging from arresting vessels, obtaining security for claims, and other disputes by the method of Arbitration. This Act has been upholding the importance of Maritime Arbitration by providing a clear clarification regarding

<sup>45</sup> Adv Digvijay Palande, 'Maritime Arbitration in India: Evolution, Legal Framework, and Future Prospects', *TIJER*, ISSN 2349-9249, Vol 11, Issue

12.  
<sup>46</sup> *Id.*



jurisdictional issues and procedural requirements for a more efficient and structured approach for maritime claims and disputes.

### 6.3. Judicial Decisions in India

In this context few judgements of the Court have been studied to analyse how the Indian judiciary have contributed in shaping and developing the practice of maritime arbitration in India. The landmark judgements regarding several issues in maritime arbitration are discussed below:

#### a. Enforceability of Arbitration agreement

- The Union of India v. The Indian Oil Corporation Ltd.<sup>47</sup>

In this matter the Supreme Court upheld the principle of separability and advocated for the enforceability of an arbitration agreement by considering the necessity to assess the arbitration agreement as an independent one other than main contract but has to be valid and enforceable.

- Duro Felguera S.A. v. Gangavaram Port Ltd.<sup>48</sup>

In this case the Supreme Court presented the intension of judicial body to uphold arbitration agreements as a fundamental aspect of resolving dispute. It further stated that unless the agreement is clearly invalid the dispute if covered within arbitration clause must be referred to arbitration.

- Indian Oil Corporation Ltd. v. Amritsar Gas Service<sup>49</sup>

The scope of arbitration has been highlighted in this case which the parties must abide by as any decision made outside the scope of arbitration agreement could be held as overriding the authority.

<sup>47</sup> Union of India v Indian Oil Corporation Ltd (2001) 6 SCC 324 (SC).

<sup>48</sup> Duro Felguera S.A v Gangavaram Port Ltd (2017) 9 SCC 729 (SC).

<sup>49</sup> Indian Oil Corporation Ltd. v. Amritsar Gas Service

#### b. Jurisdiction of Arbitral Tribunal

- National Highways Authority of India v. M. Hakeem<sup>50</sup>

The Supreme Court stated that the courts must give recognition to the jurisdiction of arbitral tribunal if it is exercised within the scope of arbitration agreement.

- Societe Generale v. Dalal Street<sup>51</sup>

The Supreme Court highlighted to give effect to international norms and recognising foreign arbitral awards under the provision of the New York Convention.

### 6.4. Challenges in India

The presence of a well-structured legal framework couldn't help maritime arbitration to develop in large scale practice in India due to several constraints facing in recent times. Though the judicial and legislative reforms have aimed to address several issues to enhance transparency and efficiency within the system, amongst which some issues are:

- Procedural delays and efficiency- Some of the factors like complex procedures, availability of arbitrators and administrative bottlenecks are responsible for making delay in maritime arbitration and inefficient.
- Lack of expertise and Specialisation- India highly requires arbitrators with specialised knowledge in Maritime Law to improve the quality of arbitration and resolve complex disputes effectively.
- Enforcement issues- The procedure for enforcement of arbitral awards is complex in India due Court procedural hurdles and delays in

(1991) 1 SCC 533 (SC).

<sup>50</sup> National Highways Authority of India v. M. Hakeem (2021) 6 SCC 637 (SC).

<sup>51</sup> Societe Generale v. Dalal Street (2014) 12 SCC 161 (SC).



the judicial system resulting in the ineffectiveness of maritime arbitration in India.

### 6.5. Position in India

The future of maritime arbitration in India is supposed to be promising with the establishment of specialized institutions, incorporation of technology and increasing the numbers of specialised arbitrators which would play a crucial role for further improving the arbitration process and maintaining the position as a major hub for international shipping and trade. In the world scenario London has succeeded to be the preferred seat for the 80% of the recognised maritime arbitrations conducted followed by Singapore and Hong Kong in recent times.

## 7. DISPUTES RELATED TO SPORTS

### 7.1. Arbitrability of Sports Disputes

The rapid growth of sports sectors has been witnessed in the 20<sup>th</sup> century in all over the world including India. The development of the world of sports has been accompanied by high rise in disputes of commercial as well as disciplinary in nature. In realisation of the large number of disputes especially commercial disputes arising from the sports sectors has made it to think for a specialised authority dedicated to sports disputes. Therefore, in absence of any specialised institute conferred with authority to deliver binding judgements gave rise to the requirement of an Arbitral institution which would be able to deal into the subject matter of Sports disputes of commercial in nature and thus evolving the practice

of sports Arbitration and arbitrability of sports disputes.

In 1983, the International Olympic Committee (IOC) officially sanctioned for the formation of the Centre for Sports Arbitration (CAS) statutes.<sup>52</sup> The statutes came into effective in 1984 and the CAS was established in Lausanne, Switzerland for resolving the disputes arising out of Sports sectors with an expectation of delivering quick and cost-efficient procedures, flexibility and binding decisions.

### 7.2. Scope for Institutional Sports Arbitration

The establishment of Centre for sports Arbitration (CAS) is governed by the Code of Sports-related Arbitration.<sup>53</sup> The Code consists of seventy Articles, further divided into two parts namely the Statute of bodies and the Procedural rules. However, since the signing of the Paris Agreement, the jurisdiction of the CAS has been widely recognized.<sup>54</sup> Thereafter, all the international federations of Olympic and National committees started to include an arbitration clause in their statutes referring to all the sports related disputes to CAS.<sup>55</sup>

The Paris agreement also resulted in the establishment of the International Council for Arbitration in Sports (ICAS), considered to be the 'supreme organ' of the CAS. The ICAS is broadly responsible for funding, maintaining independence, autonomy and rights of the parties, of the CAS.<sup>56</sup>

### 7.3. Position in India

The scenario of Sports sector is seen to be regulated by several organisations such as the Sports Authority

<sup>52</sup> Court of Arbitration for Sport, **History of the CAS**, <https://www.tas-cas.org/en/general-information/histor>.

<sup>53</sup> *Code of Sports-related Arbitration*, art. R57, Court of Arbitration for Sport (CAS), Lausanne, Switz. (in force Jan. 1, 2019).

<sup>54</sup> *Code of Sports-related Arbitration*, court of Arbitration for Sport (CAS), Lausanne, Switz., in force Jan. 1, 2019, available at [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0003/1](https://law.unimelb.edu.au/_data/assets/pdf_file/0003/1)

<sup>55</sup> *Code of Sports-related Arbitration*, Court of Arbitration for Sport (CAS), Lausanne, Switzerland, in force Jan. 1, 2019, available at <https://www.changing-perspectives.legal/arbitration/arbitral-institutions/cas/>

<sup>56</sup> Giuseppe Mancini, *Sports Arbitration: Certain Unique Features and the Court of Arbitration for Sport (the "CAS")*, Aceris Law (Mar. 22, 2021), <https://www.acerislaw.com/sports-arbitration-certain-unique-features-and-the-court-of-arbitration-for-sport-the-cas/>



of India, Sports Law and Welfare Association of India, which are being established to deal with Sports regarding issues. But, when any kind of dispute arises from the sports sector, it is required to reach before the overburdened judiciary which makes the stakeholders and sportsperson losing time which is main essence of their career.

Thereafter upon realising the above issue, the International Olympic committee (IOC) issued directives to the Indian Olympic Association (IOA) for the constitution of the Indian Court for Arbitration of Sports (ICAS) in 2011.<sup>57</sup> The Court for Arbitration of Sports is comprised of eight retired Judges as the members who shall decide all the sports-related disputed under the Indian Olympic Association.

Amongst the several disputes that has been referred to CAS, a landmark one is the case of International Association of Athletics Federations (IAAF) vs. Athletics Federation of India (AFI) & Akkunji Ashwini, Priyanka Panwar, Tiana Mary Thomas and Sini Jose,<sup>58</sup> wherein the accused athletes were held to be involved in a charge for doping. When an appeal was filed by the IAAF against the decision of the Indian Anti-Doping Disciplinary Panel, a sole arbitrator appointed had upheld the appeal and declared the players to be ineligible for a period of two years as because reportedly the athletes had failed to establish 'no significant fault or negligence' and no steps were taken to prove that the pills were safely consumed.

However, several changes have been bought in the Arbitrability of sports disputes in India but it is still unknown to many because of lack of extensive

promotion in the sports sector in the country. As the Sports industry of India is becoming more professional, globalised and revenue generating sector, it is very much essential to resolve the disputes arising from such sectors by the process of Arbitration for a speedy remedial and in a confidential manner.<sup>59</sup>

## 8. DISPUTES RELATED TO ART

### 8.1. Arbitrability of Art Disputes

There are several laws that has been in enforcement for resolving disputes arising from Art sectors such as copyright law principles, ownership issues, operation of contractual obligations, theft, misappropriation, forgery, and so on.<sup>60</sup> As the Art sectors have huge monetary and reputational stakes involved it is considered as an important revenue generating sector of the nation especially in countries of economic liberalization like India. Therefore, to resolve the commercial disputes arising from the Sports industry, it is essential to adopt the method of Arbitration as an alternative method of dispute resolution out of the traditional courtroom process.

### 8.2. Scope for Institutional Arbitration in Art Disputes

In realisation of the need for a specialised institute to deal in art disputes, the Court of Arbitration for Art ('CAfA') was established in 2018. The Court was established as a joint initiative of the Netherlands Arbitration Institute (NIA) and Authentication in Art (Aia).<sup>61</sup> The main aim of the creation of 'CAfA' is to bring together a pool of highly qualified international arbitration professionals and experts in forensic

<sup>57</sup> Shivani Panda, *The Current Position of India in Sports Dispute Resolution*, IPleaders (Dec. 22, 2020), <https://blog.ipleaders.in/current-position-india-sports-dispute-resolution>

<sup>58</sup> International Association of Athletics Federations v. Athletics Federation of India & Ors. (Akkunji Ashwini, Priyanka Panwar, Tiana Mary Thomas & Sini Jose), CAS, Lausanne (2014).

<sup>59</sup> International Association of Athletics Federations v. Athletics Federation of India & Akkunji Ashwini, Priyanka Panwar, Tiana Mary Thomas & Sini Jose,

CAS 2012/A/2763, award (30 Nov. 2012) (operative part 17 July 2012).

<sup>60</sup> R.G. Anand v. M/S Deluxe Films & Ors., AIR 1978 SC 1613, 1978 4 SCC 118 (India).

<sup>61</sup> Subhash Bhutoria, Sima Ghaffari & Amin Motamedi, *Art Disputes and the Court of Arbitration for Art: Evolution or Revolution? Am. Rev. Int'l Arb.* (Blog Post, Jan. 21, 2021), <https://aria.law.columbia.edu/art-disputes-and-the-court-of-arbitration-for-art-evolution-or-revolution/>



science provenance research to deal in the wide range of commercial disputes involving international collectors, art historians, art-market professionals, financial institutions and other stakeholders in the art market.<sup>62</sup>

The arbitration rules laid down by the 'CAfA' mandates for the requirement of three arbitrators in the arbitration tribunal and if the pecuniary value remains less than Euro 1,500,000 or the parties have agreed otherwise, then there can be a sole arbitrator for the arbitration proceedings and the panel of arbitration must also consist of pool of eligible lawyers belonging around the world.<sup>63</sup>

### 8.3. Position in India

The Indian Art industry is presently considered as one of the most revenue generating sectors of the nation because of its strong prospects as an investment opportunity and it is expected to have a turnover of USD 223 million in the recent coming years.<sup>64</sup> The matter regarding the arbitrability of Art disputes in India has still remains in complexity, inadequacy and vagueness due to several contrary judicial precedents. One of such case is Bid and Hammer Auctioneers vs. SKN investments (Chennai) Pvt. Ltd.,<sup>65</sup> wherein the respondent had reportedly made an Rs. 1.6 Crore bid for Raja Ravi Varma's classic painting Jaiyu Vadha, at the 'Significant Indian Paintings' auctioned by the petitioner. This case upheld the issues of authenticity of the art and claims of forgery and emerged as a landmark case in the history of Art arbitration disputes in India.

### 9. CONCLUSION

The research paper undertakes a comprehensive analytical examination to test *Hypothesis* and to determine the outcome of the empirical and doctrinal inquiry undertaken therein. For the purpose of conducting this test, the chapter sets out a clearly defined objective—namely, to critically analyse the commercial nature and arbitrability of disputes arising in contemporary India across diverse sectors engaged in international trade and commerce, primarily governed through complex commercial contracts.

The chapter extensively examines a wide range of commercial disputes emanating from multiple sectors such as Construction & infrastructure, Investment treaties, Maritime trade, Intellectual property matters, Insolvency & credit matters, Sports, Artistic subjects and other emerging commercial domains that increasingly form part of cross-border economic activity. In doing so, the analysis takes into account the evolving nature of commercial relationships, the sophistication of contractual frameworks, and the growing involvement of foreign parties in Indian commercial transactions.

The analytical research reveals that despite the increasing complexity and volume of international commercial disputes involving Indian entities, the scope of arbitrability of such contemporary commercial disputes in India remains narrow, inconsistent, and underdeveloped. Judicial reluctance in certain sectors, expansive interpretations of non-arbitrability, excessive court intervention, and the lack of sector-specific arbitration expertise have collectively restricted the effective resolution of disputes through arbitration. This limitation is particularly evident in disputes involving public

<sup>62</sup> Provenance and Forensic Experts, Court of Arbitration for Art, [https://www.cafa.world/arbitration/provenance\\_and\\_forensic\\_experts/](https://www.cafa.world/arbitration/provenance_and_forensic_experts/)

<sup>63</sup> CAfA Arbitration Rules (in force Jan. 1, 2019), CAfA, <https://www.cafa.world/docs/CAfA%20Arbitration%20Rules.1.pdf>

<sup>64</sup> Menaka Doshi, India's Art Market Surges as Rising Wealth Spurs Investment Interest, Bloomberg (Dec. 18, 2025), <https://www.bloomberg.com/news/newsletters/2025-12-18/india-s-art-market-surges-as-rising-wealth-spurs-investment-interest>.

<sup>65</sup> Bid & Hammer Auctioneers v. SKN Invs. (Chennai) Pvt. Ltd., Arbitration Award (Dec. 2014) (India).



interest elements, statutory rights, regulatory oversight, and emerging commercial sectors, where arbitration is either discouraged or rendered ineffective.

As a result, the study establishes that the existing arbitration framework in India has not yet fully adapted to the demands of modern international trade and commerce. This underdevelopment acts as a significant impediment to India's aspiration of emerging as a global hub for international commercial arbitration, despite legislative reforms and policy initiatives undertaken in recent years.

Accordingly, based on the findings derived from this detailed analytical examination, *Hypothesis stand conclusively tested and validated positively*, confirming that the restricted arbitrability of contemporary commercial disputes continues to undermine the growth and global competitiveness of arbitration in India.

\*\*\*\*\*

