‘Arbitrability’ in times of fast emerging techno-centric businesses in India

To simplify matters, Supreme Court has presented a four-fold test to determine whether or not a dispute is eligible for arbitration

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Over the past two decades, India has witnessed significant growth as an arbitration jurisdiction on account of factors including the introduction of crucial legislative changes and judicial precedents, coupled with the necessary socio-political reforms. As arbitration continues to be adopted by many as the preferred mode of dispute resolution, an important preliminary question that invariably emerges is whether a given dispute is arbitrable or not.

‘Arbitrability’ broadly relates to whether the disputes can be adjudicated upon by an arbitral tribunal and whether a arbitral tribunal has jurisdiction to deal with certain subject matter. Since arbitral tribunals are private fora established by consent of the parties to adjudicate disputes in place of the courts and other public fora of the state, there are certain kinds of disputes which may not suited for such private adjudication.

In *Booz Allen & Hamilton Inc vs SBI Home Finance*, the Supreme Court observed that any civil or commercial dispute which limited itself to the rights of the parties could be arbitrated upon. However, disputes which pertain to exercise of rights against the world at large were held to be non-arbitrable.

The Apex Court in the Booz Allen case held that some recognised examples of non-arbitrable disputes are matters involving criminal offences, matrimonial disputes pertaining to divorce and judicial separation, guardianship, insolvency and winding-up, testamentary matters and tenancy matters governed by special statutes.

The exclusion of actions against the world at large from the purview of arbitration demonstrates the inherent confines of arbitration as a private dispute settlement mechanism which is binding only upon the parties to the arbitration agreement.

Scope Criminal offences, matrimonial disputes pertaining to divorce and judicial separation, guardianship and insolvency ,among others, are recognised examples of non-arbitrable disputes. GETTY IMAGES/ISTOCKPHOTO

Acceptance by law as remedy

In *A Ayyasamy vs A Paramasivam*, the Supreme Court adding to the list of non-arbitrable matters held that where a public forum was conferred exclusive jurisdiction to decide upon a class of matters by operation of law, such disputes would be incapable of resolution by arbitration. In other words, the right of choice of arbitration is available only in cases where the law accepts the existence of arbitration as an alternative remedy.

Another segment of matters which are generally held to be non-arbitrable include those which involve exercise of sovereign functions of the state which are inalienable and non-delegable. For instance, criminal matters which involve imposition of sovereign penal sanctions are non-arbitrable. Similarly, matters relating to legitimacy of marriage, citizenship, winding up of companies, grant of patents etc. are non-arbitrable.

A predicament that arose from the above principles was that the position of arbitrability of fraud remained debatable for quite some time. More often than not, parties, while arbitrating in contractual disputes, allege the commission of fraud by the other party. This was also taken as a line of defense against the continuance of arbitral proceedings on the grounds of arbitrability.

This finally came to be settled in the case of *Avitel Post Studioz vs HSBC PI Holdings* where the Supreme Court held that only cases with very serious fraud allegations that virtually caused a criminal offence would be treated as non-arbitrable. The test to determine “serious allegations of fraud” is two-fold. First, whether the plea of fraud permeates the entire contract rendering it void. Secondly, whether the allegations of fraud have an implication in the public domain.

The law laid in *Avitel Post Studioz* was further relied upon in the judgment of Deccan Paper Mills case where the Supreme Court held that the old view that allegations of fraud, forgery and fabrication are non-arbitrable was a wholly archaic view and needs to be discarded. hus, the judicial precedents have tilted in favor of arbitrability of disputes over time.

In a recent judgment in *Vidya Drolia vs Durga Trading Corporation*, the Supreme Court undertook a thorough academic assessment of the law pertaining to arbitrability. The Supreme Court presented what is called a “four-fold” test to determine the question of arbitrability of the subject matter in India.

The matter is not arbitrable if any of the four conditions apply. First, the matter should not arise out of actions against the world at large. Secondly, the matter should not affect any third-party rights which may require a centralised adjudication instead of private adjudication. Thirdly, the matter should not involve exercise of sovereign functions of the state which are inalienable and non-delegable. Lastly, the matter should not be non-arbitrable on account of exclusive application of a statute pre-empting any alternate means of adjudication.

Another important aspect that the Supreme Court decided upon in Vidya Drolia pertains to the question of who decides the issue of arbitrability. The apex court held that the issue of arbitrability could be raised and decided at three stages. First, before the court in an application for reference of the dispute to an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996. Secondly, before the arbitral tribunal during the arbitral proceedings. Thirdly, before the court at the stage of challenge of arbitral award or its enforcement.

The Supreme Court also clarified that the scope of examination for the courts at the time of deciding upon an application for reference of disputes to arbitration is minimal and prima facie in nature. It was held that as a general practice, if the court is of the preliminary view that the question of arbitrability requires a deeper examination, the matter should be referred to the Arbitral Tribunal. The rule for courts, therefore, is “when in doubt, refer” to the arbitral tribunal.

Misuse as delay tactic

This is in recognition of the principle of competence-competence (or kompetenz-kompetenz) which holds that the arbitral tribunal is empowered and competent to rule on its own jurisdiction and decide upon all allied issues including the existence, validity or arbitrability of the matter. The underlying rationale behind arbitration is preventing delays and discouraging parties from using defense of arbitrability as a delay tactic.

As seen above, the evolution of judicial precedents has been pro-arbitrability of disputes. The courts have attempted to broaden the horizon for matters that are arbitrable while setting out definite parameters to determine the arbitrability of matters. The four-fold test in Vidya Drolia is much needed as new forms of business and disputes emerge centered around advanced technologies. For instance, crypto currency and commercial astronomy are two examples of sectors which are under close and heavy scrutiny of governments across the globe. At the same time, many private players are entering into these sectors. It would be interesting to see how questions pertaining to arbitrability are addressed in disputes emerging in such sectors.

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