THE CONUNDRUM OF ARBITRABILITY IN INDIA: NAVIGATING THE DIVIDE BETWEEN PUBLIC POLICY AND PARTY AUTONOMY

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ABSTRACT

Arbitration has been a favored method for resolving disputes in India, especially due to globalization and the rising number of cross-border economic transactions. Its assurances of flexibility, confidentiality, expediency, and party autonomy render it a viable alternative to conventional litigation. The efficacy of arbitration is largely contingent upon the extent of arbitrability, which determines whether a dispute is amenable to resolution via arbitration. In India, this term has remained unclear, influenced more by developing judicial interpretations than by legislative clarity. This article examines the parameters of arbitrability under Indian law, outlining the evolution of this doctrine via landmark rulings including Booz Allen, Ayyasamy, Vidya Drolia, and N.N. Global. It assesses the fluctuation of courts between a pro-arbitration position and an interventionist approach, frequently referencing issues pertaining to public policy and rights in rem. The inconsistent enforcement of the public policy exemption and procedural minutiae, such as the stamping of agreements, frequently obstruct arbitration at the outset. Utilizing comparative analyses from arbitration-friendly jurisdictions including Singapore, the United Kingdom, and France, the study advocates for a redefinition of arbitrability that curtails court overreach and strengthens party autonomy. In conclusion, the article presents doctrinal and legislative proposals to align India's arbitration structure with international standards, facilitating engagement with global entities while preserving protections against process exploitation.

Keywords: Arbitrability, Arbitration in India, Public Policy, Party Autonomy, Vidya Drolia, N.N. Global Case, Judicial Intervention, Rights in Rem, Arbitration and Conciliation Act, Cross-border Dispute Resolution

Introduction

Due to its private, adaptable, and effective features, arbitration has steadily become the go-to method for resolving disputes in the global economy. By enacting significant reforms to its arbitration framework, particularly through the Arbitration and Conciliation Act of 1996 and its subsequent revisions in 2015, 2019, and 2021, India is positioning itself as a major economic force and a desirable location for international arbitration. The changes aim to improve institutional arbitration, reduce judicial interference, and bring Indian arbitration laws into compliance with international norms, such as the UNCITRAL Model legislation. But the question of what kinds of disputes are arbitrable under Indian law remains fundamental and unresolved.

The legal ability of a subject matter to be decided by arbitration as opposed to by judicial tribunals is known as arbitrability. It establishes the external bounds of what private parties can submit for arbitral decision-making. Party autonomy, the idea that parties should be free to choose the process, venue, and arbiter for settling their disagreements, is the foundation of arbitration. There are limitations to this autonomy. Courts have repeatedly ruled that a number of issues, such as criminal charges, marital problems, insolvency, guardianship, and rights-in-rem situations, cannot be resolved through arbitration. This paradox has led to judicial disparities and doctrinal ambiguity.

Through judicial interpretation rather than exact legislation, the Indian judiciary has played a significant role in forming the idea of arbitrability. A dynamic and sometimes conflicting legal framework has been shaped by important decisions like Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd[1]., A. Ayyasamy v. A. Paramasivam,[2] and the most recent Vidya Drolia v. Durga Trading Corporation.[3] The basic difference between rights in personam (arbitrable) and rights in rem (non-arbitrable) was established by Booz Allen. However, later decisions made matters worse by adding evaluations of procedural validity, public interest, and fraud, as demonstrated in N.N. Global.[4] This has led to a fragmented legal system where judicial discretion may play a major role in determining whether a case is arbitrable.

[1] *Booz Allen & Hamilton Inc. v. SBI Home Fin. Ltd.*, (2011) 5 S.C.C. 532 (India)
[2] *A. Ayyasamy v. A. Paramasivam*, (2016) 10 S.C.C. 386 (India)
[3] *Vidya Drolia v. Durga Trading Corp.*, (2021) 2 S.C.C. 1 (India).
[4] *N.N. Glob. Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.*, (2023) 7 S.C.C. 1 (India) (Const. Bench).

It is especially alarming that Indian courts are increasingly using public policy as justification for judicial intervention, both when determining whether a dispute can be arbitrated and when enforcing arbitral awards (as permitted by Sections 34 and 48 of the 1996 Act).[5] Interventionist tactics reduce arbitration's effectiveness and increase ambiguity for international businesses looking for a trustworthy legal system.

An organized analysis of Indian jurisprudence on arbitrability is presented in this article. Before critically analyzing recent Supreme Court decisions, it first describes the bounds of arbitrability as defined by Indian jurisprudence. After comparing India's position with global best practices, it concludes with legislative and doctrinal recommendations to bring Indian arbitration law into compliance with global norms. In line with India's goal of becoming a major center for international arbitration, the goal is to clarify the concept of arbitrability and promote a more unified framework that gives priority to party sovereignty.

The Concept of Arbitrability

A key tenet of arbitration law is arbitrability, which serves as the crucial test that determines whether a disagreement can be settled through arbitration rather than litigation. Despite arbitration's growing popularity in India and around the world, there is still much uncertainty surrounding what constitutes acceptable arbitration. The topic of the disagreement and whether it is legal to settle such disputes outside of the purview of courts or public forums are at the heart of arbitrability. The Arbitration and Conciliation Act of 1996 (also known as "the 1996 Act") does not provide a clear definition of arbitrability in Indian law. India primarily relies on judicial interpretation, as opposed to some jurisdictions that define non-arbitrable issues through legislation. The concept of arbitrability has developed organically and often inconsistently through judicial interpretation due to the absence of a comprehensive legal framework. The 1996 Act, which similarly defers the determination of arbitrability to domestic legal systems, is modeled after the UNCITRAL Model Law on International Commercial Arbitration.

A body of jurisprudence pertaining to arbitrability has been gradually developed by the Indian judiciary. The difference between rights in personam and rights in rem has emerged as a key one. While the latter relates to rights enforceable between specific parties (such as contractual

[5]The Arbitration and Conciliation Act, No. 26 of 1996, §§ 8, 11, 34, 48, INDIA CODE (1996).

duties), the former relates to rights enforceable universally (such as property rights, insolvency, and marital status). The Supreme Court ruled in Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. that only disputes pertaining to rights in personam are arbitrable, while rights in rem are reserved for public bodies or courts to settle.[^1]

Although this distinction is advantageous in theory, in practice it has led to ambiguity in interpretation. Rent control laws may apply to both private and public tenancy disputes. Similarly, discussions surrounding claims of fraud have produced conflicting decisions. The Court concluded in A. Ayyasamy v. A. Paramasivam[6] that, unless they involve complex issues of public interest, simple claims of fraud do not make a matter non-arbitrable.[^2] This illustrates how arbitrability can be evaluated differently even within the same types of conflicts, leading to uncertainty. The situation is made more difficult by the impact of governmental policy. Public policy is a flexible concept that is widely used in India to oppose arbitrability and the implementation of arbitral decisions. Although Sections 8, 11, 34, and 48 of the 1996 Act limit judicial review to specific grounds, courts have occasionally expanded these provisions to include an initial assessment of arbitrability, undermining the arbitral process's independence.

By offering a methodical four-pronged analysis that looks at the nature of the rights at issue, the implications for third parties, the association with sovereign functions, and any explicit or implicit statutory prohibitions, the Vidya Drolia ruling attempted to clarify the idea of arbitrability.[^3] However, the test's application is still uneven. In India, the concept of arbitrability is still developing. While judicial efforts to define its boundaries are commendable, legislative ambiguity continues to hinder its consistent application. Clarifying ambiguities surrounding arbitrability is both a legal and business necessity as India looks to become a global center for arbitration.

Judicial Discourse and the "Arbitrability Test"

The courts in India are primarily responsible for developing the jurisprudence on arbitrability, and they have a big say in defining which issues can be resolved through arbitration. The Indian Supreme Court and a number of High Courts have developed broad guidelines over the years that both support and limit arbitrability. Current decisions show a gradual and cautious shift

[6] *A. Ayyasamy v. A. Paramasivam*, (2016) 10 S.C.C. 386 (India).

towards respecting party autonomy and minimizing court involvement, in contrast to earlier rulings that supported judicial oversight. The nonlinear nature of this journey has resulted in theological complexity and sporadic inconsistencies.

Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd

The Supreme Court formally defined the difference between rights in personam and rights in rem as a standard for assessing arbitrability in the landmark ruling of Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.[7] Since rights in rem are universally enforceable and considered public interests, they should not be resolved privately. On the other hand, rights in personam, which deal with relations between parties, were thought to be appropriate for arbitration.

The Court decided that arbitration is not applicable to disputes pertaining to rights in rem, or mortgage enforcement under the Transfer of Property Act, 1882. Criminal offenses, insolvency and liquidation, testamentary issues, and eviction or tenant conflicts governed by rent control laws were among the non-arbitrable issues listed in the ruling. Although Booz Allen is often considered a landmark decision, its dichotomous categorization fails to capture the complexity of modern business disputes that often span both public and private spheres of law.

Ayyasamy v. A. Paramasivam: Social Welfare and Deceit

The Supreme Court considered whether allegations of fraud are a matter that cannot be arbitrated in Ayyasamy v. A. Paramasivam, which was the next important step.[8] Ayyasamy marked a departure from earlier decisions that claimed fraud was inherently non-arbitrable, such as N. Radhakrishnan v. Maestro Engineers. The Court made a distinction between serious accusations pertaining to complex public interest matters that would disqualify arbitral jurisdiction and minor fraud charges that have no bearing on arbitrability.

The decision attempted to strike a balance between safeguarding the public interest and maintaining the integrity of arbitration agreements. It hinted that permitting parties to avoid arbitration by alleging fraud might compromise arbitration's core purpose. However, the decision did not offer a methodical doctrinal test, and the standard for evaluating "serious"

[7] Supra Note 1
[8] Supra Note 2

claims remained arbitrary.

Durga Trading v. C. Vidya Drolia: The Quadripartite Analysis

In Vidya Drolia v. Durga Trading Corporation, a three-judge Supreme Court panel developed a four-step test to determine whether a dispute could be arbitrated, establishing the definitive exposition of the arbitrability theory.[9] The test asks:

- Determining whether the subject matter and cause of action are exempt from arbitration because they relate to actions in rem;
- The effect that the subject matter and cause of action have on third-party rights and their erga omnes effect;
- Whether the subject matter and cause of action relate to the state's core sovereign and public interest functions;
- Figuring out whether the topic is expressly or implicitly non-arbitrable in accordance with mandatory laws.

The Vidya Drolia case, which sought to lessen judicial intervention at the referral stage under Sections 8 and 11 of the 1996 Act, was viewed as a pro-arbitration ruling. It emphasized that, unless the issue is so clear that the court can decide it prima facie, matters of arbitrability should, to the greatest extent possible, be entrusted to the arbitral tribunal in accordance with the Kompetenz-Kompetenz principle.

However, there were some ambiguities in this landmark decision. Booz Allen's rights in rem and personam distinction was upheld, but it left open questions about claims that cover both parts. Additionally, in spite of the clarity offered, High Courts have applied the test inconsistently, particularly when it comes to cases involving fraud, consumer protection, or statutory rights like employment and tenancy.

D. N.N. Global v. Indo Unique: Arbitrability and Procedural Restraints

In N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd., the Supreme Court ruled that

[9] Supra Note 3.

an unstamped arbitration agreement is void and unenforceable, further escalating the conflict.[10] A Constitution Bench later upheld this viewpoint, concluding that the arbitration agreement is invalid under Indian law due to the failure to pay stamp duty. The decision has important procedural ramifications even though it is not a conclusive evaluation of arbitrability. It compromises the arbitral process by allowing courts to reject arbitration references right away. This decision deviates from international best practices, which hold that procedural flaws, like the lack of stamping, do not render arbitration clauses void, especially in business contexts.

Though it has made great strides, conceptual and procedural ambiguities still plague the Indian judiciary's discussion of arbitrability. A more structured and liberal approach has replaced the courts' strict, interventionist one. However, judicial discretion continues to play a major role in the application of these doctrines. In order to improve its standing as an arbitration-friendly jurisdiction, India needs to firmly establish the principles set forth in Vidya Drolia, reduce the procedural gatekeeping that was demonstrated in N.N. Global, and pass a clear law governing arbitrability.

Arbitrability and Public Policy: An Ongoing Tension

In Indian arbitration law, the intersection of arbitrability and public policy is perhaps the most controversial and least settled area. Despite arbitration's emphasis on party autonomy and minimal judicial intervention, public policy serves as a constitutional and legislative safeguard that allows for judicial intervention in situations deemed harmful to the country's social, moral, or economic interests. The doctrine of arbitrability has been significantly complicated by Indian courts' expansive and frequently erratic interpretation of public policy, which has led to legal ambiguity and reduced India's appeal as a country that supports arbitration.

A. Non-Arbitrability Based on Public Policy

In the Indian arbitration system, public policy issues have traditionally been used in two main situations. First, if the matter is judged non-arbitrable for public policy reasons, courts may refuse to send parties to arbitration during the referral stage (Sections 8 and 11 of the Arbitration and Conciliation Act, 1996). Second, if an arbitral award is judged to be against Indian national policy, it may be revoked or denied enforcement during the enforcement phase

[10] Supra Note 4.

(Sections 34 and 48). Courts have a great deal of interpretive discretion because the definition of "public policy" is not clearly defined in the statute. The term has been notoriously difficult to define, and its definition varies depending on the context. The Supreme Court interpreted public policy broadly in ONGC Ltd. v. Saw Pipes Ltd[11]., taking into account factors like patent invalidity and violations of Indian law. The finality and binding nature of arbitration were compromised by this expansion, which allowed Indian courts to evaluate arbitral decisions on their merits.

The harm was already done, despite subsequent rulings that attempted to restrict this scope, such as the 2015 Amendment to the Arbitration Act and Shri Lal Mahal Ltd. v. Progetto Grano Spa, which sought to limit public policy to the "fundamental policy of Indian law" and "basic notions of morality or justice." Public policy jurisprudence is still evolving and subject to arbitrary judicial interpretations.

B. The Relationship Between Public Policy and Arbitrability

The main conflict arises when courts rule that certain issues cannot be arbitrated because doing so is seen as against public policy. This justification has been applied in fields like:

- Criminal matters
- Procedures for bankruptcy and insolvency
- Rent control laws govern tenancy disputes.
- Custodianship and marital disputes
- The impact of fraud on the general public

The Supreme Court acknowledged that public policy affects the determination of arbitrability in Vidya Drolia v. Durga Trading Corporation, but cautioned against using it too broadly. The Court upheld the four-fold requirements for arbitrability, stating that arbitration ought to be allowed unless there is a statutory ban, the dispute affects the rights of third parties, or it involves sovereign powers. However, in subsequent cases, lower courts have consistently

[11] *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 S.C.C. 705 (India).

invoked public policy at the referral stage, often citing concerns about illegality, statutory non-compliance, or wider public implications.

The case of N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.[12], in which the Supreme Court ruled that an unstamped arbitration agreement was unconstitutional and unenforceable, serves as a prominent example of this ongoing tension. Permitting arbitration based on an unstamped document would be against public policy regarding the enforcement of fiscal statutes like the Indian Stamp Act of 1899, according to the rationale.[^4] By establishing a procedural gatekeeping mechanism under the guise of a public policy issue, this decision gave courts the ability to use technicalities to get around party autonomy.

C. Jurisprudence in Comparison

On a global level, public policy is handled more precisely and cautiously. For example:

In England, public policy is applied cautiously. Except in cases where the dispute essentially violates the rule of law or the interests of the country, judicial bodies typically support the enforcement of arbitration agreements and awards.

In order to maintain Singapore's standing as an arbitration hub, public policy is interpreted narrowly, and the International Arbitration Act in Singapore expressly limits judicial review to specific grounds. Since French courts uphold judgments unless they manifestly contravene French foreign public policy, the public policy environment in France is noticeably more conducive to arbitration. India's policy is considered interventionist when compared to these jurisdictions. Public policy is frequently brought up during the pre-arbitral stage, which reduces party autonomy and increases procedural ambiguity.

D. The Need for an Equitable Approach

In a country like India, which has complex socioeconomic problems and a diverse legal system, public policy is a crucial restriction on the arbitration framework. However, its overuse as a tool to block arbitrations in their early stages defeats the main goal of the 1996 Arbitration and Conciliation Act, which is to promote minimal judicial interference and speedy resolution. In order to avoid excessive judicial intervention, the 246th Law Commission Report

[12] Supra Note 4.

recommended that the term "public policy" be precisely defined. Although these problems were somewhat alleviated by the Act's 2015 and 2019 revisions, the appearance of public policy arguments during the referral stage was not expressly disregarded. A better option would be:

- Changes to the law that expressly forbid courts from referring to public policy when Sections 8 and 11 are in effect;
- Judicial restraint in applying the Kompetenz-Kompetenz principle when assigning complex public policy decisions to the arbitral tribunal.
- Educating and raising judges' awareness of international arbitration standards in commercial courts.

India's struggle to balance judicial independence with corporate efficiency revolves around the conflict between arbitrability and public policy. While maintaining the integrity of arbitration agreements and the concept of party autonomy, courts must ensure that arbitration does not act as a cover for unlawful activity or harm to the public. India's goal of becoming a global center for arbitration depends on limiting the reach of public policy, particularly during the initial stages of arbitration.

Conclusion and Recommendations

The issue of arbitrability in Indian law is continually developing at the confluence of statutory interpretation, judicial innovation, and commercial exigency. As India endeavors to establish itself as a worldwide arbitration center, the jurisprudence on the arbitrability of cases has gained significant importance. The ambiguity around the extent of arbitrability, especially when intertwined with expansive interpretations of public policy, has impeded the development of arbitration as a dependable alternative to conventional litigation in India.

The judicial discourse over the last twenty years indicates a transition from an excessively interventionist position to a more arbitration-favorable perspective. Starting with Booz Allen, which established the distinction between rights in rem and rights in personam, and concluding in Vidya Drolia, where a systematic four-fold test for arbitrability was articulated, Indian courts have sought to elucidate this complex domain. Nonetheless, the theory is fraught with ambiguity, particularly when courts reference public policy issues during the referral phase or

when confronting procedural inadequacies, such as unstamped arbitration agreements (N.N. Global).

These activities undermine the Kompetenz-Kompetenz concept and thwart the fundamental aim of the Arbitration and Conciliation Act, 1996—to provide a prompt, effective, and conclusive resolution of disputes by arbitration.

The erratic interpretation of the arbitrability doctrine by lower courts persists in hindering parties attempting to enforce arbitration agreements, leading to extended litigation regarding preliminary issues. This scenario starkly contrasts with worldwide best practices, wherein courts typically embrace a pro-arbitration approach and limit public policy arguments to the enforcement phase exclusively. The subsequent proposals are offered to remedy these issues:

Legislative Clarification: Parliament must revise the Arbitration and Conciliation Act, 1996 to establish a definitive and comprehensive enumeration of non-arbitrable subject topics, akin to jurisdictions such as Germany or Switzerland. This would limit excessive judicial authority and provide clarity in commercial dealings.

Limit Public Policy to Enforcement Phase: Statutory provisions should prohibit courts from considering public policy during the referral stage (Sections 8 and 11). These matters ought to be entrusted to the arbitral tribunal, accompanied by restricted post-award judicial scrutiny.

Implement specialized training programs for judges in commercial courts and High Courts to harmonize judicial comprehension with international arbitration standards, especially on doctrines like arbitrability and Kompetenz-Kompetenz.

The N.N. Global verdict highlights a fundamental issue with India's colonial-era stamp duty regulations, which are being employed to obstruct arbitration. Reforms should remove arbitration agreements from the stamping requirement or, at the very least, classify stamping as a rectifiable procedural fault.

Advancing Institutional Arbitration: A more robust framework for institutional arbitration, characterized by established regulations for jurisdiction, arbitrability, and competence, might mitigate judicial interference. Institutions such as the Mumbai Centre for International Arbitration (MCIA) require empowerment via governmental backing and legal acknowledgment.

In conclusion, although Indian arbitration jurisprudence has advanced, particularly following Vidya Drolia, attaining clarity on arbitrability is an essential change. Reconciling the demands of party autonomy, judicial scrutiny, and public interest is difficult yet crucial. A coordinated approach encompassing legislative measures, judicial restraint, and institutional advancement is essential for India to achieve its aspiration of becoming a strong and dependable hub for both international and domestic arbitration.