

THE ARBITRABILITY OF THE SUBJECT MATTER OF DISPUTES IN ARBITRATION

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ABSTRACT

In both domestic and international arbitration, the arbitrability of the subject matter is a primary consideration before the courts and arbitral tribunals. When a party submits a dispute for arbitration, their opponent may resist the arbitration proceedings on the grounds that the dispute is non-arbitrable according to the law of the State and should only be decided by the competent court. In such situations, the arbitrator or court must decide whether a particular claim or dispute is capable of settlement by arbitration under the applicable law. The issue of arbitrability differs between countries and may also change over time. In most countries, disputes or claims relating to commercial or contractual matters are arbitrable, whereas criminal, family, bankruptcy, and insolvency matters are not. In many countries, legislation and judicial decisions have narrowed the scope of non-arbitrability in order to encourage arbitration between parties

Keywords: Arbitral Tribunal, Arbitrability, Public Policy, UNCITRAL Model Law, New York Convention.

INTRODUCTION

Arbitration is a private dispute settlement process that allows the parties a large degree of autonomy and parties may submit any arbitrable dispute to arbitration (Lew et al., 2003). By agreeing to arbitrate, private parties waive their right to approach national courts in order to avail the benefits of a flexible, neutral, and impartial forum of adjudication (Choudhary, 2015). Where an agreement contains an arbitration clause, the court is obliged to refer the parties to arbitration in accordance with its terms. However, in some cases, an otherwise valid arbitration agreement is unenforceable because the dispute's subject matter is not arbitrable.

To enforce an arbitration agreement, the dispute's subject matter must be considered appropriate for arbitration (Moses, 2017). In order to examine the arbitrability of dispute issues, the paper examines the meaning of arbitrability, who decides what is arbitrable, and under which law arbitrability is determined. The paper also discusses how different jurisdictions have addressed the non-arbitrability of the subject matter of disputes.

Arbitrability involves determining which types of dispute may be resolved by arbitration and which should be exclusively reserved for the courts (Blackaby et al., 2015). Arbitration legislation and judicial decisions in many States provide that particular categories of disputes cannot be settled by arbitration (Born, 2009). If the issue of arbitrability arises, the relevant laws of the different States that are or may be concerned must be considered. These are likely to include the law governing the party involved, the law governing the arbitration agreement, the law of the seat of arbitration, and the law of the place of award enforcement (Redfern & Hunter,

2004). Under international conventions, the national courts are obliged to enforce arbitration agreements and awards only where the dispute is arbitrable (Lew et al., 2003).

Non-Arbitrability Exceptions under International Conventions

Under the UNCITRAL Model Law on International Commercial Arbitration, an arbitral award may be set aside by the court if it finds that the dispute's subject matter cannot be settled by arbitration under the law of the State (Article 34(2) (b) (i)). For foreign awards, the court may also refuse to recognize and enforce the award if it finds that arbitration of the dispute's subject matter is unlawful in the enforcing State (Article 36(1) (b) (i)).

The non-arbitrability doctrine is also relevant at the stage of enforcing arbitral awards (Born, 2016). The enforceability of foreign arbitral awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("*New York Convention*"). It provides that the recognition and enforcement of an arbitral award may be refused if the competent authority in the country where these are sought finds that the dispute's subject matter cannot be settled by arbitration under the law of that country (Article V(2)(a)). An arbitral award is valid and enforceable only if the dispute's subject matter is arbitrable according to the law of the State, where the dispute is arbitrated and where the recognition and enforcement is sought.

The Non-Arbitrability Doctrine in Arbitration

The non-arbitrability doctrine rests on the notion that some matters so pervasively involve public rights or the interests of third parties, which are subject of uniquely governmental authority, that agreements to resolve such disputes by "*private*" arbitration should not be effective (Born, 2009). In most jurisdictions, issues such as a criminal, child custody, family, and bankruptcy matters are non-arbitrable (Moses, 2017). Each state decides which matters may or may not be resolved by arbitration in accordance with its own political, social, and economic policies (Redfern & Hunter, 2004).

In *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited* (Cases, 2011), the Indian Supreme Court identified three facets of arbitrability:

1. Whether, by nature, the dispute could be resolved by a private forum chosen by the parties (arbitral tribunal) or falls within the exclusive domain of public fora (courts);
2. Whether the dispute is covered by the arbitration agreement;
3. Whether the parties have referred the dispute to arbitration.

In both civil and common law courts, disputes in the following areas have sometimes been found non-arbitrable: antitrust, securities law, intellectual property, damage from unilateral termination of exclusive distributorship agreements, political embargoes, damage to cargo carried under a bill of lading (the Carriage of Goods by Sea Act claims), bankruptcy, and administrative contracts (Vardy et al., 2003).

In international arbitration, arbitrability issue might be interpreted liberally in favour of arbitrability. The fact that a particular matter is non-arbitrable in a domestic setting under a particular national law does not necessarily mean that it is non-arbitrable in an international setting: rather, local non-arbitrability rules are often interpreted as applicable only in domestic matters (Born, 2009). For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,

(Cases, 1985) the U.S. Supreme Court held that the ambit of arbitration may be wider in an international context than in a national context; hence, the court declared antitrust disputes to be arbitrable, contrary to the ruling in *American Safety Equipment Corp v. J P Maguire & Co.*, (Cases, 1968) that they were non-arbitrable in a domestic context (Lew et al., 2003).

Who Decides the Question of Arbitrability?

The arbitrability issue can arise at four points in an arbitrated dispute:

1. Where a national court deliberates whether to enforce an arbitration agreement;
2. Where the arbitrators decide the scope of their competence;
3. Where a court, generally in the country where the arbitration was conducted, hears an action to set aside the award; and finally,
4. Before a court asked to recognize and enforce the award (Vardy et al., 2003).

Most arbitration rules give arbitrators the discretion to determine their own jurisdiction (UNCITRAL, 2012). The *Kompetenz-Kompetenz* doctrine (which allows the tribunal to decide a dispute regarding its own jurisdiction) provides that the arbitral tribunal has the power to decide its own jurisdiction, premised on the autonomy of the arbitration clause (Jalili, 1996).

In *First Options of Chicago, Inc., v. Kaplan* (Cases, 1995), a U.S. court held that the parties' agreement determines who has primary power to decide issue of arbitrability. In *AT&T Technologies, Inc. v. Communications Workers* (Cases, 1986), the U.S. Supreme Court held that the question of arbitrability is undeniably for judicial determination unless the parties clearly and unmistakably provide otherwise. In *Paine Webber, Inc. v. Elahi*, (Cases, 1996) a U.S. court ruled that a valid agreement to arbitrate the merits of the subject matter in dispute creates a presumption of arbitrability; other issues relating to the substance of the dispute or the arbitration procedures then become matters for the arbitrator (Newman & Davidson, 1997). In *Howsam v. Dean Witter Reynolds, Inc.*, (Cases, 2002) the U.S. Supreme Court concluded that questions of substantive arbitrability are for courts to decide, whereas questions of procedural arbitrability are for arbitrators to decide (Mason, 2013).

Which Law should be applied?

The non-arbitrability doctrine raises potentially complex choice-of-law questions in determining what law(s) apply to determine whether a claim or dispute is arbitrable. There is little agreement among national courts and commentators on this issue (Born, 2014). Most arbitration agreements contain no express provisions on arbitrability (Newman & Davidson, 1997). When a court is deciding whether the dispute is arbitrable, the dominant solution is to apply the law of the forum (Barausova, 2017). Under Article V(2)(a) of the New York Convention, the enforcing country should apply its own laws to determine whether the dispute is arbitrable (Lew et al., 2003). Articles 34(2)(b)(i) and 36(1)(b)(i) of the Model Law also support this view, and several court decisions have applied the law of the seat of arbitration to determine arbitrability.

Law of the Seat of Arbitration

In *Consultant v. Egyptian Local Authority* (Cases, 1990), the contract provided that arbitration be held in Geneva under the ICC Rules and applying Egyptian laws. The defendant contested the tribunal's jurisdiction on the ground that the arbitration clause was null and void since, under Egyptian law, parties may submit a dispute to arbitration only if expressly permitted by a legal provision. The tribunal applied the law of the seat of arbitration i.e. Switzerland, and found that the dispute was arbitrable under Swiss law.

In *Fincantieri-Cantieri Navali Italiani SpA v. Ministry of Defence, Armament and Supply Directorate of Iraq, Republic of Iraq* (Cases, 1996), the Italian parties commenced proceedings against Iraq in the Court of First Instance of Genoa (Italy), alleging frustration of the contract and seeking termination and damages. The respondent objected to the court's jurisdiction, contending that the dispute should be referred to arbitration as provided for in the contracts. The court applied Italian law (law of the seat) and held that the dispute was non-arbitrable due to Italian embargo legislation. A similar dispute was held to be arbitrable according to the law of the seat of arbitration: in *Fincantieri-Cantieri Navali Italiani SpA ET OTO Melara Spa v. ATF* (Cases, 1992), two Italian companies argued that, under a public policy exception, the dispute was non-arbitrable due to a trade embargo against Iraq. The tribunal applied the domestic rules (law of the seat) and held that the dispute could be settled under Swiss law.

Tribunals and courts applying the law of the seat do not consider foreign law in determining arbitrability. The Swiss Federal Supreme Court held in the *Serbian Case* (Cases, 2012) and *Bulgarian case* (Cases, 2013) that considering foreign mandatory laws was beyond the arbitral tribunal's remit, and that arbitral tribunals seated in Switzerland are not obliged to render an award that is enforceable in all circumstances (Boog & Moss, 2013). That an award rendered in Switzerland might be unenforceable in other countries under Article V(2) of the New York Convention was not a valid reason to set it aside (Cases, 1992). This means that the duty to render an enforceable award does not oblige the tribunal to ensure the enforceability of its award in every potential jurisdiction where enforcement may be attempted (Bansal, 2018).

Foreign non-arbitrability rules are only relevant when they stipulate that it is mandatory for the disputed claim to be heard by a domestic court (Cases, 1992). Hence to determine the arbitrability of the dispute's subject matter, the law of the seat of arbitration is a primary consideration. However, if the arbitration agreement nominates the law to govern the arbitrability of disputes, then the parties' choice would be honored (Cases, 2004). For instance in *M.S.A. v. Company M* (Cases, 1989), the court in Brussels (Belgium) applied the parties' choice of law (Swiss law), rather than the law of the seat (Belgium).

Non-Arbitrability Issue in Different Jurisdictions

The arbitrability of various matters may vary widely between jurisdictions (Moses, 2017). To determine whether a claim or dispute is arbitrable, one must refer to statutes and judicial interpretations of their provisions. In virtually all States, legislation and judicial decisions rule certain categories of disputes to be non-arbitrable as a matter of public policy, even if the parties have concluded a valid arbitration agreement (Born, 2016). This section explores approaches of the legislatures and courts in India, the United States, and other countries to determine which subject matters are arbitrable.

India

Under the Indian Arbitration and Conciliation Act, 1996, all disputes arising out of a legal relationship, whether contractual or not, to be submitted to arbitration (Section 7). As such, there is no direct provision defining categories of disputes that are non-arbitrable. However, inferences can be drawn from the Act's provisions that certain disputes may not be submitted to arbitration. First, the Act does not affect any law prohibiting the submission of certain disputes to arbitration (Section 2 (3)). Second, an arbitral award may be set aside by the court if it finds that the dispute's subject matter cannot be settled by arbitration under the law then in force (Section 34 (2)(b)(i)). Third, the enforcement of a foreign award may be refused if the court finds that the dispute's subject matter cannot be settled by arbitration under Indian law (Section 48(2)).

In *Shri Vimal Kishor Shah and Ors. v. Mr. Jayesh Dinesh Shah and Ors.*, (Cases, 2016) the Indian Supreme Court identified the following examples of non-arbitrable disputes in India:

1. Disputes relating to criminal offences;
2. Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, or child custody;
3. Guardianship matters;
4. Insolvency and winding-up matters;
5. Testamentary matters (grant of probate, letters of administration, and succession certificate);
6. Eviction or tenancy matters governed by special statutes. In this case, the court held that disputes under the Trust Deed and the Trust Act cannot be arbitrated, despite the existence of an arbitration agreement between the parties.

In *Kingfisher Airlines Limited v. Prithvi Malhotra Instructor* (Cases, 2013), the Indian Supreme Court held that labour disputes are not arbitrable as a matter of public policy. In *Natraj Studios Pvt. Ltd. v. Navrang Studios* (Cases, 1981), the Supreme Court of India held that disputes under the Rent Control Act, 1947 are adjudicated by specialized tribunals. In *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited* (Cases, 2011), the Indian Supreme Court held that a suit to enforce the sale of a mortgaged property should, for public policy reasons, be tried by the courts, and not an arbitral tribunal. In *Chiranjilal Shrilal Goenka v. Jasjit Singh and Ors.*, (Cases, 1993) the Indian Supreme Court ruled that the courts have exclusive jurisdiction to grant probate, which overrides any agreement to submit such a dispute to arbitration.

In *Fair Air Engineers (P) Ltd. v. N.K. Modi* (Cases, 1996), the court interpreted Section 3 of the Indian Consumer Protection Act, 1986 and held that consumer disputes are not arbitrable. In *Haryana Telecom Ltd. v. Sterlite Industries India Ltd.*, (Cases, 1999) the Supreme Court of India held that arbitrator has no jurisdiction to order winding up of a company. Regarding Competition law suits, the High Court of Delhi in *Union of India v. Competition Commission of India* (Cases, 2012) observed that the arbitral tribunal would neither have the mandate, nor the expertise, nor the wherewithal to prepare the investigation report necessary to decide the dispute in question.

United States

Securities and antitrust claims

Courts at all levels in the United States have, at various points in time, considered the issue of arbitrability. In *Wilko v. Swan* (Cases, 1953), a customer sued a securities brokerage

firm to recover damages under the civil liabilities provisions of Section 12(2) of the Securities Act of 1933, alleging misrepresentation in the sale of securities. The court held that an agreement for arbitration of any future controversy arising between the parties was void under Section 14, which could not be waived, notwithstanding the provisions of the United States Federal Arbitration Act. Similarly, in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, (Cases, 1968) the court concluded that the antitrust claims raised is inappropriate for arbitration.

In *Scherk v. Alberto-Culver Co.*, (Cases, 1974) the U.S. Supreme Court held that a statutory federal securities law claim was arbitrable, and so the arbitration clause must be respected and enforced by federal courts. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, (Cases, 1985) the District Court relied on *Scherk* (Cases, 1974) in ordering that most of the issues in dispute be arbitrated, including federal antitrust issues.

In *Shearson v. McMahon* (Cases, 1987), the U.S. Supreme Court overruled *Wilko v. Swan* (Cases, 1953) and held that claims under the Securities Exchange Act are arbitrable. The court noted that, as observed in *Mitsubishi Motors Corp.*, (Cases, 1985) "*we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals*" should inhibit enforcement of the Act in controversies based on statutes (Cases, 1987). The U.S. Supreme Court held in *Compu Credit v. Greenwood* (Cases, 2012) that claims arising under federal statutes are arbitrable as a matter of public policy absent a "*contrary congressional command*."

Consumer Disputes, Labour and Employment Disputes

In *Discover Bank v. Superior Court* (Cases, 2005), the California Supreme Court held that class waivers in consumer arbitration agreements are unconscionable. However, in *AT&T Mobility LLC v. Concepcion* (Cases, 2011), US Supreme Court held that individual arbitration claims to be arbitrable. In *Circuit City Stores, Inc. v. Adams* (Cases, 2001), the U.S. Supreme Court held that the arbitration exclusion contained in Section 1 of the Federal Arbitration Act, 1925 is confined to transportation workers; consequently, general employment contracts are arbitrable.

Other Jurisdictions

Whether a particular type of dispute is arbitrable under a given law is essentially a matter of public policy for each State to determine. Public policy varies between countries, and also changes over time (Redfern & Hunter, 2004). For instance, disputes involving antitrust laws, which were formerly considered inappropriate for arbitration, are now considered arbitrable in the United States (Moses, 2017).

In *Eco Swiss China Time Ltd., v. Benetton International NV* (Cases, 1999), the European Court of Justice ruled that an arbitration agreement could be valid with respect to EU competition claims provided any resulting award is subject to judicial review. In *Desputeaux v. Éditions Chouette Inc.*,(Cases, 1987) the Supreme Court of Canada considered jurisdiction over disputes concerning the Canadian Copyright Act, and it held that the mere fact an arbitral tribunal had to apply public order rules did not make the dispute non-arbitrable (UNCITRAL, 2012). In *AED Oil Limited v. Puffin FPSO Limited* (no. 2) (Judd, 2009), an Australian court held that a taxation dispute could be settled by arbitration, however, pure tax disputes should not

be arbitrable (Brazier, 2015).

CONCLUSION

The study concludes that the purpose of arbitrability is to ensure that certain matters are decided within the public fora of national courts as a matter of public policy. Accordingly, certain subject matters cannot be settled by the private fora of arbitral tribunals, even where a valid arbitration agreement exists between the parties. Articles 34(2)(b)(i) and 36(1)(b)(i) of the Model Law and Article V(2)(a) of the New York Convention supports the concept of non-arbitrability for certain disputes. In determining the arbitrability of a dispute's subject matter, the courts and tribunals have applied the law of the seat of arbitration. Recent years have seen a shift in judicial decisions to narrow the scope of non-arbitrability, especially in the sphere of international arbitration. For the purpose of determining the issue of arbitrability of the subject matter, the parties to the arbitration can include provisions in their arbitration agreement concerning the governing law, the law of the seat of arbitration, and the law of the place where the award is likely to be enforced. The parties' arbitration agreement may also include the express choice for the arbitrator/s to resolve the issue of arbitrability.

REFERENCES

- Bansal, S. (2018). The dampening effect of foreign mandatory laws. *Asian International Arbitration Journal*, 14(2), 165-179.
- Barausova, V. (2017). The law governing arbitrability: Problems and proposals. *International Commercial Arbitration Review*, 12(4), 136-139.
- Blackaby, N., Partasides, C., Redfern, A., & Hunter, M. (2015). *Redfern & Hunter on international arbitration*. Kluwer Law International, Oxford University Press.
- Boog, C., & Moss, B. (2013). Arbitrability foreign mandatory law and the lazy myth of the arbitral tribunal's obligation to render an enforceable award. *ASA Bulletin*, 31(3), 649-658.
- Born, G.B. (2009). *International commercial arbitration (First Edition)*. Kluwer Law International.
- Born, G.B. (2014). *International commercial arbitration (Second Edition)*. Kluwer Law International.
- Born, G.B. (2016). *International arbitration: Law and practice (Second Edition)*. Kluwer Law International.
- Brazier, L.W. (2015). The arbitrability of investor-state taxation disputes in international commercial arbitration. *Journal of International Arbitration*, 32(1), 1-9.
- Cases. (1953). *Wilko v. Swan*, 346 U.S. 427.
- Cases. (1968). *American safety equipment corp., v. J P Maguire & Co.*, 391 F 2d 821.
- Cases. (1974). *Scherk v. Alberto-Culver Co.*, 417 U. S. 506.
- Cases. (1981). *Natraj studios Pvt. Ltd. v. Navrang studios*, AIR SC 537.
- Cases. (1985). *Mitsubishi motors corp., v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614.
- Cases. (1986). *AT&T technologies, Inc. v. Communications workers*, 475 U.S. 643.
- Cases. (1987). *Desputeaux v. Éditions Chouette Inc.*, 1 S.C.R. 178, 2003 SCC 17.
- Cases. (1987). *Shearson v. McMahon*, 482 US 220.
- Cases. (1989). *M.S.A v. company, M, Cour d'Appel (court of appeal) of Brussels 1985, XIV yearbook of commercial arbitration*.
- Cases. (1990). *Consultant v. Egyptian local authority, final award, ICC Case No. 6162, XVII yearbook of commercial arbitration*.
- Cases. (1992). *Fincantieri-Cantieri Navali Italiani SpA ET OTO Melara Spa v. ATF, Switzerland federal tribunal, June 23, BGE 118 II 353*.
- Cases. (1993). *Chiranjilal Shrilal Goenka v. Jasjit Singh and Others* 2 SCC 507.
- Cases. (1995). *First options of Chicago, Inc., v. Kaplan*, 514 U.S. 938.
- Cases. (1996). *Fair air engineers (P) Ltd. v. N.K. Modi*, 6 SCC 385.

- Cases. (1996). *Fincantieri-Cantieri Navali Italiani SpA v. Ministry of defense, armament and supply directorate of Iraq, republic of Iraq, Italy, Corte di Appello of Genoa, 1994, XXI yearbook of commercial arbitration.*
- Cases. (1996). *Paine Webber, Inc. v. Elahi, 87 F. 3d 589 (1st Cir).*
- Cases. (1999). *Eco Swiss China time Ltd., v. Benetton international NV, Case C-126/97, XXIV yearbook of commercial arbitration.*
- Cases. (1999). *Haryana telecom Ltd. v. Sterlite industries India Ltd., 5 SCC 688.*
- Cases. (2001). *Circuit city stores, Inc., v. Adams, 532, U.S. 105, 107.*
- Cases. (2002). *Howsam v. Dean Witter Reynolds Inc., 537 U.S. 79.*
- Cases. (2004). *Motorola credit corp., v. Uzan, 388 F.3d 39 (2d Cir).*
- Cases. (2005). *Discover bank v. Superior court, 36 Cal. 4th 148.*
- Cases. (2011). *AT&T mobility LLC. v. Concepcion, 563 U.S. 333.*
- Cases. (2011). *Booz Allen and Hamilton Inc. v. SBI home finance limited 5 SCC 532.*
- Cases. (2012). *CompuCredit v. Greenwood, 132 S. Ct.665.*
- Cases. (2012). *High court of Delhi in union of India v. Competition commission of India, AIR 2012 Del 66.*
- Cases. (2012). *Serbian case, decision of the Swiss Federal supreme court, 4A_654/2011.*
- Cases. (2013). *Bulgarian case, decision of the Swiss Federal supreme court, 4A_388/2012.*
- Cases. (2013). *Kingfisher airlines limited v. Prithvi Malhotra instructor, (7) Bom. CR 738 (India).*
- Cases. (2016). *Shri Vimal Kishor Shah and Ors., v. Mr. Jayesh Dinesh Shah and Ors., supreme court of India, civil appeal no 8614.*
- Choudhary, T. (2015). Arbitrability of competition law disputes in India: Where we are now and where do we go from here. *Indian Journal of Arbitration Law, 10(4), 69-75.*
- Jalili, M. (1996). Kompetenz-Kompetenz: Recent U.S. and U.K. Developments. *Journal of International Arbitration, 13(1), 169-177.*
- Judd, J. (2009). *AED oil limited v. Puffin FPSO limited; No. 2.* Retrieved from <https://jade.io/j/?a=outline&id=120539>
- Lew, J.D., Mistelis, L.A., Kröll, S.M., & Kröll, S. (2003). *Comparative international commercial arbitration.* Kluwer Law International BV.
- Mason, S.H. (2013). Recent development: ADR to trusts: Alternative dispute resolution: 2nd Circuit holds Res judicata not a question of procedural arbitrability. *Louisiana Bar Journal, 60(1), 323-333.*
- Moses, M.L. (2017). *The principles and practice of international commercial arbitration.* Cambridge University Press.
- Newman, L.W., & Davidson, C.M. (1997). Arbitrability of timeliness defences who decides? *Journal of International Arbitration, 14(1) 137-143.*
- Redfern, A., & Hunter, M. (2004). *Law and practice of international commercial arbitration (Fourth Edition).* Sweet & Maxwell (London).
- UNCITRAL. (2012). *United Nations commission on international trade law: Digest of case law on the model law on international commercial arbitration.*
- Vardy, T. (2003). *International commercial arbitration: A transnational perspective (Second Edition).* American Case Book Series.