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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

ARBITRABILITY OF CONSUMER FRAUD DISPUTES: ANALYSING THE SCOPE IN INDIA

AUTHORED BY - MIR SHATIL

ABSTRACT

In India the scenario of arbitrability scope regarding the disputes related to consumer frauds have still remains a conflicting matter which is evolving as a tension between the private dispute resolution system like arbitration and public forum jurisdiction like Court trial for the matters considering to be part of public interest. Since long time the Indian legislative framework has put restrictions on the scope of arbitrability in cases involving serious allegations of fraud as the matter is considered to be involving interest and rights of public at large which requires judicial trial and examination. However, in the present time Indian Courts have been trying to be more liberal towards the approach of arbitration due to expanding pro-arbitration policies worldwide and the influence of international best practices. This paper critically analyses the status of arbitrability as existing in India in the light of international and domestic legislative framework, the doctrinal shifts in judicial interpretation of the national Courts, and the balance between party autonomy and public policy concerns in fraud-related disputes including Consumer fraud disputes too. The examination of key developments and finding out the existing ambiguities, this research article provides perceptions of the existing landscape of consumer fraud arbitrability in India in reference to the global community of International Commercial Arbitration.

Keywords: Arbitrability, Consumer Fraud, Public Policy, Judicial Interpretation, International Commercial Arbitration.

1. Introduction

*'The future of arbitration is not just international - it is also Indian.'*¹

- Justice Surya Kant

The concept of Arbitrability 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.'²

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 falls outside the purview of arbitration. To mention about the New York Convention, it had also interpreted the concept of arbitrability by incorporating Article II (1) upholding the requirement of an agreement between the contracting states wherein they are required to undertake obligation to submit their disputes to arbitration whether contractual or not and dispute must be capable to be settled by arbitration. Simultaneously, Article V (2) (a) of the Convention mentioned about the disputes not capable to be resolved by arbitration as per legal prohibitions of the country.

Thus, to justify, there can be two types of arbitrability of disputes:

- a. Objective Arbitrability: This type of arbitrability depends on the subject matter of the dispute. It relates to the question of 'which' kind of matters can and cannot be submitted to arbitration.
- b. Subjective Arbitrability: This arbitration generally refers to the subject of scope and thus it is called Subjective arbitrability as it involves interpreting the intention of the parties of choosing the method of arbitration for a specific dispute mentioned in arbitration agreement.

¹Utkarsh Anand, *Future of Arbitration Is Indian: Justice Surya Kant in Sweden*, **Hindustan Times** (July 12, 2025), <https://www.hindustantimes.com/india-news/future-of-arbitration-is-indian-justice-surya-kant-in-sweden-101752316559492.html>.

² Loukas A. Mistelis & Stavros L. Brekoulakis, *Arbitrability: International and Comparative Perspectives* (Kluwer Law Int'l 2009).

2. Arbitrability Test

The actual meaning of the term 'Dispute' must be analysed in this present time of growing importance of arbitration worldwide. International rules like UNCITRAL Model Law and New York Convention explained the term 'dispute' in way to denote those kinds of issues or conflicts which can really be settled by Arbitration depending upon the nature and class of disputes. This explanation also give rise to another notion that there are still some kinds of dispute which are incapable to be settled by arbitration thereby creating a limitation in choosing the subject matters for adjudication.

The arbitrability concept denotes the kind of subject matters that can be settled under the process of Arbitration and examining the possibility of Arbitration agreement and intention of the parties to refer the dispute to Arbitration process which is to be resolved by an Arbitrator,³ referred to as Objective arbitrability and Subjective arbitrability. Similarly, in India, the Arbitration & Conciliation Act, 1996, doesn't impose any specific restrictions mentioning particularly as to what kind of disputes may be referred to Arbitration. However, in an ambiguous manner the Act stated that if an 'award' is rendered in a matter not capable to be resolved by arbitration then such an award may be set aside by the Court.⁴ Therefore, determination of arbitrability of a dispute is a vital aspect to be considered at the time of preparing an arbitration agreement as well as before the commencement of arbitration proceeding. The judgements of the Supreme Court of India in two important cases laid down the test of arbitrability.

2.1. *Booz Allen Case*

In case of *Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd & Ors*⁵, the Supreme Court has apportioned with various aspects of arbitrability and laid down three kinds of Tests to determine arbitrability of a dispute, which are as follows:

i. Nature of dispute-

This kind of test are advised in order to determine whether a dispute matter should be decided in public forum like Court of Law or in a private forum like arbitration. The Court stated that if the subject matter of dispute involves 'right in personam' and further

³ *Booz Allen & Hamilton Inc. v. SBI Home Fin. Ltd.*, (2011) 5 S.C.C. 532 (India).

⁴ Arbitration & Conciliation Act, No. 26 of 1996, § 34(2)(b)(i) (India).

⁵ *Booz Allen & Hamilton Inc. v. SBI Home Fin. Ltd.*, (2011) 5 S.C.C. 532, ¶ 39 (India).

if the dispute is related to sub-ordinate rights in personam arising from rights in rem, then in both the cases it would be considered to be arbitrable.

ii. Remedy test-

This second kind of test laid down by the apex court is to focus on whether the relief sought by the parties are capable to be awarded by an Arbitrator. In this context the court stated 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.

iii. 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 recognise only ‘nature of rights test’.

2.2. *Vidya Drolia Case-*

In case of *Vidya Drolia & others v Durga trading Corporation*⁶, 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:

- i. 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 large⁷. 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 decided⁸. This kind

⁶ *Vidya Drolia v. Durga Trading Corp.*, 2020 SCC OnLine SC 10 (India).

⁷ Ramanathan Aiyar, *Advanced Law Lexicon* (3d ed.).

⁸ *Booz Allen & Hamilton Inc. v. SBI Home Fin. Ltd.*, MANU/SC/0533/2011 (India).

of judgement decides the fate for public at large and binds them in spite of their absence⁹. 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*¹⁰, 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*¹¹ categorically stated that disputes related to patents, copyright and other Intellectual Properties are beyond the scope of arbitration.

- ii. In *Eros International v. Telemax*¹² 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.
- iii. 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-arbitrable¹³, and thus, it requires centralised adjudication mechanism and any sort of mutual adjudication like Arbitration would not be appropriate and enforceable.

⁹ G.C. Cheshire & P.M. North, *Private International Law* 362 (12th ed. Butterworths 1992).

¹⁰ *Suresh Dhanuka v. Sunita Mohapatra*, (2012) 1 S.C.C. 578 (India).

¹¹ *Emaar MGF Land Ltd. v. Aftab Singh*, (2019) 12 S.C.C. 751 (India).

¹² *Eros Int'l v. Telemax*, 2016 SCC OnLine Bom 2179 (India).

¹³ *Vidya Drolia v. Durga Trading Corp.*, MANU/SC/0939/2020 (India).

- iv. 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.
- v. In case the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

3. Disputes Related to Fraud

The several judicial decisions rendered by the Indian Courts formed a list of subject matters to be considered as non-arbitrable which includes the matter of fraud disputes too. For the first time an issue was raised regarding the arbitrability of fraud disputes in the case of Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak,¹⁴ wherein the three Judges' bench of the Supreme Court expressed its opinion that a matter involving an element of fraud cannot be brought under the purview of Arbitration without judicial examination in Court of Law. The said judgement was under the provisions of the Arbitration Act, 1940 and the principle has remained the same under the present 1996 Act also. Similarly, in the case of N. Radhakrishnan,¹⁵ the Judgement remained the same as of Abdul Kadir's one. However, the Judgements of both the above case are declared notably in the matter of Domestic arbitration only and not in regard to international arbitration.

However, the matter of arbitrability of Fraud disputes in international arbitration was raised in the case of World Sport Group (Mauritius) Ltd. V. Msm (Singapore) Pte,¹⁶ wherein the SC held that in an International Commercial Arbitration seated outside India, the arbitrator has jurisdiction to give a finding on a dispute involving fraud. Thereafter, the Judiciary took major steps to develop the rules of arbitrability which can be seen in the judgement of A. Ayyasamy v. A. Paramasivam,¹⁷ in this case the Supreme Court disagreed with its earlier view taken in the case of N. Radhakrishnan which stated that all allegations of fraud would not be arbitrable in any manner. Further, the Court took effort to classify 'Fraud' into two categories:

- Fraud Simpliciter (Plain allegations); and,
- Complex Fraud (Serious allegations).

¹⁴ *Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak*, A.I.R. 1962 S.C. 406 (India).

¹⁵ *N. Radhakrishnan v. Maestro Eng'rs*, (2010) 1 S.C.C. 72 (India).

¹⁶ *World Sport Grp. (Mauritius) Ltd. v. MSM (Singapore) Pte.*, (2014) 11 S.C.C. 639 (India).

¹⁷ *A. Ayyasamy v. A. Paramasivam*, (2016) 10 S.C.C. 386 (India).

The classification of fraud has further given rise to a situation of doubtfulness and confusion which is still prevailing today. The Court explained the arbitrability of fraud in a positive manner for allegations involving plain and simple fraud and negatively for serious fraud allegations which is to be adjudicated by Court of Law. In arbitration proceedings seated outside India any kinds of fraud allegations are arbitrable, on the other hand, in India-seated arbitrations a difference on the degree of fraud has been segregated.

Thereafter, the question arose regarding the determination process of a simple and complex fraud. The Supreme Court of India gave a befitting reply to this question while giving the judgement in the case of *Rashid Raza v. Sadaf Akhtar*¹⁸, wherein, the Court had laid down the process for determination of a Complex fraud in the dispute between the parties by invoking two kinds of test which are as follows:

- a. Does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void? Or,
- b. Whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain?

Now, based upon the justification of these two test it could be determined whether the allegation of disputes is of serious in nature or simple and if it appears to be simple or plain allegations of dispute then it is capable to be resolved by arbitration. Thereafter, the above judgement has been further interpreted by the Supreme Court in the case of *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*,¹⁹ wherein it was held that the first kind of test laid down in *Rashid Raza* case would be proved if the Court can find out that the parties to the dispute never entered into an arbitration agreement, and the second test would be proved if the Court finds out that the allegations of fraud is made against the state or its instrumentalities. To explain further the SC stated that if the allegations are fraud in personam it would be arbitrable but if it has an imposing effect on the world at large it would be outside the purview of arbitration. However, if the subject matter falls under criminal jurisdiction still it would not be treated as non-arbitrable. The above stated verdicts of the Court have been started implementing by various Courts, amongst which notably the Bombay High Court, in the case

¹⁸ *Rashid Raza v. Sadaf Akhtar*, (2019) 8 SCC 710, 2019 SCC OnLine SC 1170 (India).

¹⁹ *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*, 2020 SCC OnLine SC 656 (India).

of Sai Guru Mega Solar Park Ltd. v. Union of India.,²⁰ while deciding the arbitrability and nullification of an arbitration clause on the allegations of fraud placed its reliance on the Supreme Court decisions on Rashid Raza and Avitel case.

4. Disputes Related to Consumer Fraud

The existence of markets depends upon the existence of consumers in that market. The nature of the market must be consumerism so that it can step up to meet the increasing demands of consumers in the market and for that the business players of any size in the market have to prepare their strategies based on consumer's interest. In this era of technology, the consumers of the market are driving towards a converging commonality and thus e-commerce has been growing rapidly due to its availability round the clock. The matter which raises concerns is regarding the protection of consumers from being exploited in this dynamic era of market revolution. The increasing numbers of consumers facing exploitation regularly due to faulty and unsafe products physical and e-commerce markets.

In India, the Consumer Protection Act, 1986, is in force under whose authority the consumer courts, consumer councils and consumer dispute redressal forums were formed in order to provide the aggrieved consumers an expeditious resolution to their problems on a mandate to resolve a dispute between three months to six months. But if we have to rely on data collected then it can be seen that there are a huge burden of cases pending to be resolved yet which is almost 18, 517 cases at the district level and 3, 549 cases at the State level.²¹

In order to modify the adjudication infrastructure of consumer disputes the Government of India has undertaken several measures amongst which the establishment of Online Consumer Mediation Centre in 2016 to provide an efficient resolution process between the e-commerce customers and vendors is remarkable one but unfortunately, the step taken was unsuccessful because the e-commerce vendors and companies were hesitant and non-cooperative with the process because of the non-binding nature of mediation.²²

²⁰ Sai Guru Mega Solar Park Ltd. v. Union of India Through Ministry of New & Renewable Energy, 2020 SCC OnLine Bom 6348 (India).

²¹Mini Muringatheri, Delayed Justice from Consumer Courts, *The Hindu*, July 22, 2019, <https://www.thehindu.com/news/national/kerala/delayed-justice-from-consumer-courts/article28662030.ece>.

²² Mughda Variyar, E-Consumer Mediation Centre Gets Off to a Low Start, *Econ. Times*, Jan. 1, 2018, <https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/econsumer-mediation-centre-gets-off-to-a-slow-start/articleshow/62321215.cms>.

4.1. Arbitrability of Consumer Fraud Disputes

In the present time when the market of e-commerce is uprising, the method of Online dispute resolution, commonly known as ODR has the potential to develop as an alternative to physical arbitration proceedings as there are no notable distinctions between the two. On the other hand, the validity and enforceability of online arbitration agreements are also being recognized by the Indian Courts as seen in the case of *Trimex International*.²³ The positive elements of arbitration such as efficiency and cost-effective process can make arbitration a futuristic model to resolve consumer disputes speedily. However, whether the consumer disputes are arbitrable in India needs to be analysed firstly.

In India, The Arbitration and Conciliation Act, 1996 did not provide list of arbitrable matters in the legislation but provided the non-arbitrability of a dispute as a ground for setting aside an arbitral award under the purview of the Section 34(2) (b) (i) of the 1996 Act. The Supreme Court of India proposed the test of arbitrability in the case of *Booz-Allen & Hamilton Inc. v. SBI Home Finance*²⁴, wherein the scope of arbitrability was explained on the basis of actions in rem and actions in personam. Disputes related to actions in rem are to be excluded from the subject matter of arbitrability as it becomes applicable against the world at a large, whereas, in actions in personam the matter becomes arbitrable as it becomes applicable to an individual only. Now the question which arises is whether the consumer disputes retain actions in rem or actions in personam.

Recently an opinion passed by the Court in the case of *Aftab Singh*²⁵ held that consumer disputes fall under the category of right in rem which itself is a factor making the consumer disputes non-arbitrable in nature. But previously in the case of *A. Ayyaswamy v. A. Paramasivam*²⁶, the Court was of the opinion that as the disputes mainly take place between a consumer and a service provider then it could be possible to categorize the dispute under subordinate rights in personam arising from rights in rem which are considered valid subject to arbitration. Similarly in another case it was held by the Court that the remedy sought in a consumer dispute is generally against the parties to the dispute itself and not to the public at large.²⁷ The question arises in regard to the second test that is whether a dispute arising out of

²³ *Trimex Int'l FZE Ltd. v. Vedanta Aluminium Ltd.*, (2010) 3 SCC 1 (India).

²⁴ *Booz Allen & Hamilton Inc. v. SBI Home Fin. Ltd.*, (2011) 5 S.C.C. 532 (India).

²⁵ *M/s Emaar MGF Land Ltd. v. Aftab Singh*, Review Petition (C) Nos. 2629–2630 of 2018 (India).

²⁶ *id* 17.

²⁷ *Eros Int'l Media Ltd. v. Telex Links India Pvt. Ltd.*, 2016 (6) Arb. L.R. 121 (Bom) (India).

a special statute can be submitted before arbitral tribunal? The apex court of India through its judgement in the case of Ayyaswamy has placed in the consumer disputes in the category of Arbitrable matter and focussed on the fact that ‘parties are forbidden from contracting out of the legislative command when the matter is ruled by a welfare legislation’ to mention such as the Consumer Protection Act, 1986, wherein the consumer disputes are resolved before the Consumer forum.

So, in the case of Aftab Singh²⁸ which was regarding a disagreement occurred between a builder and a consumer of a flat due to delayed in giving possession to the consumer and for which they are supposed to be referred to arbitration, but the Supreme Court regarded the Consumer disputes as non-Arbitrable. While deciding the matter the issue raised before the Court was “whether the proceedings under the Consumer Protection Act, 1986, could be initiated and sustained despite there being a pre-existing agreement between the parties to refer the dispute to arbitration?” and the Court decided that it would be fair for the Consumer forum to take cognizance of the matter and its jurisdiction cannot be ousted. The Court further construed its decision through the clarification of Law that is as per Sec. 8(1) of the Arbitration and Conciliation (2015 Amendment) Act, 1996, the Judicial authority must refer a dispute to Arbitration unless it finds that prima facie no valid arbitration agreement exists, but on the other hand, this provision cannot override Section 2(3) of the 1996 Act which mentions that Part I of the Act will not affect any other Law for the time being in force by virtue of which certain disputes may not be submitted to Arbitration.

5. Conclusion

In this paper the circumstantial scenario of Arbitrability scope has been upheld with special focus on commercial disputes related to Fraud including the consumer frauds and it has become the major concern for the poor growth of International Commercial arbitration regime in India. The absence of any legislative definition of Arbitrability in India has made us to follow the judicial pronouncements for obtaining a list of matters clearly specifying the subjects matters which are arbitrable and non-arbitrable.

The main problem is that test of arbitrability is different in different jurisdictions and it is very much depended on the public policy of the State. The existing limitations and barriers in

²⁸ id 25.

adjudication of various disputes, though commercial in nature but still left outside the purview of arbitration mechanism. Apart from the dispute of Fraud and allied consumer frauds some of the other kind of commercial disputes related to public sector undertakings, Trust disputes, Company act disputes, MSME disputes, Industrial disputes and Competition Act disputes are still left outside the purview of arbitrability in India. The main philosophy should be not to avoid rather to adopt the arbitration process by leaving space for it in as many ways possible.

On the other hand, over the last few years we have been witnessing how the momentum towards arbitration has been increasing as the preferred method of commercial dispute resolution. The Indian parliament has been also trying to make arbitration friendly environment in India and as such several amendments have been made successively to Arbitration Law of India in Act of 2015, 2018, 2019, 2021 and the present amendment bill of 2024 each aimed to align legislation with global best practices.

Developing nations like India has to put heavy reliance on business, trade and commerce in order to uplift the economic condition of the nation and providing ample opportunities to its people to raise their income scale through business, jobs, entrepreneurship, infrastructure, industrialisation and in many more ways.

In the recent times the government of India has set its goal for infrastructural development of sectors of international trade and commerce and to engage in a healthy relationship with foreign jurisdictions in order to attract the foreign economy. In this situation it must be portrayed before the whole world that we have a strong infrastructure for arbitration specially with a wider scope of arbitrability so that if any kind of disputes arising out of commercial relationship between the two parties belonging to different jurisdictions may get resolved amicably in India through a standardised international process.