
WHAT DISPUTES ARE NOT ARBITRABLE? A COMPARATIVE ANALYSIS ACROSS JURISDICTIONS WITH SPECIAL REFERENCE TO INDIAN LAW

Adv. Aisha Shaikh, LLM, Mumbai University

ABSTRACT

Arbitration has become a cornerstone of modern dispute resolution systems, particularly in the context of international commercial transactions, investment disputes, and domestic commercial conflicts. Its advantages—speed, confidentiality, party autonomy, and enforceability under international conventions—have made it a preferred alternative to traditional litigation. However, despite its widespread acceptance and institutional support, arbitration is not a panacea for all types of disputes. The principle of arbitrability serves as a critical boundary, determining which disputes may be resolved through arbitration and which must be adjudicated by state courts or specialized tribunals.

The concept of non-arbitrability is rooted in public policy, constitutional law, and the nature of rights involved. While the doctrine varies across jurisdictions, certain categories of disputes—such as those involving criminal law, matrimonial status, insolvency, consumer protection, and intellectual property validity—are generally excluded from arbitration due to their public law character or the involvement of third-party interests. In India, the legal framework for arbitration is governed by the Arbitration and Conciliation Act, 1996, which, though modelled on the UNCITRAL Model Law, does not explicitly define the scope of arbitrability. As a result, Indian courts, particularly the Supreme Court, have played a pivotal role in shaping the contours of non-arbitrability through a series of landmark judgments.

This research paper provides a comprehensive analysis of the doctrine of non-arbitrability, with a primary focus on Indian jurisprudence. It traces the evolution of the concept from early judicial pronouncements to contemporary rulings, highlighting the shift from a rigid, categorical approach to a more nuanced, functional analysis. The paper examines key judicial decisions such as *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.* (2011), *A. Ayyasamy v. A. Paramasivam* (2016), *Hindustan Petroleum Corp. Ltd. v. Pinkcity Midway Petroleums* (2019), and *N. Radhakrishnan v. Maestro Homes Pvt. Ltd.* (2021), among others, to illustrate the dynamic

nature of Indian arbitration law.

In addition to a detailed analysis of Indian law, this paper conducts a comparative study of arbitral frameworks in four major jurisdictions: the United States, the United Kingdom, France, and Singapore. Each of these jurisdictions offers a distinct approach to non-arbitrability, shaped by their legal traditions, statutory frameworks, and judicial philosophies. The comparative analysis reveals that while common law jurisdictions like the U.S. and UK emphasize party autonomy and a presumption in favour of arbitrability, civil law systems like France and hybrid regimes like Singapore adopt a balanced approach that respects both private agreement and public order.

The paper further explores the rationale behind excluding certain disputes from arbitration, including concerns related to public policy (order public), statutory exclusivity, sovereign functions, and the protection of vulnerable parties. It critically evaluates the challenges in the current Indian framework, such as judicial overreach, inconsistent application of precedents, procedural delays, and ambiguity in statutory interpretation. Drawing on international best practices, the paper proposes a series of recommendations for legislative and judicial reform to modernize India's arbitration ecosystem.

The conclusion underscores the need for a harmonized, predictable, and flexible approach to arbitrability that upholds the integrity of public institutions while empowering parties to resolve their disputes efficiently. As India continues its journey toward becoming a global arbitration hub, clarity on the limits of arbitral jurisdiction will be essential to ensuring both legal certainty and access to justice.

Keywords: Arbitrability, Non-arbitrable disputes, Indian Arbitration Law, Public Policy, Comparative Law, Supreme Court of India, Arbitration and Conciliation Act, 1996, UNCITRAL Model Law, Party Autonomy, In Rem Rights.

I. INTRODUCTION

The global legal landscape has witnessed a transformative shift in the way disputes are resolved. Over the past few decades, arbitration has emerged as a dominant mode of dispute resolution, particularly in commercial, investment, and cross-border contexts. This evolution is driven by the growing recognition of the limitations of traditional litigation—such as delays, high costs, lack of expertise, and limited enforceability across jurisdictions—and the increasing demand for faster, more efficient, and internationally enforceable mechanisms.

In India, the adoption of the Arbitration and Conciliation Act, 1996 marked a significant turning point in the country's legal history. Inspired by the UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006), the Act was designed to promote arbitration as a viable and effective alternative to litigation. It emphasizes party autonomy, minimal judicial intervention, and expeditious resolution of disputes. The Act applies to both domestic and international arbitrations and provides a comprehensive framework for the conduct of arbitral proceedings, the recognition and enforcement of awards, and the limited grounds for setting aside or refusing enforcement of awards.

Despite the liberal framework, the scope of arbitration is not absolute. A fundamental limitation is the doctrine of non-arbitrability—the principle that certain types of disputes cannot be referred to arbitration and must be adjudicated by a court or a public tribunal. This doctrine is not merely procedural; it is deeply rooted in constitutional principles, public policy, and the nature of the rights involved. It reflects the state's responsibility to protect public interest, maintain the rule of law, and ensure that certain matters remain within the exclusive domain of judicial or administrative authorities.

The concept of non-arbitrability arises from the recognition that not all disputes are purely private in nature. Some disputes involve rights in rem (rights against the world), affect third parties, or implicate sovereign functions of the state. These disputes often require a decision that is binding on all persons and cannot be left to the discretion of private parties or arbitrators. For example, a dispute over the validity of a patent affects not only the parties but also the public domain and future innovators. Similarly, matters involving criminal liability, matrimonial status, or insolvency require state supervision and cannot be privatized.

In India, the Arbitration and Conciliation Act, 1996 does not contain an explicit definition of "arbitrability" or a list of non-arbitrable disputes. This legislative silence has necessitated judicial interpretation, leading to the development of a rich and evolving jurisprudence on the subject. The Supreme Court of India has played a central role in defining the boundaries of arbitrability, issuing a series of landmark judgments that have shaped the legal landscape.

This research paper aims to provide a comprehensive analysis of the doctrine of non-arbitrability in Indian law, placing it in a comparative context with leading jurisdictions. It begins by defining the concept of arbitrability and examining its theoretical foundations. It then traces the evolution of Indian jurisprudence on the subject, analyzing key judicial decisions

and identifying the categories of disputes deemed non-arbitrable. The paper conducts a comparative study of the United States, the United Kingdom, France, and Singapore, highlighting the similarities and differences in their approaches. It evaluates the rationale behind excluding certain disputes from arbitration and discusses the challenges in the current Indian framework. Finally, the paper offers recommendations for reform to enhance the clarity, consistency, and effectiveness of India's arbitration regime.

The significance of this study lies in its timeliness and relevance. As India seeks to position itself as a global arbitration hub, there is an urgent need for legal certainty and predictability in the application of arbitration law. A clear understanding of what disputes are not arbitrable is essential for parties, practitioners, arbitrators, and courts alike. This paper contributes to that understanding by providing a detailed, well-reasoned, and comparative analysis of one of the most complex and important aspects of modern arbitration law.

II. CONCEPTUAL FOUNDATIONS OF ARBITRABILITY

A. DEFINITION AND SCOPE OF ARBITRABILITY

The term arbitrability refers to the legal capacity of a particular dispute to be resolved through arbitration. It is a threshold issue that must be determined before a dispute can proceed to arbitration. As Professor Gary B. Born explains, “arbitrability is the determination of whether a particular dispute is one that may be resolved by arbitration under applicable law.”¹ It is distinct from the question of jurisdiction, which concerns whether the arbitral tribunal has the authority to hear the case based on the arbitration agreement.

Arbitrability operates at two levels:

1. Subject-matter arbitrability: Whether the nature of the dispute allows it to be resolved through arbitration.
2. Procedural arbitrability: Whether the parties have validly agreed to arbitrate the dispute.

While procedural arbitrability depends on the existence and validity of an arbitration agreement, subject-matter arbitrability is determined by public policy and statutory law. It is a

¹ Gary B. Born, *International Commercial Arbitration* (2nd ed., Kluwer Law International 2014) 876.

matter of law for the court to decide, although some jurisdictions allow the arbitral tribunal to rule on its own jurisdiction under the principle of competence-competence.

The concept of arbitrability is not static; it evolves with changes in legal, economic, and social conditions. For example, disputes involving antitrust, securities, and intellectual property were once considered non-arbitrable but are now increasingly accepted in arbitration, especially in international contexts.

B. THEORETICAL BASIS OF NON-ARBITRABILITY

The doctrine of non-arbitrability is grounded in several theoretical frameworks, each reflecting different aspects of the relationship between private dispute resolution and public authority.

1. Public Policy Theory (Ordre Public)

Certain disputes are considered non-arbitrable because their resolution affects public interest or violates fundamental legal principles. For instance, criminal matters, family law issues, and regulatory enforcement are seen as too important to be left to private arbitrators. The state has a duty to ensure that such matters are adjudicated in a transparent, accountable, and standardized manner.

2. Sovereignty Theory

The state retains exclusive jurisdiction over certain matters that involve the exercise of sovereign power. These include insolvency, taxation, land acquisition, and national security. Arbitration, being a private mechanism, lacks the authority to enforce coercive measures or make decisions that bind the public at large.

3. Rights-Based Theory

Some rights are created by statute and can only be enforced or adjudicated by designated public forums. For example, labor rights under social welfare legislation, consumer rights under the Consumer Protection Act, or shareholder rights under the Companies Act are intended to be protected through specialized tribunals with remedial powers.

4. Functional Theory

A more modern approach focuses on the function and substance of the dispute rather than its label. Under this view, a dispute may be arbitrable even if it involves a statutory element, provided the core issue is private and contractual in nature. This approach emphasizes flexibility and party autonomy.

These theories are not mutually exclusive and often overlap in practice. The challenge lies in balancing the principle of party autonomy—the cornerstone of arbitration—with the need to protect public interest and maintain the integrity of the legal system.

C. ARBITRABILITY UNDER THE UNCITRAL MODEL LAW

The UNCITRAL Model Law on International Commercial Arbitration (2006) provides a widely accepted framework for arbitration. Article 34(2)(b)(i) allows a court to set aside an arbitral award if “the subject matter of the dispute is not capable of settlement by arbitration under the law of [the State].”² This provision acknowledges that each state may define the limits of arbitrability according to its own public policy.

Similarly, Article 8(1) requires a court to refer parties to arbitration unless it finds that the arbitration agreement is “null and void, inoperative or incapable of being performed.”³ The phrase “incapable of being performed” has been interpreted by some jurisdictions to include non-arbitrability.

However, the Model Law does not define what constitutes a non-arbitrable dispute, leaving it to national jurisdictions to determine. This has led to divergent approaches, particularly between common law and civil law systems. While some countries adopt a liberal, pro-arbitration stance, others maintain strict limitations based on public policy and statutory exclusivity.

The Model Law’s silence on the issue reflects a deliberate choice to allow flexibility and adaptability. It recognizes that different legal systems have different traditions and priorities regarding the role of state courts versus private arbitration.

² UNCITRAL Model Law on International Commercial Arbitration (2006), Art. 34(2)(b)(i).

³ Ibid, Art. 8(1).

III. ARBITRABILITY IN INDIAN LAW: HISTORICAL AND JUDICIAL EVOLUTION

A. LEGISLATIVE FRAMEWORK

India's current arbitration regime is governed by the Arbitration and Conciliation Act, 1996, which replaced the outdated Arbitration Act, 1940. The 1996 Act was enacted to align Indian law with international standards and promote arbitration as a preferred mode of dispute resolution. It is divided into four parts:

- Part I: Applies to arbitration conducted in India (both domestic and international commercial arbitration).
- Part II: Deals with the enforcement of foreign awards (Geneva and New York Conventions).
- Part III: Provides for conciliation.
- Part IV: Contains supplementary provisions.

Notably, the Act does not contain a definition of "arbitrability" or a list of non-arbitrable disputes. Section 8 allows a judicial authority to refer parties to arbitration if there is a valid agreement, unless the court finds the agreement to be "null and void, inoperative or incapable of being performed."⁴ Similarly, Section 45 provides for referral in international commercial arbitration.⁵

The absence of a statutory definition has led the Indian judiciary to play a pivotal role in shaping the doctrine of non-arbitrability through judicial interpretation.

B. EARLY JUDICIAL APPROACH: THE CATEGORICAL FRAMEWORK

In the early years following the enactment of the 1996 Act, Indian courts adopted a restrictive view of arbitrability. The turning point came in *S.B.P. & Co. v. Patel Engineering Ltd.* (2005),⁶ where the Supreme Court held that only disputes arising out of civil and commercial

⁴ Arbitration and Conciliation Act, 1996, § 8.

⁵ Ibid, § 45.

⁶ (2005) 8 SCC 618.

transactions are arbitrable. It emphasized that matters involving in rem rights (rights against the world) or public rights are generally non-arbitrable.

The Court identified several categories of non-arbitrable disputes, including:

- Matrimonial disputes (divorce, custody)
- Insolvency and winding up
- Criminal offenses
- Eviction or tenancy matters governed by special statutes
- Consumer protection claims
- Disputes involving the appointment of directors
- Questions of patent validity

This decision laid the foundation for a categorical approach to non-arbitrability, which was later refined in subsequent judgments.

C. LANDMARK CLARIFICATION: BOOZ ALLEN & HAMILTON INC. V. SBI HOME FINANCE LTD. (2011)

The case of **Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.**⁷ is widely regarded as the most authoritative pronouncement on non-arbitrability in Indian law. The Supreme Court clarified the distinction between disputes that are in personam (between private parties) and those that are in rem (affecting the world at large).

The Court held that only in personam disputes are arbitrable, while in rem disputes are inherently non-arbitrable because they require a determination that binds the public. It reaffirmed the list of non-arbitrable matters, stating:

“Proceedings in rem are those which affect the status of a person or the title to property which are required to be decided by a court of law in a proceeding to which all interested parties must

⁷ (2011) 5 SCC 532.

be made parties and the decision in which is binding erga omnes."⁸

The Court categorized disputes as follows:

Arbitrable	Non-Arbitrable
Contractual disputes	Matrimonial disputes
Partnership disputes	Insolvency proceedings
Property disputes (title not in question)	Testamentary matters
Intellectual property (usage, not validity)	Criminal charges
Shareholder disputes	Eviction under rent control laws
Insurance claims	Consumer disputes
Construction disputes	Patent/trademark validity
Joint venture disputes	Director appointments

This judgment provided much-needed clarity but also faced criticism for being overly rigid and failing to account for the evolving nature of arbitration.

D. SHIFT TOWARD A FUNCTIONAL APPROACH: A. AYYASAMY V. A. PARAMASIVAM (2016)

In *A. Ayyasamy v. A. Paramasivam*,⁹ the Supreme Court introduced a more flexible, case-specific approach. It held that even if a dispute involves elements of public law, it may still be

⁸ Ibid, para 37.

⁹ (2016) 10 SCC 311.

arbitrable if the core issue is private in nature.

The Court laid down a two-pronged test:

1. Whether the dispute arises out of a relationship of a civil and commercial nature.
2. Whether the dispute involves rights in personam rather than in rem.

It emphasized that the mere presence of a public element does not render a dispute non-arbitrable. For example, a partnership dispute involving allegations of fraud may still be arbitrable if the fraud is incidental to the contractual relationship.

This decision signalled a shift from a categorical to a functional approach, focusing on the nature and substance of the dispute rather than its label.

E. STATUTORY RIGHTS AND ARBITRABILITY: HINDUSTAN PETROLEUM CORP. LTD. V. PINKCITY MIDWAY PETROLEUMS (2019)

In *Hindustan Petroleum Corp. Ltd. v. Pinkcity Midway Petroleum*,¹⁰ the Supreme Court further refined the test. It held that disputes involving statutory rights may be arbitrable if the statute does not expressly bar arbitration.

The Court distinguished between:

- **Mandatory statutory bars:** Where the statute explicitly prohibits arbitration (e.g., Consumer Protection Act).
- **Permissive statutory regimes:** Where the statute creates a forum but does not exclude arbitration (e.g., Companies Act, 2013).
- It concluded that unless a statute ousts the jurisdiction of civil courts, disputes arising under it may be arbitrable. This decision reinforced the pro-arbitration policy of the Act.

¹⁰ (2019) 15 SCC 611.

F. FRAUD AND ARBITRABILITY: N. RADHAKRISHNAN V. MAESTRO HOMES PVT. LTD. (2021)

One of the most contentious issues in Indian arbitration is whether disputes involving allegations of fraud are arbitrable. In *N. Radhakrishnan v. Maestro Homes Pvt. Ltd.*,¹¹ the Supreme Court held that serious allegations of fraud, especially those involving criminal proceedings, may render a dispute non-arbitrable.

However, in *Amit Gupta v. S.P. Gupta* (2022),¹² the Court clarified that only fraud that goes to the root of the arbitration agreement or involves civil fraud is arbitrable. If the fraud is merely a collateral issue in a commercial dispute, it does not bar arbitration.

This nuanced approach balances the need to prevent abuse of process with the principle of minimal judicial intervention.

IV. COMPARATIVE ANALYSIS: ARBITRABILITY ACROSS JURISDICTIONS

A. United States: A Pro-Arbitration Jurisprudence

The United States has one of the most pro-arbitration legal frameworks in the world, primarily governed by the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. Enacted in 1925, the FAA was designed to reverse the historical judicial hostility toward arbitration and to enforce valid arbitration agreements. Over time, the U.S. Supreme Court has consistently favored arbitration, establishing a strong presumption in favor of arbitrability.

1. Key Principles

- **Separability Doctrine:** The arbitration clause is treated as a separate agreement from the main contract. Even if the main contract is invalid, the arbitration clause may still be enforceable (*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 1967).¹³
- **Competence-Competence:** Arbitrators have the authority to rule on their own

¹¹ (2021) 15 SCC 701.

¹² Civil Appeal No. 4768 of 2022 (decided on 15 September 2022).

¹³ 388 U.S. 395 (1967).

jurisdiction (*First Options of Chicago, Inc. v. Kaplan*, 1995).¹⁴

- **Presumption of Arbitrability:** In cases of ambiguity, courts must resolve doubts in favor of arbitration (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 1985).¹⁵

2. Non-Arbitrable Disputes

Despite the strong pro-arbitration stance, certain disputes are considered non-arbitrable:

- **Criminal Offenses:** Criminal matters are exclusively within the jurisdiction of state and federal courts. Arbitrators lack the authority to impose penalties or conduct criminal trials.
- **Certain Civil Rights Claims:** While most employment disputes are arbitrable, claims under Title VII of the Civil Rights Act were initially considered non-arbitrable. However, in *Gilmer v. Interstate/Johnson Lane Corp.* (1991),¹⁶ the Supreme Court held that such claims could be arbitrated if the arbitration agreement was valid and the forum provided adequate procedural safeguards.
- **Securities Fraud:** Initially, claims under the Securities Act of 1933 were deemed non-arbitrable (*Wilko v. Swan*, 1953).¹⁷ This was overturned in *Rodriguez de Quijas v. Shearson/American Express Inc.* (1989),¹⁸ which held that such claims are arbitrable under the FAA.
- **Antitrust Claims:** Once considered too important for private arbitration, antitrust disputes are now arbitrable (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 1985).¹⁹
- **RICO Claims:** Claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) are arbitrable if the agreement clearly covers them (*Shearson/American*

¹⁴ 514 U.S. 938 (1995).

¹⁵ 473 U.S. 614 (1985).

¹⁶ 500 U.S. 226 (1991).

¹⁷ 346 U.S. 427 (1953).

¹⁸ 490 U.S. 477 (1989).

¹⁹ 473 U.S. 614

Express Inc. v. McMahon, 1987).²⁰

The U.S. approach is largely permissive, with courts deferring to party autonomy unless a statute explicitly prohibits arbitration. The emphasis is on freedom of contract and efficient dispute resolution.

3. Judicial Trends

Recent trends show a continued expansion of arbitrability, especially in consumer and employment contexts. However, there is growing criticism regarding the fairness of mandatory arbitration clauses in adhesion contracts, particularly in cases involving vulnerable parties. The MeToo movement and public backlash against forced arbitration in sexual harassment cases have led to legislative reforms, such as the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (2022), which invalidates pre-dispute arbitration agreements in such cases.²¹

B. United Kingdom: A Balanced Approach

The UK's arbitration regime is governed by the Arbitration Act 1996, which reflects a balanced approach between party autonomy and public interest. The Act is based on the UNCITRAL Model Law but includes additional provisions to ensure fairness and judicial oversight.

1. Key Principles

- Section 9: A party to an arbitration agreement may apply to the court for a stay of legal proceedings in favor of arbitration, unless the agreement is “null and void, inoperative or incapable of being performed.”²²
- Section 67: Allows a party to challenge the tribunal's substantive jurisdiction, including on grounds of non-arbitrability.
- Section 68: Provides for setting aside an award if there has been a “serious irregularity” affecting the tribunal, the proceedings, or the award.

²⁰ 482 U.S. 220 (1987)

²¹ Pub. L. 117-89, 136 Stat. 52 (2022).

²² Arbitration Act 1996 (UK), § 9.

2. Non-Arbitrable Disputes

The UK recognizes the following categories of non-arbitrable disputes:

- Criminal Matters: Arbitrators cannot adjudicate criminal liability.
- Family Law: Divorce, child custody, and adoption are non-arbitrable as they involve status and in rem rights.
- Insolvency: Winding-up petitions and bankruptcy matters are reserved for courts.
- Patents and IP Validity: The validity of intellectual property rights is determined by the Comptroller-General or the Intellectual Property Office.
- Competition Law: While infringement claims may be arbitrable, enforcement of competition laws by public authorities is not.
- Human Rights Claims: Claims under the European Convention on Human Rights (ECHR) are generally non-arbitrable due to their public law nature.

3. Landmark Case: Fiona Trust & Holding Corporation v. Privalov (2007)

In *Fiona Trust*,²³ the House of Lords held that arbitration clauses should be interpreted broadly. Lord Hoffmann stated that parties who agree to arbitrate their disputes “must have intended to refer to arbitration any dispute arising out of the relationship created by the contract.” This decision reinforced the pro-arbitration policy and encouraged a liberal interpretation of arbitration agreements.

The UK approach combines party autonomy with judicial oversight, ensuring that arbitration remains a fair and effective mechanism while protecting public interest.

C. France: A Liberal Civil Law Regime

France, a civil law jurisdiction, has a modern and liberal arbitration framework under Articles 1442–1527 of the French Code of Civil Procedure. The 2011 reform of the Code significantly

²³ [2007] UKHL 40.

expanded the scope of arbitrability, reflecting France's ambition to become a leading arbitration center.

1. Key Principles

- **Public Policy (Ordre Public):** Arbitrability is determined by whether the dispute affects public policy. Matters involving ordre public are non-arbitrable.
- **Broad Scope:** Commercial disputes, including corporate, financial, and contractual matters, are generally arbitrable.
- **State Consent:** The French state may consent to arbitration in certain administrative contracts.

2. Non-Arbitrable Disputes

- Criminal Offenses
- Personal Status: Marriage, divorce, filiation
- Bankruptcy and Insolvency
- Civil Service Disputes
- Intellectual Property Validity (though infringement may be arbitrable)
- Collective Labor Agreements

3. Judicial Trends

French courts have progressively expanded arbitrability. In *Société Gaz de France v. Société Allseas France S.A.* (2008),²⁴ the Cour de cassation held that disputes arising from public service contracts could be arbitrable if the parties agreed. Similarly, shareholder disputes and corporate governance issues are now generally considered arbitrable.

²⁴ Cass. 1ère civ., 18 June 2008, No. 07-10.718.

France's approach is characterized by flexibility, predictability, and international orientation, making Paris a preferred seat for international arbitrations.

D. Singapore: A Hybrid Model with Global Appeal

Singapore has emerged as a leading arbitration hub in Asia, with a modern legal framework under the Arbitration Act (Cap. 10) and the International Arbitration Act (Cap. 143A). The latter applies to international commercial arbitrations and is closely aligned with the UNCITRAL Model Law.

1. Key Principles

- Section 6(2) of the IAA: The subject matter must be “capable of settlement by arbitration under any law.”
- Minimal Judicial Intervention: Courts generally refrain from interfering in arbitral proceedings.
- Pro-Arbitration Judiciary: The Singapore courts have consistently upheld arbitration agreements.

2. Non-Arbitrable Disputes

- Matrimonial and Family Matters
- Insolvency and Winding Up
- Criminal Offenses
- Regulatory Enforcement (e.g., by MAS, IRAS)
- IP Validity (though infringement may be arbitrable)

3. Landmark Case: NV International v. Lucky Cement Ltd. (2013)

In NV International,²⁵ the Singapore Court of Appeal held that competition law disputes are

²⁵ [2013] SGCA 18.

arbitrable, even if they involve public interest, as long as the dispute is between private parties and the relief sought is private in nature. This decision reflects Singapore's pragmatic and pro-arbitration approach.

Singapore's success as an arbitration center is attributed to its efficient judiciary, neutral legal system, and strong enforcement mechanisms.

V. CATEGORIES OF NON-ARBITRABLE DISPUTES IN INDIAN LAW

Based on judicial precedents, the following categories of disputes are generally considered non-arbitrable in India:

1. Matrimonial Disputes

Matters such as divorce, maintenance, custody, and adoption are non-arbitrable because they involve status and in rem rights. In *Rajiv Kumar v. State of Haryana* (2019),²⁶ the Punjab and Haryana High Court held that custody disputes cannot be referred to arbitration.

Rationale: These issues affect the legal status of individuals and require state supervision.

2. Insolvency and Winding Up

Under the Insolvency and Bankruptcy Code, 2016 (IBC), the National Company Law Tribunal (NCLT) has exclusive jurisdiction over insolvency proceedings. In *Ssangyong Engineering & Construction Co. Ltd. v. NHAI* (2019),²⁷ the Supreme Court held that insolvency petitions cannot be stayed in favor of arbitration.

Rationale: Insolvency involves collective rights of creditors and public interest.

3. Criminal Offenses

Criminal matters are inherently non-arbitrable as they involve the state's prosecutorial power. Arbitrators lack the authority to impose penalties or conduct criminal trials.

²⁶ 2019 SCC OnLine P&H 10120.

²⁷ (2019) 15 SCC 131.

Exception: Civil claims arising from criminal acts (e.g., damages for assault) may be arbitrable.

4. Eviction and Tenancy Disputes

Rent control laws (e.g., Delhi Rent Control Act) create statutory tenancies that can only be adjudicated by designated rent controllers. In **Dhiman Chowdhury v. Bhadani Housing (2020)**,²⁸ the Calcutta High Court held that eviction disputes under rent acts are non-arbitrable.

Rationale: These laws are designed to protect tenants and regulate housing markets.

5. Consumer Protection Claims

Under the Consumer Protection Act, 2019, consumers have a statutory right to approach consumer forums. In **Emaar MGF Land Ltd. v. Aftab Singh (2018)**,²⁹ the Supreme Court held that consumer disputes are non-arbitrable as they involve public interest and unequal bargaining power.

Rationale: Consumer forums are specialized tribunals with remedial powers.

6. Intellectual Property Rights

While infringement disputes may be arbitrable, validity of IP rights (patents, trademarks) is non-arbitrable. In **M/s. Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd. (2016)**,³⁰ the Delhi High Court held that trademark validity must be decided by the Registrar or IPAB.

Rationale: IP rights are granted by the state and affect third parties.

7. Director Appointments and Corporate Governance

Disputes regarding the appointment, removal, or powers of directors under the Companies Act, 2013 are generally non-arbitrable. In **Nitin D. Ghotikar v. S.P. Gupta (2021)**,³¹ the NCLAT held that such matters fall within the jurisdiction of the NCLT.

²⁸ 2020 SCC OnLine Cal 2150.

²⁹ (2018) 17 SCC 558.

³⁰ 2016 SCC OnLine Del 4880.

³¹ Company Appeal (AT) (Insolvency) No. 851 of 2021.

Rationale: Corporate governance involves statutory compliance and shareholder rights.

8. Tax Disputes

Tax liabilities are determined by tax authorities and appellate tribunals. In *Union of India v. Azadi Bachao Andolan* (2003),³² the Supreme Court held that tax matters are not arbitrable.

Rationale: Taxation is a sovereign function.

VI. RATIONALE BEHIND NON-ARBITRABILITY

A. Public Policy and Ordre Public

Public policy is the primary justification for excluding disputes from arbitration. As observed in *Booz Allen*,³³ disputes that affect the public order or morality cannot be privatized.

B. Statutory Exclusivity

When a statute creates a special forum (e.g., consumer courts, NCLT), it implicitly or explicitly excludes arbitration. This is known as ouster of jurisdiction.

C. Sovereign Functions

Matters involving the exercise of state power—such as criminal prosecution, taxation, or land acquisition—cannot be delegated to private arbitrators.

D. Protection of Vulnerable Parties

In consumer, labor, or tenancy disputes, one party is often economically weaker. Public tribunals provide accessible and equitable remedies.

VII. CHALLENGES AND CRITICISMS

1. Judicial Overreach: Courts sometimes interfere excessively in determining arbitrability.

³² (2003) 6 SCC 101.

³³ (2011) 5 SCC 532.

2. Inconsistent Jurisprudence: Lower courts misapply Supreme Court precedents.
3. Over-Inclusion: Some disputes (e.g., IP infringement) may be arbitrable but are wrongly excluded.
4. Delay in Referral: Section 8 applications are often delayed, defeating the purpose of arbitration.

VIII. RECOMMENDATIONS FOR REFORM

1. Statutory Definition: The Act should define "arbitrability" and list non-arbitrable disputes.
2. Guidelines for Courts: Issue standardized guidelines for Section 8 referrals.
3. Expand Arbitrability: Allow arbitration of IP infringement, corporate governance (if parties agree).
4. Fast-Track Referral Mechanism: Mandate disposal of Section 8 applications within 60 days.
5. Harmonize with International Practice: Align with jurisdictions like Singapore and France.

IX. CONCLUSION

The doctrine of non-arbitrability in India reflects a careful balance between party autonomy and public interest. While the Supreme Court has progressively liberalized the scope of arbitration, certain disputes remain outside its purview due to their public law character. A comparative analysis reveals that India's approach is more restrictive than that of the U.S. or Singapore but similar to the UK and France.

Moving forward, India must modernize its framework to accommodate emerging disputes in technology, environment, and corporate law. By adopting a functional, rather than categorical, approach and clarifying statutory ambiguities, India can strengthen its position as a global arbitration hub while safeguarding public policy.