NON-ARBITRABILITY IN INTERNATIONAL COMMERCIAL ARBITRATION: FROM CATEGORIES TO ADJUDICATIVE NECESSITY

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ABSTRACT

Non-arbitrability marks the point at which party autonomy yields to public adjudication. Yet the doctrine remains unsettled. The New York Convention and the UNCITRAL Model Law harmonise the arbitral process while leaving its outer limit to national law, and national courts have historically defined that limit by reference to broad subject-matter categories such as fraud, insolvency, tenancy and competition. This essay argues that the categorical method is both over- and under-inclusive, and that the better question is one of adjudicative necessity: whether the relief claimed can only be granted by a public forum because it binds third parties, requires centralised or collective administration, involves a sovereign function, or has been reserved by a mandatory statute. Tracing Indian jurisprudence from Booz Allen to Vidya Drolia and the seven-judge decision in the stamping reference, the essay shows that Indian law has moved substantially in this direction but has not yet completed the shift. It proposes four refinements: a relief-centred inquiry in place of subject-matter labels; a narrower conception of arbitrability when enforcing foreign awards under section 48; principled severance of mixed disputes; and express legislative signals of exclusive jurisdiction. Together, these would enhance legal certainty and the enforceability of awards without diluting the public interests the doctrine exists to protect.

Keywords: Arbitrability, Non-Arbitrability, International Commercial Arbitration, New York Convention, UNCITRAL Model Law, Arbitration and Conciliation Act 1996, Public Policy, Party Autonomy.

I. INTRODUCTION

International commercial arbitration rests on consent. Parties choose their tribunal, their procedure and frequently the law that will govern their dispute, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention") allows the resulting award to circulate among more than 170 Contracting States.[1] Consent, however, operates within a legal order that reserves certain questions for courts, regulators and collective statutory processes. The doctrine of non-arbitrability names that reservation. It determines which disputes a legal system will allow private adjudicators to resolve and which it insists on keeping for itself.

The doctrine is easy to state and notoriously difficult to apply. No international instrument defines it, national laws rarely list the matters they exclude, and courts have traditionally answered the question by sorting disputes into categories: fraud, insolvency, tenancy, competition, family status and so on. The categorical method has the appeal of simplicity, but it has produced inconsistent outcomes within jurisdictions and divergent outcomes across them. Those inconsistencies matter more in international arbitration than anywhere else, because the same dispute may be tested for arbitrability by a referral court, the arbitral tribunal, the court of the seat and one or more enforcement courts, each potentially applying a different law.[2]

This essay does not offer another catalogue of non-arbitrable disputes. Its argument is that non-arbitrability is better understood as a question of *adjudicative necessity*: whether the relief a party seeks can only be granted by a public forum. Part II locates arbitrability among the related concepts with which it is often confused. Part III examines how the international framework harmonises arbitral procedure while deliberately leaving its outer limit to national law. Part IV traces the Indian trajectory from *Booz Allen* to *Vidya Drolia* and the recent referral jurisprudence, arguing that Indian law has moved most of the way from categories to function. Part V tests the recurring categories against that functional approach, and Part VI proposes four refinements.

II. ARBITRABILITY AS THE OUTER LIMIT OF CONSENT

Arbitrability asks whether a dispute is legally capable of settlement by arbitration. It is distinct

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].
[2] *See generally* NIGEL BLACKABY, CONSTANTINE PARTASIDES & ALAN REDFERN, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ch. 2 (7th ed. 2022).

from the existence, validity and scope of the arbitration agreement. A clause may be validly concluded and broad enough to cover a dispute, yet the law may still withhold that dispute from private adjudication.[3] Consent is therefore a necessary condition of arbitration but not a sufficient one. Conversely, a finding of non-arbitrability says nothing about the quality of the parties' consent; it is a statement about the limits of what consent can achieve.

Two further distinctions sharpen the inquiry. The first is between subject-matter arbitrability, which concerns the nature of the dispute, and subjective arbitrability, which concerns the capacity of a party, typically a State or public entity, to agree to arbitrate. International commercial practice is concerned mainly with the former, because it is subjectmatter restrictions that can defeat an otherwise valid agreement or award. The second distinction, central to Indian law, is between rights *in rem*, which avail against the world at large, and rights *in personam*, which bind particular parties.[4] An arbitral tribunal derives its authority from a contract and can bind only those who consented to it; it cannot, by its nature, determine rights against strangers to the agreement.

Non-arbitrability also overlaps with public policy, but the two are not identical. Nonarbitrability asks whether a subject matter may be entrusted to arbitration at all. Public policy asks whether a particular award, once made, offends the fundamental values of the forum in which it is challenged or enforced. A dispute may be perfectly arbitrable yet produce an award that cannot be enforced on public policy grounds; equally, a non-arbitrable dispute may be decided in a way that is substantively unobjectionable but still lacks legal effect. Collapsing the two concepts, as courts sometimes do, tends to expand both.

III. THE INTERNATIONAL FRAMEWORK: HARMONISED PROCESS, NATIONAL LIMITS

The New York Convention addresses arbitrability at both ends of the arbitral process. Article II(1) obliges Contracting States to recognise written agreements concerning "a subject matter capable of settlement by arbitration", and Article V(2)(a) permits refusal of recognition or enforcement where the subject matter is not capable of settlement by arbitration "under the law of that country". Article V(2)(b) separately preserves the public policy defence.[5] The

[3] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION ch. 6 (3d ed. 2021).
[4] *See* Booz Allen & Hamilton Inc. v. SBI Home Fin. Ltd., (2011) 5 SCC 532 (India).
[5] New York Convention, *supra* note 1, arts. II(1), V(2)(a)–(b).

UNCITRAL Model Law mirrors this structure. Article 1(5) preserves other laws under which certain disputes may not be submitted to arbitration, while Articles 34(2)(b)(i) and 36(1)(b)(i) make non-arbitrability a ground for setting aside and for refusing recognition respectively.[6]

The design is deliberate. The drafters of the Model Law did not attempt a uniform list of non-arbitrable matters, leaving that choice to each enacting State because it is closely tied to national regulatory priorities.[7] The result is an international system that harmonises how arbitration is conducted but leaves its outer boundary national. Enforcement courts have rarely refused awards on this ground in practice,[8] but Article V(2)(a) ensures that every enforcement State retains a veto over subject matter it considers its own.

Two consequences follow. The first is a choice-of-law problem. Article V(2)(a) points to the law of the enforcing State, but the Convention says nothing about which law governs arbitrability at the referral stage, and seat courts naturally apply their own. A dispute may therefore be arbitrable at the seat yet non-arbitrable where the losing party's assets are located. The second is a problem of standard. Because each State defines its own limits, the same subject may be treated restrictively in one jurisdiction and liberally in another.

Leading foreign courts have responded by treating arbitrability functionally rather than categorically. In *Mitsubishi*, the United States Supreme Court held that antitrust claims arising from an international transaction were arbitrable, reasoning that comity and the need of international commerce for predictability required it to honour the parties' agreement even where a purely domestic dispute might have been treated differently.[9] In *Eco Swiss*, the European Court of Justice accepted that tribunals may apply competition law, while treating that law as part of the public policy a reviewing court must be able to enforce at the annulment stage.[10] The English Court of Appeal in *Fulham Football Club* held that a shareholder's unfair prejudice claim was arbitrable because the relief sought affected only the parties, distinguishing a winding-up order that would affect creditors and the public.[11] Common to all three is a shift

[6] UNCITRAL Model Law on International Commercial Arbitration arts. 1(5), 34(2)(b)(i), 36(1)(b)(i), U.N. Doc. A/40/17, annex I (1985), *as amended*, U.N. Doc. A/61/17, annex I (2006).
[7] *See* HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY (1989).
[8] ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981).
[9] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985).
[10] Case C-126/97, Eco Swiss China Time Ltd. v. Benetton Int'l NV, 1999 E.C.R. I-3055.
[11] Fulham Football Club (1987) Ltd. v. Richards [2011] EWCA (Civ) 855, [2012] Ch. 333 (Eng.).

from asking what a dispute is about to asking what an award would do, and to whom.

IV. THE INDIAN TRAJECTORY: FROM CATEGORIES TO FUNCTION

A. The Statutory Framework

The Arbitration and Conciliation Act, 1996 is modelled on the UNCITRAL Model Law and reproduces its approach. Section 2(3) preserves any other law by virtue of which certain disputes may not be submitted to arbitration; section 34(2)(b)(i) permits an award to be set aside where the subject matter is not capable of settlement by arbitration under Indian law; and section 48(2)(a) makes the same ground available against foreign awards.[12] The Act does not itself identify a single non-arbitrable category. That task has fallen to the courts.

B. Booz Allen and the In Rem Distinction

In *Booz Allen*, the Supreme Court held that a suit to enforce a mortgage by sale was not arbitrable because it involved rights *in rem*, and it identified illustrative categories ordinarily unsuitable for arbitration: criminal offences, matrimonial disputes, guardianship, insolvency and winding up, testamentary matters, and eviction or tenancy matters governed by special statutes.[13] The decision gave the doctrine a principled basis. It also recognised that subordinate rights *in personam* arising from rights *in rem* may be arbitrable, consistently with earlier authority treating a claim for specific performance as an *inter partes* matter within a tribunal's competence.[14]

The difficulty lay in how *Booz Allen*'s illustrations were later used. The list was offered as examples of a principle, but it was frequently applied as a closed catalogue, and labels began to substitute for analysis.

C. Fraud and Tenancy: Dismantling Categories

Fraud is the clearest example. In *N. Radhakrishnan*, the Supreme Court declined to refer a dispute involving serious allegations of fraud and malpractice, reasoning that such matters

[12] Arbitration and Conciliation Act, 1996, §§ 2(3), 34(2)(b)(i), 48(2)(a), No. 26, Acts of Parliament, 1996 (India).
[13] *Booz Allen*, (2011) 5 SCC 532, ¶¶ 35–36.
[14] *See* Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan, (1999) 5 SCC 651 (India).

required the procedures of a civil court.[15] In *A. Ayyasamy*, the Court confined that reasoning to serious and complex allegations, holding that mere allegations of fraud do not oust arbitration.[16] *Rashid Raza* reframed the inquiry around whether the allegation permeates the entire contract, including the arbitration agreement, and whether it concerns only the internal affairs of the parties without public implications.[17] *Avitel* then held that fraud renders a dispute non-arbitrable only where the arbitration agreement itself is vitiated, or where allegations against the State or its instrumentalities raise questions of public law.[18] Within a decade, fraud had moved from a near-automatic bar to a narrowly defined exception.

Tenancy followed a similar path. *Himangni Enterprises* held that tenancy disputes under the Transfer of Property Act, 1882 were non-arbitrable.[19] *Vidya Drolia* overruled that decision, holding that such disputes are arbitrable because they concern rights *in personam* between landlord and tenant, while disputes governed by rent control legislation remain nonarbitrable because that legislation confers special protection and exclusive jurisdiction on statutory forums.[20] The line is drawn not by the word "tenancy" but by the legal consequence of the adjudication.

D. Vidya Drolia's Fourfold Test

Vidya Drolia is now the leading Indian authority. The Court held that a dispute is nonarbitrable when (i) its cause of action and subject matter relate to actions *in rem* that do not pertain to subordinate rights *in personam*; (ii) it affects third-party rights, has *erga omnes* effect, or requires centralised adjudication; (iii) it relates to inalienable sovereign and public interest functions of the State; or (iv) it is expressly or by necessary implication made nonarbitrable by mandatory statute.[20] The Court added that the tests are not watertight compartments and must be applied holistically. Applying the fourth limb, it held that claims within the jurisdiction of the Debts Recovery Tribunals under the Recovery of Debts and Bankruptcy Act, 1993 are non-arbitrable.

The test is a significant advance because three of its four limbs are functional. They ask whether

[15] N. Radhakrishnan v. Maestro Eng'rs, (2010) 1 SCC 72 (India).
[16] A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386 (India).
[17] Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710 (India).
[18] Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713 (India).
[19] Himangni Enters. v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706 (India).
[20]Vidya Drolia v. Durga Trading Corp., (2021) 2 SCC 1 (India).
[20] *Id.* ¶ 76.

the adjudication would bind non-parties, whether it requires the coordinated administration that only a public forum can supply, and whether it involves a power the State cannot delegate. Only the first limb retains the vocabulary of rights *in rem*, and even that limb is qualified by the subordinate-rights exception. *Vidya Drolia* thus moved Indian law most of the way from categories to function.

E. The "Who Decides" Question

Vidya Drolia also addressed the allocation of authority between courts and tribunals. Building on section 11(6A), introduced by the 2015 amendments,[21] it held that the tribunal is the preferred first authority to decide non-arbitrability, with the referral court confined to a prima facie review designed to weed out manifestly non-arbitrable disputes. Its guiding maxim was that, when in doubt, the court should refer.[22]

Later decisions have narrowed referral review further. A five-judge bench in *N.N. Global* held in 2023 that an unstamped instrument containing an arbitration agreement could not be acted upon at the referral stage.[23] Within months, a seven-judge bench overruled that view, holding that the referral court's inquiry under section 11(6A) is confined to the existence of an arbitration agreement, with stamping objections left to the tribunal.[24] In *Krish Spinning*, the Court extended this reasoning to hold that even a plea of accord and satisfaction should ordinarily be decided by the tribunal.[25]

These decisions do not address non-arbitrability directly, and how far *Vidya Drolia*'s prima facie screen survives the seven-judge bench's emphasis on existence alone remains to be settled. Their practical effect, however, is clear: arbitrability questions are increasingly decided first by tribunals and only later by courts at the setting-aside or enforcement stage. That shift raises the stakes of the post-award standard, to which Part VI returns.

V. THE RECURRING CATEGORIES RECONSIDERED

Tested against the functional approach, the familiar categories turn out to be less categories

[21] Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of Parliament, 2016 (India).
[22] *Vidya Drolia*, (2021) 2 SCC 1.
[23] N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd., (2023) 7 SCC 1 (India).
[24] *In re* Interplay Between Arbitration Agreements Under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, (2024) 6 SCC 1 (India).
[25] SBI Gen. Ins. Co. v. Krish Spinning, 2024 INSC 532 (India).

than clusters of different reliefs. Criminal liability is non-arbitrable because punishment is a sovereign function; no agreement can confer penal jurisdiction on a private tribunal. Yet a commercial dispute whose facts might also constitute an offence can still be arbitrated so far as the tribunal determines only civil rights between the parties. Matrimonial and guardianship matters are excluded because declarations of status operate against the world and engage the State's protective jurisdiction, while purely financial arrangements between the parties may call for separate analysis.

Insolvency is non-arbitrable because it is collective: it requires the centralised administration of an estate for the benefit of all creditors. In *Indus Biotech*, the Supreme Court held that where an application under section 7 of the Insolvency and Bankruptcy Code, 2016 is pending, the adjudicating authority must first determine whether a default has occurred; if the application is admitted, the proceedings acquire an *in rem* character that displaces arbitration, but if it is not, the parties' contractual dispute may proceed to arbitration.[26] The exclusion attaches to the collective relief, not to every dispute involving a financially distressed party.

Competition law illustrates the same point. The Competition Commission of India exercises statutory powers to investigate and penalise anti-competitive conduct, and section 61 of the Competition Act, 2002 bars civil courts from entertaining matters within the Commission's domain.[27] A tribunal cannot impose penalties or issue market-wide directions. Whether it may decide a contractual claim that turns incidentally on competition law is less settled in India than in jurisdictions following *Mitsubishi* and *Eco Swiss*, and the answer should depend on whether the relief claimed is confined to the parties.

Consumer disputes show the fourth limb at work. In *Emaar MGF*, the Supreme Court held that a consumer may pursue statutory remedies before consumer fora notwithstanding an arbitration clause, because consumer protection legislation creates special remedies for a protected class.[29] The exclusion does not turn on the subject matter, since the sale of an apartment is an ordinary commercial transaction, but on a legislative choice to guarantee access to a public forum.

[26] Indus Biotech Pvt. Ltd. v. Kotak India Venture (Offshore) Fund, (2021) 6 SCC 436 (India); *see also* Insolvency and Bankruptcy Code, 2016, § 7, No. 31, Acts of Parliament, 2016 (India).
[27] Competition Act, 2002, § 61, No. 12, Acts of Parliament, 2003 (India).
[29]Emaar MGF Land Ltd. v. Aftab Singh, (2019) 12 SCC 751 (India).

VI. RETHINKING NON-ARBITRABILITY

A. A Relief-Centred Inquiry

The analysis above suggests that the decisive question is not what a dispute is about but what the award would need to do. A tribunal can award damages between the parties to a mortgage, but it cannot order a sale binding on subsequent encumbrancers. It can decide whether a shareholder was unfairly treated, but it cannot wind up the company. It can determine whether an agreement was induced by fraud, but it cannot convict anyone of cheating. In each pair the subject matter is the same; what differs is the relief and the persons it would bind.

Vidya Drolia's limbs already supply the criteria. The proposal is that courts and tribunals apply them to each head of relief rather than to the dispute as a whole, asking whether the relief would bind persons who are not parties to the arbitration agreement; whether it requires collective or centralised administration; whether it involves a sovereign power the State cannot delegate; and whether a statute has reserved that relief, expressly or by clear implication, to a public forum. If none of these applies, the relief is arbitrable whatever label the dispute bears. This approach preserves every interest the doctrine protects while removing the incentive to plead a dispute into a disfavoured category.

B. Two Arbitrabilities at the Enforcement Stage

The second refinement concerns foreign awards. Section 48(2)(a), like Article V(2)(a), asks whether the subject matter is arbitrable "under the law of India". Read literally, this imports the full range of domestic exclusions into the enforcement of foreign awards. Indian law has already rejected a literal approach to the neighbouring public policy defence. In *Renusagar*, the Supreme Court held that public policy should be construed more narrowly when enforcing foreign awards, confining it to the fundamental policy of Indian law, the interests of India, and justice or morality.[28] The 2015 amendments codified a narrow conception of public policy for section 48, and in *Vijay Karia* the Court stressed that enforcement of foreign awards should be refused only in exceptional cases.[29]

There is no principled reason why arbitrability under section 48(2)(a) should be read more

[28] Renusagar Power Co. v. Gen. Elec. Co., 1994 Supp (1) SCC 644 (India).
[29] Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1 (India); *see also* Arbitration and Conciliation Act, 1996, § 48(2) expl. 1 (as inserted by the Arbitration and Conciliation (Amendment) Act, 2015).

expansively than public policy under section 48(2)(b). A domestic rule that channels certain claims to a specialist Indian forum, such as a Debts Recovery Tribunal or a consumer commission, protects Indian procedural arrangements; it does not necessarily express a fundamental objection to the same claim having been resolved by a foreign-seated tribunal. Following the logic of *Renusagar* and *Mitsubishi*, Indian courts should distinguish between domestic arbitrability, which governs India-seated proceedings, and international arbitrability, which should exclude only matters whose resolution by a foreign award would offend a fundamental Indian interest, such as personal status, criminal liability or the collective administration of an Indian insolvency. This would align the two limbs of section 48(2), prevent assets in India from becoming a refuge from valid foreign awards, and strengthen India's credibility as an enforcement jurisdiction.

C. Principled Severance of Mixed Disputes

Commercial disputes frequently combine arbitrable and non-arbitrable elements. Treating the whole dispute as non-arbitrable because one element is reserved defeats the parties' agreement on everything else, while splitting every dispute mechanically risks parallel proceedings and inconsistent findings. The relief-centred approach offers a middle course. Where the reserved relief can be separated, the tribunal should decide the remainder. Where it is so intertwined with the rest that separation would be artificial, the dispute should go to the public forum as a whole. Both outcomes are principled; what is not principled is allowing a single reserved claim to be used tactically to derail an entire arbitration.

D. Clearer Legislative Signals

Finally, much uncertainty stems from statutes that create specialist forums without saying whether their jurisdiction excludes arbitration. Section 2(3) of the 1996 Act defers to such laws but cannot say which they are, so courts are left to infer exclusion by "necessary implication", the least predictable limb of the *Vidya Drolia* test. Where Parliament intends a forum's jurisdiction to be exclusive of arbitration, it should say so expressly. Express drafting would convert the most contested limb of the test into the most certain.

VII. CONCLUSION

Non-arbitrability defines the boundary of party autonomy in international commercial

arbitration, and its legitimacy depends on that boundary being clear and narrowly drawn. The New York Convention and the UNCITRAL Model Law deliberately leave the boundary to national law. The task for national systems is therefore not to eliminate diversity but to ensure that their own exclusions are principled and foreseeable.

Indian law has made substantial progress. *Booz Allen* grounded the doctrine in the distinction between rights *in rem* and *in personam*; the fraud and tenancy decisions dismantled categories that had hardened into automatic bars; and *Vidya Drolia* supplied a largely functional test while allocating first-instance authority to tribunals. The remaining step is to complete the shift from categories to function: by asking, of each head of relief, whether only a public forum could grant it; by recognising a narrower international arbitrability at the enforcement stage; by severing mixed disputes on principle rather than by tactics; and by legislating exclusivity expressly. These refinements would strengthen legal certainty and the enforceability of awards without surrendering any public interest the doctrine exists to protect.