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ARBITRABILITY OF DISPUTES IN INDIA: THE CHANGING LANDSCAPE OF 'EXCLUSIVE JURISDICTION' DISCOURSE

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ABSTRACT

The principle of arbitrability is fundamental to the progression of an arbitration regime in any country. The success of arbitration rests on the aid and assistance accorded to it by the courts. In such a scenario, the role of the judiciary in providing an extensive and expansionist interpretation of arbitrability becomes crucial. However, such support and protection are often found missing in jurisdictions characterized by a conservative judiciary. Arbitration in India seems to suffer from the same malady. Several tests of arbitrability exist but their narrow interpretations have allowed an intrusive judiciary to superimpose itself on the arbitral process. One such test, which has presented itself as a major challenge, is the test of exclusive jurisdiction. The purpose behind this test was to limit the excessive judicial intervention thereby providing the necessary impetus and assistance to the arbitration process in the country. Instead, it seems to have become a tool to subvert the cherished principle of party autonomy. The confusion emanating from the unnecessary invocation and inconsistent interpretation of the test has raised questions on its utility and efficacy in the promotion of arbitration in India. This paper attempts to examine the ambiguity surrounding scope and test of arbitrability, particularly the test of exclusive jurisdiction, in India through a catena of judicial decisions. It highlights the

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failure of judicial appreciation of the profound impact of its myopic understanding of 'arbitrability' and the restricted application of the test. The article suggests a purposive shift in the judicial approach towards 'arbitrability' from deep-rooted mistrust to being pro-arbitration through reconciliation of principles of public interest and party autonomy.

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I. INTRODUCTION

When will mankind be convinced and agree to settle their difficulties by arbitration?

- Benjamin Franklin[1]

The progression of arbitration law from an "*alternate*" to a preferred and thriving mode of dispute resolution has been remarkable. Although the courts remain firmly placed in their role as 'guardians of justice', arbitration allows the parties to overcome the frustrations of litigation.[2] It is this alternate mechanism to courts which is not only considered neutral, speedy, and flexible, but also ensures the considerations of being confidential, and cost-efficient.[3] Thus, arbitration contributes immensely in "*maintenance of social stability and order*"[4] by supplementing and not supplanting the courts in the dispensation of justice.

In our own backyard, the Indian judiciary cautiously opened up towards this global trend.[5] In a bid to promote alternate dispute resolution [*hereinafter* referred to as "**ADR**"] mechanisms, the courts started adopting

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[1] Letter from Benjamin Franklin to Joseph Banks (July 27, 1783), in 1 THE PRIVATE CORRESPONDENCE OF BENJAMIN FRANKLIN 132, (3 ed., 1818).

[2] Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 AM. REV. INT'L ARB. 267, 268 (1996).

[3] Vinay Reddy and V. Nagaraj, *Arbitrability: The Indian Perspective*, 19 J. INT'L ARB. 117, 149-150 (2002) (*hereinafter* "**Vinay**").

[4] Donald L. Carper & John B. LaRocco, *What Parties Might Be Giving Up and Gaining When Deciding Not to Litigate: A Comparison of Litigation, Arbitration and Mediation*, 63 DISP. RESOL. J. 8, 49 (2008).

[5] *See,* Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 (India); Guru Nanak Foundation v. Rattan Singh & Sons, AIR 1981 SC 2075 (India).

a pro - arbitration approach as is evident in the matter of *Afcons Infrastructure Ltd. v. Cherian Varkey Constructions*,[6] wherein the Supreme Court laid down effective guidelines for the courts to enforce the mandate of Section 89 of the Civil Procedure Code, 1908 [*hereinafter* referred to as "**CPC**"][7] which promotes parties to adopt ADR mechanisms, and directs courts to uphold such will of the parties. This position was strengthened through a series of judgments, such as *Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Service, Inc. and Ors.*,[8] wherein the court curtailed its powers to intervene in foreign seated arbitrations. Further, in the case of *Shri Lal Mahal Ltd. v. Progetto Grano Spa*,[9] the court went ahead and significantly watered down the ambit and scope of 'public policy' exception to be raised as a defence against enforcement of arbitral awards.

Unfortunately, the judiciary failed to fully embrace and respect the most sacrosanct principles arbitration, viz. party autonomy and *kompetenz – kompetenz*.[10] Owing to this, the judicial 'pro-arbitration' stance transformed into 'conservative' and, ultimately, reneged to 'regressive'. Although the legislature made several attempts in circumscribing the judicial overreach but failed miserably. Therefore, in spite of the relentless pursuit of the

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[6] Afcons Infrastructure Ltd. v. Cherian Varkey Constructions, (2010) 8 SCC 24 (India).
[7] The Code of Civil Procedure, No. 5 of 1908 INDIA CODE (1908), § 89.
[8] Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Service, Inc. and Ors., (2012) 9 SCC 552 (India).
[9] Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433 (India).
[10] *See*, NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 347, (5th ed., 2009); DICEY, MORRIS AND COLLINS, THE CONFLICT OF LAWS 740 (2006). (The Doctrine of Kompetenz-Kompetenz indicates that an Arbitral Tribunal is empowered and has the competence to rule on its own Jurisdiction, including determining all jurisdictional issues, and the existence or validity of an Arbitration agreement.)

policymakers to promote the country as a "*global arbitration hub*",[11] India is still considered as an arbitration agnostic state. The arbitration regime in India has been lamented to be on a reverse track as instead of "*becoming mature, advanced and confident, it seems to have become weak and unduly defensive*"[12].

This paper attempts to draw a careful insight into arbitration to examine the issue of 'arbitrability' in India. The *first part* of the paper undertakes an understanding of arbitrability by tracing its evolution and progression to its current state internationally as well as in India. In the *second part*, the author examines the complexity in the intertwined relationship between arbitrability and arbitration agreement. It explores the effect of invalidity of an arbitration agreement on the arbitrability of disputes and *vice versa*. The *third part* of the paper explores the parameter and threshold of the judicially evolved test of exclusive jurisdiction of public forums with respect to the arbitrability of disputes. It endeavours to trace the trend of Indian judiciary in the application of the test. It seeks to map the extent and impact of the digression of Indian courts from the internationally accepted principles with respect to the protection of exclusive jurisdiction of public forums. It also examines a progressive change in the attitude of the Indian judiciary towards arbitration with the help of recent judicial pronouncements. The *fourth part* analyses the

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[11] Shri Narendra Modi, Honourable Prime Minister of India, Valedictory Speech on *"National Initiative towards Strengthening Arbitration and Enforcement in India"* at Niti Aayog's Global Conference (Oct. 23, 2016).

[12] Nidhi Gupta, *Saving Face Or Upholding 'Rule Of Law': Reflections On Antrix Corp Ltd. v. Devas Multimedia P. Ltd. (Arbitration Petition No. 20 Of 2011, Decided On May 10, 2013)*, 2(2) IND. J. ARB. L. 6-81, 69 (2014).

justifications and limitations of the doctrine of public policy in the context of progression of the arbitration regime in India. It discusses the shrinking space of public policy in arbitrability discussions across jurisdictions and the response of the Indian judiciary on this delicate yet crucial issue. In the end, the paper suggests a middle approach that must be followed to calibrate the balance between judicial intervention and judicial restraint. It recommends an interpretative role for the Indian judiciary which is in consonance with the spirit of helping India become a 'global arbitration hub'.

II. UNDERSTANDING 'ARBITRABILITY'

To put it simply, '*arbitrability*' refers to the ability of a dispute to constitute the subject matter of arbitration.[13] It pertains to the jurisdictional aspects of a dispute. It goes beyond the preliminary determination of the legal validity of the arbitration agreement and tries to ascertain whether the dispute is capable of being adjudicated by a private forum instead of courts.[14]

There are two kinds of arbitrability, one being '*objective arbitrability*',[15] which determines as to what kinds of issues can be submitted to arbitration

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[13] William W. Park, *Arbitrability and Tax in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES*,* 179*,* (L. A MISTELIS & S. BREKOULAKIS, 2008) (*hereinafter* "**Park**"); ALEXIS MOURRE, ARBITRABILITY OF ANTITRUST LAW FROM THE EUROPE AND US PERSPECTIVE, EU AND US ANTITRUST ARBITRATION: A HANDBOOK OF PRACTITIONERS, (3rd ed., 2011).

[14] Assimakis P. Komninos, *Arbitration and EU Competition Law* 7 UNIV. COLL. LONDON, DEP'T OF LAW 1-49 (2009).

[15] LEW ET AL., COMPARATIVE INTERNATIONAL AND COMMERCIAL ARBITRATION, 187, (Kluwer Law Int'l, 2003); *see also* EMMANUEL GAILLARD AND JOHN SAVAGE, FOUCHARD

(also known as the '*non-arbitrability doctrine*') and whether certain disputes have been exclusively reserved for adjudication by public fora.[16] Another category of arbitrability is '*subjective arbitrability*' (or '*ratione personae*') which examines as to who all can submit their disputes for arbitration. The paper is restricted to the concept of objective arbitrability only.

The concept of arbitrability owes its origin to the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 [*hereinafter* referred to as "**Geneva Convention**"] which through its expression "*capable of settlement by arbitration*" prescribed it as a necessary pre-condition for enforcement of a foreign award in a State.[17] Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 [*hereinafter* referred to as "**New York Convention**"],[18] the arbitrability can be dealt with by the national courts either at the time of reference of the dispute to arbitration or at the time of enforcement of a foreign arbitral award.[19] It allows the States to recognize and enforce the arbitration agreement of "*subject matter capable of settlement*".[20] Moreover, it also empowers the States to refuse the recognition and enforcement of an arbitral award if the domestic legal regime of such States prohibits the

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GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, 123, (Kluwer Law Int'l, 1999).

[16] ALAN REDFERN AND MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 22, (2nd ed., 1991) (*hereinafter* "**Hunter et al**").

[17] Geneva Convention on the Execution of Foreign Arbitral Awards art. I(2)(b), Sept. 26, 1927, 301 U.N.T.S. 92.

[18] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

[19] *Id.* art. II and art. V.

[20] *Id.* a conjoint reading of art. II (1) and art. II (3).

settlement of the subject matter of the award by way of arbitration on grounds of public policy.[21] A similar view is also endorsed under the UNCITRAL Model Law on International Commercial Arbitration[22] [*hereinafter* referred to as "**Model Law**"] where the States are at liberty to shape their arbitration regimes through their public policies.[23] Importantly, the Model Law echoes the position of the New York Convention on the issue of refusal of recognition and enforcement of the award on grounds of non-arbitrability.[24] It also allows the domestic courts of the enforcing State to set aside an award if the subject matter of the award is incapable of being settled through arbitration under the domestic laws of such State.[25]

III. THE INDIAN SCENARIO

The utter dissatisfaction with the archaic and outdated Arbitration Act of 1940[26] coupled with the clarion call of the business community and legal experts to formulate a dispute settlement mechanism that was in sync with best international practices marked the dawn of a new era of arbitration laws in India. The enactment of the Indian Arbitration Act, 1996[27] was done with the dual intention of, *first*, consolidation of arbitration

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[21] *Id.* art. V(2)(a) .
[22] UNCITRAL, Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, 24 I.L.M. 1302 (1985), with amendments adopted on July 7, 2006 (*hereinafter* "**Model Law**").
[23] *Id.* art. 1(5).
[24] *Id.* art. 36(1)(b)(i).
[25] *Id.* art. 34(2)(b)(i).
[26] The Arbitration Act, No. 10 of 1940 (India).
[27] The Arbitration and Conciliation Act, 1996, No. 26 of 1996 INDIA CODE (*hereinafter* "**Arbitration Act**").

laws in India, and *second*, to bring it in sync with the Model Law.[28] The ambition was to develop an alternate mode of dispute settlement which would be quick, efficacious, and amicable, especially towards commercial disputes, and which could keep pace with the economic progression of the country. Therefore, the legislature had succinctly laid down its three most important features: *first*, fair, just, and swift resolution of disputes; *second*, the concept of party autonomy; and, *lastly*, minimal judicial intervention.[29] It is the last two features which are often regarded as 'key foundational stones' towards ensuring the success of an arbitration regime.[30] However, the excessive or intrusive interventions by the courts present a serious threat to the progression and development of arbitration in India.

In the spirit of recognizing the principle of 'party autonomy' and ensuring minimal judicial intervention, Section 89 was introduced in the CPC by way of an amendment.[31] It was the formal acknowledgment of court-annexed alternate dispute resolution mechanisms in India. The Arbitration Act does not specify any category of disputes which are excluded from its applicability.[32] Thus, in principle, the general mandate of this Act is to allow all kinds of civil disputes, "*whether contractual or not*"[33] to

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[28] Promod Nair, *Surveying a Decade of the 'New' Law of Arbitration in India*, 23 ARB. INT'L 699, 701 (2007).
[29] The Arbitration and Conciliation Bill, Bill of 1995, Statement of Objects and Reasons.
[30] Ajay KR Sharma, *Judicial Intervention in International Commercial Arbitration: Critiquing the Indian Supreme Court's Interpretation of The Arbitration and Conciliation Act, 1996*, 3(1) IND. J. ARB. L. 6, 69 (2014).
[31] The Code of Civil Procedure, No. 5 of 1908 INDIA CODE (1908), § 89.
[32] A. Ayyasamy v. A Paramasivam, (2016) 10 SCC 386 (India); Aftab Singh v. Emaar MGF Land Ltd., (2017) SCC Online NCDRC 1614 (India).
[33] The Arbitration and Conciliation Act, No. 26 of 1996 INDIA CODE (1996), § 7(1).

be settled through arbitration. However, the Arbitration Act does prescribe a general 'exclusionary' clause according to which if a dispute is prohibited from being settled through arbitration by virtue of any other law in force, then such a prohibition would prevail over the general mandate of the Arbitration Act.[34] This restricts the otherwise overriding effect of the Arbitration Act over other legislations, due to the non-obstante clause.[35] More importantly, this also preserves the exclusivity of jurisdiction vested in national courts and tribunals by such special legislations.

The question of arbitrability of a dispute is often raised as a defence either at the time of arbitration proceeding or when the enforcement of the arbitral award is sought. Therefore, the issue of arbitrability can arise at the *initial or pre-reference* stage of the proceeding.[36] Furthermore, the question of arbitrability can also be raised, before a court, *after* the arbitration proceedings have culminated in an arbitral award.[37] This can result in the award being set aside by the court if it was to conclude that either the subject matter of award is non-arbitrable under the existing law or the award falls foul of the public policy of the country. The Arbitration Act allows for a similar recourse as well as fate to the foreign awards.[38] Thus, arbitrability can also be a ground for non-enforcement of an arbitral award at the *post-proceedings stage.*

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[34] *Id.* § 2 (3).
[35] *Id.* § 5.
[36] *Id.* §§ 8 and 45.
[37] *Id.* § 34 (2)(b)(i).
[38] *Id.* §§ 48 (2)(a) and (b).

The idea of arbitrability, in India, took its current shape and form through numerous decisions of courts. The Supreme Court in the landmark case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.* [*hereinafter* referred to as "**Booz Allen**"[39] accorded enormous power to the judicial authorities over arbitral tribunals by explicitly declaring that:

> "*where the issue of 'arbitrability' arises in the context of an application under section 8 of the Act in a pending suit, all aspects of arbitrability have to be decided by the court seized of the suit, and cannot be left to the decision of the Arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a Special Court or Tribunal.*" *(emphasis supplied)*

This ruling has had the most devastating impact on another hallmark feature of arbitration, i.e., the principle of *kompetenz - kompetenz*, in India.[40] On another occasion, the court did acknowledge the need to keep the scope of judicial intervention to minimal but, nonetheless, reserved to

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[39] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 (India), ¶ 33.

[40] The Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE, § 16 (The doctrine of *kompetenz - kompetenz* indicates that an arbitral tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of an arbitration agreement).

itself the power to undertake an inquiry on the issue of objective arbitrability.[41]

Therefore, an examination of objective arbitrability necessitated a relook into the utility and merit of exclusive jurisdiction of public forums through the lens of public policy. That is how all these concepts became intertwined adding to the prevailing confusion and ambiguity surrounding the understanding of arbitrability.

IV. RELATIONSHIP BETWEEN ARBITRABILITY AND ARBITRATION AGREEMENT

Arbitrability of the subject matter is an essential precondition without which even a valid arbitration agreement would not allow the parties to settle their disputes amicably through arbitration. It separates the different types of disputes that may be resolved through arbitration and the ones that are reserved to be exclusively dealt with by the courts.[42] Some authors consider arbitrability to be a question of jurisdictional in nature, based on the subject matter of the dispute.[43]

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[41] A. Ayyasamy v. A Paramasivam, (2016) 10 SCC 386 (India), ¶ 25 ("*While dealing with such an issue in an application under Section 8 of the Act, the focus of the Court has to be on the question as to whether the jurisdiction of the Court has been ousted instead of focusing on the issue as to whether the Court has jurisdiction or not.")(emphasis supplied*).

[42] Park, *supra* note 13.

[43] Agnish Aditya and Siddharth Nigotia, *Semantic and Doctrinal Restructuring of 'Arbitrability': Examining Brekoulakis' Arguments in the Indian Context*, 33 ARB. INT'L (2017) (*hereinafter* "**Agnish**").

It is pertinent to note that the non-arbitrability of the subject matter does not affect the validity of the arbitration agreement. Stavros Brekoulakis observes that although one may find the concepts of arbitrability and validity of the arbitration agreement to be closely related, there does exist a fine yet important difference between the two.[44] *First*, most arbitration legislations distinguish between arbitrability and invalidity through the insertion of separate provisions governing them at different points of the arbitral process. In India, for instance, the Arbitration Act clearly provides for invalidity of an arbitration agreement under Section 34(2)(a)(ii), disputes falling beyond the scope of agreement under Section 34(2)(a)(iv) and inarbitrability under Section 34(2)(b)(i) as separate grounds for vacatur.[45] *Second*, arbitration agreements, despite being basically a type of agreement, differ from most with respect to their validity criteria in as much as they are only required to satisfy a bare minimum threshold of *consensus as idem*, *party capacity*, and *other requirements laid out in arbitration statute* to be valid. The imposition of arbitrability as an additional pre-condition of validity on the arbitration agreements would place them at a disadvantageous position *vis-à-vis* other types of agreements.

Further, it has been argued that inarbitrability and invalidity have different jurisdictional results. Brekoulakis presents an argument that inarbitrability only precludes the tribunal's jurisdiction to deal with certain

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[44] Stavros Brekoulakis, *On Arbitrability: Persisting Misconceptions and New Areas of Concern in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES, 19 (L. A MISTELIS & S. BREKOULAKIS, 2008) (*hereinafter* "**S. Brekoulakis**").

[45] Agnish, *supra* note 43.

kinds of inarbitrable claims but exercise jurisdiction over other kinds of arbitrable claims. However, in the case of *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Anr.* [*hereinafter* referred to as "**Sukanya Holdings**"][46] the apex court has categorically denied the possibility of any bifurcation of disputes into arbitrable and inarbitrable claims. It is this restriction on the bifurcation of claims where Brekoulakis's argument fails in India.

V. TEST OF EXCLUSIVE JURISDICTION: PROTECTIONIST OR UNNECESSARY IMPEDIMENT

A fundamental challenge that confronts the policymakers during the formulation of an arbitration policy is to strike a balance between two conflicting considerations. On one hand the principle of party autonomy[47] must be adequately protected and promoted for it is one of the most critical and hallmark features of arbitration. On the other hand, one must also be mindful of the inherent dangers of this private arrangement which, therefore, warrant States to circumscribe and tailor arbitration regime in accordance with its public policy.[48] It is on the swinging scale of these two factors that the fate of arbitrability delicately hangs.[49]

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[46] Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Anr., (2003) 5 SCC 531 (India).
[47] *See* Volt Information Sciences Inc. v. Leland Stanford University 489 US 468 (Sup. Ct., 1989). In accordance with this principle, the parties are free to structure their arbitration agreement.
[48] GARY B. BORN, NON-ARBITRABILITY AND INTERNATIONAL ARBITRATION AGREEMENTS, *in* INTERNATIONAL COMMERCIAL ARBITRATION 943, (2nd ed., 2014).
[49] *See generally* Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 (India); Food Cooperation of India v. Indian Council of Arbitration & Ors., (2003) 6 SCC 564 (India).

'Jurisdiction' has been held to be a "*word with many hues…. whose colour must be discerned from the setting in which it is used*".[50] The above statement highlights the complexity surrounding the determination of the 'jurisdiction' of forums over certain types of disputes. National laws of most countries earmark certain kinds of disputes for public forums established under special laws. This 'exclusivity' serves as a limitation on the arbitrability of such disputes.

The courts have devised certain kinds of tests to ascertain the arbitrability of a subject matter.[51] The Indian Supreme Court in *Booz Allen* observed that certain categories of disputes could only be resolved through adjudication by public forums.[52] This marked the advent of the *test of exclusive jurisdiction of public forums*. The Bombay High Court firmly cemented this test in the arbitrability debates while pronouncing its verdict on arbitrability of disputes under the Industrial Dispute Act, 1947 [*hereinafter* referred to as "**Industrial Disputes Act**"][53] According to the court, the test of exclusivity emanates from and is deeply rooted in the doctrine of public policy. However, to the astonishment of many,[54] the court in a bid

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[50] National Thermal Power Corp. Ltd. v. Siemens Atkeingesellschaft, (2007) 4 SCC 451 (India), ¶ 18.

[51] Sai Anukaran, *Scope of Arbitrability of Disputes from the Indian Perspective*, 14(1) ASIAN INT'L ARB. JOURNAL 77 (2018); Shreyas Jayasimha & Rohan Tigadi, *Arbitrability Of Oppression, Mismanagement And Prejudice Claims In India: Need For Re-Think?*, 11 NUJS L. Rev. 4, 17 (2018).

[52] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 (India), ¶ 35.

[53] Kingfisher Airlines Ltd. v. Prithvi Malhotra Instructor, (2013) (1) AIR Bom R 255 (India).

[54] Payel Chatterjee & Simone Reis, *Private Enforcement Of Competition Issues, Competition Commission Of India Vis-À-Vis- Alternate Forums – Is It Actually An Option?*, NISHITH DESAI

to over-protect the exclusivity of the public forums made observations that sought to narrow the mandate of the apex court in *Booz Allen*. It declared that if the legislature, on grounds of public policy, has conferred exclusive jurisdiction on public forums with respect to certain kinds of disputes then such disputes cannot be settled through arbitration *irrespective of the nature of rights involved therein*.[55] Does that mean that the establishment of specialized public forums is the litmus test for determining the arbitrability of, otherwise perfectly arbitrable, disputes?

The court, in answer to the foregoing issue, observed that the correct approach is to discern the reason behind the conferment of such 'exclusivity'. This, in turn, would make it necessary to examine and analyse "…*the object as well as the broad scheme*"[56] of the legislation. With respect to the facts of that case, it opined that the Industrial Disputes Act,[57] *being a beneficial legislation* is committed towards "*amelioration of the conditions of workers, tempered by a practical sense of peaceful co-existence, to the benefit of both-not as in a neutral position, but with restraints on laissez - faire and concern for the welfare of the weaker lot.*"[58] The Court observed that although the Industrial Disputes Act allows

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ASSOCIATES (Jan. 03, 2013), https://www.nishithdesai.com/fileadmin/userupload/pdfs/Research%20Articles/Private%20Enforcement%20of%20Competition%20Law%20Issues.pdf.

[55] The Supreme Court, in Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 (India), has expressly declared disputes with respect to rights *in personam* and subordinate rights *in personam* arising from rights *in rem*, to be amenable to arbitration.

[56] Kingfisher Airlines Ltd. v. Prithvi Malhotra Instructor, (2013) (1) AIR Bom R 255 (India), ¶ 13.

[57] The Industrial Disputes Act, No. 14 of 1947 INDIA CODE (1947).

[58] Life Insurance Corporation of India v. D.J. Bahadur, (1981) 1 SCC 315 (India); *see also*, Rajesh Korat v. Innoviti Embedded Solutions Pvt. Ltd., (2017) SCC OnLine Kar 4975 (India).

for 'voluntary arbitration'[59] of disputes, it prescribes a separate and specific procedure for it. This is indicative of the scheme of the Act which treats an otherwise private dispute between an employer and employee differently.[60] The reason for such a differential treatment lies in the nature of the relationship between the parties to dispute and the profound impact the dispute will have on other employees and consequently the whole industry.[61] The court also noted that the tribunal created under the Industrial Disputes Act was significantly different from the civil courts.[62] Therefore, the test of exclusive jurisdiction would limit the arbitrability of a subject matter arising out of a legislation, only if:[63]

1. The legislation creates special rights and obligations, not pre-existing under common law; and

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[59] The Industrial Disputes Act, No. 14 of 1947 INDIA CODE (1947), § 10A.

[60] Kingfisher Airlines Ltd. v. Prithvi Malhotra Instructor, (2013) (1) AIR Bom R 255 (India), ¶ 15.

[61] *Id.* ¶ 18.

[62] *See also,* Dhulabhai v. State of Madhya Pradesh, AIR 1969 SC (India) (The court observed that the Tribunal established under the Act are, not tied with elaborate procedures, layers of appeal and revision, meant to provide prompt, inexpensive and effective forum of dispute settlement. "*It is, therefore, always in the interest of the workmen that disputes concerning them are adjudicated in the forums created by the Act and not in a Civil Court. That is the entire policy underlying the vast array of enactments concerning workmen. This legislative policy and intendment should necessarily weigh with the Courts in interpreting these enactments and the disputes arising under them.*")

[63] Significant to this discussion is another doctrine which the courts resort to while interpreting and examining the validity of jurisdiction ouster clauses under any legislation- the *Doctrine of Uno-flatu* (implied repeal). *See, e.g.,* Dhulabhai v. Madhya Pradesh, AIR 1969 SC 78 (India); Premier Automobiles Ltd. v. Kamlakar Shanatram, AIR 1975 SC 2238 (India); M/s. Kamala Mills Ltd v. State of Bombay, (1966) 1 SCR. 64 (India); Maya Devi v. Inder Narain, AIR 1947 All 118 (India); Shri Panch Nagar Parak v. Puru Shottam Das, AIR 1999 SC 3071 (India).

2. The legislation, as a matter of public policy, provides for a special and distinct remedy and specialized forum for adjudication of disputes involving such rights and obligations.

This position got reaffirmed through the supplementing opinion of Justice Chandrachud in the landmark case of *A. Ayyasamy v. A Paramasivam* [*hereinafter* referred to as "**Ayyasamy**"][64] observing that where the legislature, on grounds of public policy, confers exclusive jurisdiction on special forums, to the exclusion of jurisdiction of an ordinary civil court, over certain categories of disputes then such disputes cannot be resolved through arbitration. It went on to discuss a few cases where a similar position had been upheld by the courts on account of public policy goals.[65] Thus, the test has now become two-pronged: *first*, all disputes in the nature of or involving adjudication of rights *in rem* are not arbitrable due to the *Booz Allen* test, and *second*, all disputes involving in-personam rights can be arbitrated unless they have not been reserved for adjudication 'exclusively'

[64] A. Ayyasamy v. A Paramasivam, (2016) 10 SCC 386 (India), ¶ 38.

[65] *Id.* ¶¶ 36-38; Natraj Studios (P) Ltd v. Navrang Studios, (1981) 2 SCR 466 (India) (declaring that rent legislations are welfare legislations thereby recognizing the exclusive jurisdiction of special courts under such legislations); Skypak Courier Ltd. v. Tata Chemical Ltd., (2000) 5 SCC 294 (India); National Seeds Corporation Ltd. v. M. Madhusudhan Reddy, (2012) 2 SCC 506 (India) (observed that Consumer Protection Act has a social objective and therefore, consumer disputes cannot be subject matter of arbitration). *See generally*, K Kishan v. M/s Vijay Nirman Co. Pvt. Ltd., (2018) 10 SCALE 256 (India) (holding that Insolvency & Bankruptcy Code, 2016 is a special legislation which would have an overriding effect over Arbitration Act, 1996 due to Section 238 of the Code.); Vimal Kishore Shah v. Jaynesh D. Shah & Ors., (2016) 8 SCC 788 (India) (Trusts Act, 1882 provides for a specific remedy. Therefore, trust related disputes would not be amenable to arbitral proceedings).

through a public forum (for example - courts, tribunals, commissions, etc.) by the legislature on grounds of public policy.[66]

However, the focus of this test seems to be somewhat misplaced. The test, in its present form, does not delve into the possibility of the parties mutually agreeing to choose arbitral tribunals over such specialized tribunals. It is at this point that the principle of 'party autonomy' is ousted by the doctrine of 'exclusive jurisdiction'. It is this limitation of the test which raises serious doubt over its utility and therefore must be immediately addressed by courts. One such opportunity presented itself before the High Court of Delhi in the matter of *HDFC Bank v. Satpal Singh Bakshi* [*hereinafter* referred to as "**HDFC**"][67] The court was to decide whether disputes, which fall within the exclusive scope and jurisdiction of Debt Recovery Tribunals [*hereinafter* referred to as "**DRT**"] established under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 were arbitrable? The court observed that the creation of a specialized tribunal "*only ousts the jurisdiction of the civil courts*" and does not act as a limitation on the freedom of parties to choose an alternative forum.[68] It emphasized that the principle of "*party autonomy is recognized as paramount*" in the Indian judicial system so much so that "*even the intervention by the Courts is restricted and is minimal*".[69] The court held that the "*tribunalization of justice*" should make no difference to

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[66] *See generally* NOMANI MZM, INTELLECTUAL PROPERTY RIGHTS & PUBLIC POLICY 20, 2019; Tanya Choudhary, *Arbitrability Of Competition Law Disputes In India – Where Are We Now And Where Do We Go From Here?*, 4(2) IND. J. ARB. L. 69, 78 (2016).
[67] HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del. 4815 (India).
[68] *Id.* ¶ 7.
[69] *Id.* ¶ 10.

the above mentioned position of law. It referred to the *Booz Allen* ratio to hold that a dispute must be with respect to a 'right *in personam*' which is "*capable of adjudication and settlement through arbitration*".[70] Thereafter, the court laid out the scheme and methodology of the test of 'exclusive jurisdiction'. It held that any dispute which is devoid of any element of public interest and is essentially a claim *in personam* is capable of being settled through arbitration. Thus, the court, while holding the DRT disputes to be arbitrable, declared that the creation of specialised tribunals to adjudicate disputes under a legislation would not automatically render every dispute non-arbitrable.[71]

It is extremely important that the scope and methodology as proposed in the *HDFC* case and the *Kingfisher* case is the governing yardstick of the test of 'exclusive jurisdiction'. Many scholars are of the opinion that the judicial approach towards the applicability of this test must be extremely narrow and restrictive so as provide necessary protection and impetus to arbitration proceedings in a country.[72] This would also be in favour of another sacrosanct principle of arbitration: principle of *kompetenz - kompetenz*.[73] The underlying objective behind this principle is to check the anathema of excessive judicial intervention in arbitration proceedings. This statutorily recognised principle has been upheld by the Indian Courts on

[70] *Id.* ¶ 12.
[71] *Id.* ¶ 14.
[72] Eric A. Schwartz, *The Domain of Arbitration and Issues of Arbitrability: The View from the ICC*, 9(1) ICSID REV. FOREIGN INV. L. J. 17 (1994).
[73] The Arbitration and Conciliation Act, No. 26 of 1996 INDIA CODE (1996), § 16.

several occasions.[74] Moreover, the judicial intervention has been limited to only "*prima facie examination of issue…leaving the parties to a full trial either before the arbitral tribunal or before the court at post-award stage*".[75]

The Law Commission sought to expand the power of arbitral tribunal by proposing various amendments in the Arbitration Act.[76] Most importantly, it proposed an amendment in Section 16 which would empower it to decide disputes involving "*serious question of law, complicated questions of fact or allegations of fraud, corruption, etc.*".[77] Read along with the amended Sections 8 and 11, it would have conclusively settled the supremacy of arbitral tribunals over arbitration proceedings. It would have also narrowed the scope and ambit of the test of 'exclusive jurisdiction'. However, that was not to be as the proposed amendment did not find place in the subsequent amendment.[78] Thus, a golden opportunity was squandered and the jurisprudence on arbitrability continued its ordeal with vague and regressive tests of arbitrability.

Interestingly, some positive and encouraging developments have taken place in this area. Through a series of recent judgements, the Indian

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[74] *See generally*, Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 (India); SBP & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618 (India); Gas Authority of India Ltd. & Ors. v. Keti Constructions Ltd. & Ors., (2007) 5 SCC 38 (India); IOCL v. S.P.S. Engg. Ltd., (2011) 3 SCC 507 (India); Today Homes & Infra. Pvt. Ltd. v. Ludhiana Improvement Trust & Anr., (2014) 5 SCC 68 (India).

[75] Shin Etsu Chemicals Co. Ltd. v. Aksh Optifibre, (2005) 7 SCC 234 (India), ¶ 105.

[76] *Amendments to The Arbitration and Conciliation Act, 1996*, (Report No. 246) LAW COMMISSION OF INDIA (Aug. 2014) (*hereinafter* "**Report No. 246**").

[77] *Id.* at 50.

[78] The Arbitration and Conciliation (Amendment) Act, No. 3 of 2016 INDIA CODE (2016) (*hereinafter* "**Arbitration Amendment Act**").

judiciary has started responding favourably towards arbitration. Recently, the Court embraced the legislative intent behind the amended Section 8 with full vigour by declaring that mere allegation of fraud by recalcitrant parties to obstruct arbitration would not render disputes inarbitrable.[79] The decision upheld the amended interpretation of Section 8 thereby breaking free the jurisprudence on arbitrability from the restrictive approach prescribed in *Sukanya Holdings* which did not allow for bifurcation of the subject matter.[80]

On another occasion, the Indian Supreme Court held that if a statute, when read as a whole, does not expressly or by necessary implication oust arbitrability of disputes arising under it, then such disputes are amenable to arbitration.[81] The court looked into the 246th Law Commission Report on the amended Sections 11(6A) and 16 (*kompetenz - kompetenz*) of the Arbitration Act, to limit its scope of power to the mere ascertainment of the existence of an arbitration agreement. The growing trust in arbitral proceedings was reflected when the Court declared an offence simpliciter (fraud) that does not vitiate the validity of arbitration agreement and which is a private dispute without any element of public interest, to be arbitrable.[82] However, the big moment came when the Court expressly declared its pro-arbitration bias by observing that:

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[79] Ameet Lalchand Shah & Ors. v. Rishabh Enterprises & Ors., (2018) 15 SCC 678 (India).
[80] Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Anr., (2003) 5 SCC 531 (India).
[81] Vidya Drolia & Ors. v. Durga Trading Corporation, (2019) SCC OnLine SC 358 (India), ¶¶ 26-32.
[82] Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710 (India).

> "*Once parties have agreed to refer disputes to arbitration, the court must plainly discourage and discountenance litigative strategies designed to avoid recourse to arbitration. Any other approach would seriously place uncertainty on the institutional efficacy of arbitration. Such a consequence must be eschewed. The Arbitration Act must be interpreted in a manner consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. Minimising the intervention of courts is again a recognition of the same principle*".[83] (*emphasis supplied*)

VI. PUBLIC POLICY AND ARBITRABILITY: AN UNRULY HORSE IN CHINATOWN?

The New York Convention deals with the recognition and enforcement of foreign arbitral awards. Article II(1) provides that an international arbitration agreement shall be recognized if it "*concern(s) a subject matter capable of settlement by arbitration*".[84] Further, it provides that a foreign award may not be recognized or enforced if, "*the subject matter of the difference is not capable of settlement by arbitration under the law of the country where recognition and enforcement are sought*" or where such recognition or "*enforcement*

[83] Swatantra Properties Pvt. Ltd. v. Airplaza Retail Holdings Pvt., 2019 (1) ALJ 409 18 (India).
[84] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 art. II (1).

of the award would be contrary to the public policy of the country".[85] It is evident that these three aforesaid provisions contained within them the concept of non-arbitrability of disputes.[86]

The arbitration statutes recognize party autonomy in resolving civil disputes through arbitration. Although the parties are free to opt-out of the conventional mode of dispute settlement (i.e., litigation) under a contractual arrangement, the State restricts or limits the exercise of this right over a few subject matters in accordance with its economic and social policy.[87] Therefore, the idea of arbitrability is deeply rooted in and around the doctrine of public policy of a State.[88]

The question of arbitrability of a dispute is different from public policy, which is a separate ground for rejection of enforcement of an arbitral award by the court. It is this question of non-arbitrability doctrine which has had various forms in different legal systems. In one commentator's words:

> "*All jurisdictions put limits on what can be submitted to arbitration. Customary law in Homeric Greece as in modern Papua Guinea would allow a dispute arising from a killing to be settled by arbitration;*

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[85] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 art. V(2)(a) and (b).
[86] Ajar Rab, *Defining the Contours of The Public Policy Exception – A New Test for Arbitrability in India,* 7 IND. J. ARB. L 161, at 163 (2019) (*hereinafter* "**Ajar Rab**").
[87] HUNTER ET. AL., *supra* note 16.
[88] Ajar Rab, *supra* note 86.

but…not sacrilege in Greece, nor adultery in parts of Papua New Guinea…or in Rome."[89]

It is important that the concept of public policy must be construed very narrowly because it is a term of very wide meaning. The term must be used only in exceptional circumstances, because it is an acknowledgement of the right of the state courts to exercise their ultimate control over any arbitral process, restricting the recognition and enforcement of any arbitral award(s).[90] It should be used as a defence, available only when the "*enforcement would violate the state's basic notion of morality and justice*".[91]

Historically, public policy considerations have been seen as a restriction on arbitrability, however, it has been increasingly recognized that the relevance of public policy in relation to arbitrability is diminishing.[92] Laws of many jurisdictions are delineating the inarbitrability on the basis of the criteria of the public policy.[93] It is contended that "*relevance of public policy*

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[89] D. Roebuck and B. De Fumichon, *Roman Arbitration,* 26(3) J. OF LEGAL HIST. 104 (2004); *see also* D. ROEBUCK, MEDIATION AND ARBITRATION IN THE MIDDLE AGES: ENGLAND 1154 (2012).

[90] ILA COMM. ON INTER'L COMMERCIAL ARBITRATION, *Public Policy as a Bar to the Enforcement of International Arbitral Awards*, London Conference Report (2000), 2. The final Report was presented at the 2002 New Delhi conference and published in the 2002 Proceedings and at <www.ila-hq.org>.

[91] *Parsons and Whittemore Overseas Co, Inc v. Société générale de l'industrie du papier (RAKTA)*, 508 F. 2d 969, 974 (2nd Cir., 1974).

[92] Stavros L. Brekoulakis, *Third Parties in International Commercial Arbitration, in* 21 OXFORD INT'L ARB. SERIES, (1st ed., 2009) (*hereinafter* "**Brekoulakis - II**").

[93] S. Brekoulakis, *supra* note 44 (*"In the USA, the Arbitration Fairness Act of 2007 constitutes as the latest legislative effort to severly restrict the scope of arbitrability on public policy grounds. There are other jurisdictions such as Belgian Judicial Code that provides that arbitration laws that define inarbitrability on the basis that the dispute is "permissible to compromise".*)

to the discussion of arbitrability is essentially very limited, and therefore, the scope of in-arbitrability should not be determined by reference to public policy".[94]

It is important that we understand public policy because it is nothing but a double-edged sword, helpful as a tool, and dangerous as a weapon.[95] This is because there exists no clear understanding of the wide - ranging scope of public policy. Public policy addresses "*the most basic norms of morality and justice*"[96] of a State, whose violation "*would be clearly injurious to the public good or, possibly … would be wholly offensive to the ordinary reasonable and fully informed member(s) of the public, on whose behalf the powers of the State are exercised*".[97]

It is imperative to state that the standard of public policy is very vague, without defining its proper contours, basing the test of arbitrability on it is not fair. The public policy exception does not mandate oust of arbitral tribunal's jurisdiction by the creation of a specialized forum.[98] It is only "*specific matters or specific legislations with a social or economic objective*"[99] that would fall within the public policy exception.

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[94] Brekoulakis - II, *supra* note 92, at 34.
[95] Loukas Mistelis, *Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards* 2 INT'L. L. FORUM DROIT INT'L. 248-253 (2000).
[96] The Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE (1996), § 48.
[97] Seutsche Schachtbaund Tiefbohrgesellscaftmbh v. Ras Al Khaimah National Oil Company, 2 Lloyd's Rep 246, 254 (England and Wales, Court of Appeal).
[98] HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del. 4815 (India), ¶ 14.
[99] Natraj Studios Pvt. Ltd. v. Navrang Studios & Anr., (1981) 1 SCC 523 (India).

Furthermore, the Arbitration Act states that enforcement of an arbitral award may be refused if it violates the public policy.[100] Further, the Explanation to the section reads that an award may be in conflict with public policy, if:

> *(i)* "*The making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or 81 of the Arbitration Act;*
>
> *(ii)* *It is in contravention with the fundamental policy of Indian law;*
>
> *(iii)* *It is in conflict with the most basic notions of morality and justice*."[101]

Therefore, in view of the above, public policy covers procedural as well as substantive aspects. It was in the case of *Renusagar Power Co. Ltd.* v. *General Electric Company*[102] that the Supreme Court clarified the contours of public policy stating that it cannot be equated with the law of India, "*something more than the violation of the law must be established*".[103]

In *Booz Allen* case, it was held that any matter which can be decided by a civil court can also be dealt with by an arbitral tribunal. However, this one decision has not seen many changes and litigants continue to knock the doors of the courts with matters of all dimensions and character.[104]

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[100] The Arbitration and Conciliation Act, No. 26 of 1996 INDIA CODE (1996), § 48(2)(b).
[101] *Id.* Explanation 1 to § 48.
[102] Renusagar Power Co. Ltd. v. General Electric Company, AIR 1994 SC 860 (India).
[103] *Id.*
[104] Aaliyah Siddiqui, *Making of A Model Procedure of Institutional Arbitration for Domestic Commercial Disputes in India*, 2 CONTEMP. L. REV. 310, 340 (2018).

It is important to consider why is there such disagreement on getting issues involving the concept of public policy not resolved by arbitration. Well, the answer is due to the following three objections:

(i) **Due Process concerns**: It is alleged that the arbitration proceedings are not as intensive in terms of fact-finding or less rigorous in evidential proceedings. It was held in the case of *Alexander v. Gardner-Denver*[105] that usually in the arbitral proceedings, the rules of evidence do not apply and therefore, the record of the arbitral proceedings is never complete;

(ii) **Limited or lack of reasoned arbitral awards**: It was the dissenting opinion of Justice Douglas in the case of *Scherk v. Alberto-Culver*[106] that, "*arbitral award can be made without explication of reasons and without development of a record, so that arbitrator's conception of our statutory requirement may be absolutely incorrect yet functionally unreviewable*".

(iii) **No process for appeal**: It was the dissenting opinion of Justice Stevens in the case of *Mitsubishi v. Soler,* in which the judge stated characteristically that, "*arbitration awards are only reviewable for manifest disregard of the law…. And the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator's decision is virtually unreviewabl*e".

[105] Alexander v. Gardner-Denver, 415 US 36, 94 Sup. Ct. 1011.
[106] Scherk v. Alberto-Culver, 417 US. 506 (US Sup. Ct., 1974).

It is understood that though arbitration proceedings have different procedures than practiced by the national courts, yet, stating point-blank that arbitration is a compromised dispute resolution mechanism in terms of due process or unfit to deal with public policy disputes is not absolutely correct. It is important to conclude this issue right here that arbitration being a confidential and private method of dispute resolution has its unique procedural characteristics and does not produce any uncompromised proceedings. Another set of argument(s) dealing with the capability of arbitrators is a flawed presumption, resting on flawed and faulty assumptions.

VII. ANALYSIS AND CONCLUSION

The story of India's push for structural reforms in the dispute resolution area has caught much attention from investors worldwide.[107] From being a jurisdiction where the term 'dispute' meant complex litigation procedures, confusion, and ambiguity surrounding the jurisdictional issues, a huge backlog of cases, etc., to an investment destination which has undertaken important steps towards improving quality of the judicial process and vows to effectively reduce time and cost of enforcing a contract.[108] The most significant and promising development has been the

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[107] Anurag K. Agarwal, *Resolving Business Disputes Speedily*, 41 ECON. & POL. WKLY. 2417, 2418 (2006).

[108] Amitabh Kant, *Effective Arbitration Process Can Make India A Sought After Business Destination*, THE ECONOMIC TIMES, (July 2019), https://economictimes.indiatimes.com/news/economy/policy/view-how-properarbitration-mechanism-can-make-india-a-sought-after-businessdestination/articleshow/70368747.cms?from=mdr (*hereinafter* "**Amitabh**").

monumental change in approach and outlook of the government towards the promotion of alternate dispute resolution mechanisms which is reflective of its ambition of advancing India as a preferred seat of arbitration.[109] The establishment of the New Delhi International Arbitration Centre,[110] an independent and autonomous regime meant to boost institutionalized arbitration in the country is one such step. A big leap in Ease of Doing Business Index is an attestation of the changing perception amongst the international investor community.[111] Therefore, the role of national courts in the advancement of the arbitration regime becomes all the more important.

Arbitration can intuitively compliment an overburdened justice delivery mechanism in India. However, a lot would depend upon the attitude of parties and the critical support from the judiciary through its display of bias towards arbitration agreements. The concept of arbitrability is a cornerstone of arbitration policy and framework. It gives the courts the power and authority to refuse the enforcement of an otherwise valid arbitration agreement on policy grounds. It is to be borne in mind that ordinarily, the presumption is in favour of arbitrability of disputes.[112] All disputes are arbitrable until it is proven that the legislative intent is to oust

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[109] Several amendments to The Arbitration & Conciliation Act 1996, No. 26 of 1996 INDIA CODE (1996), in a span of few years; Introduction of mediation in Companies Act 2013; Compulsory Mediation in Commercial Courts Act, 2015; Establishment of New Delhi International arbitration Centre act, Report of The High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India, 2017 (*Justice Sri Krishna Report*).

[110] The New Delhi International Arbitration Centre Act, No. 17 of 2019, INDIA CODE (2019).

[111] Amitabh, *supra* note 108.

[112] Magma Leasing & Finance Ltd. v. Potluri Madhavilata, (2009) 10 S.C.C. 103 (India).

the contractual freedom of parties to settle their disputes through arbitration, or that there exists such fundamental conflict between the subject matter of dispute and the current understanding of public policy. An excessive interventionist and intrusive approach by the judiciary can lead to failure of the arbitration process. It has been well argued *that* "*being over-protectionist and labelling all subject matters governed by a specialized legislation as inarbitrable provides for a slippery slope*".[113] The courts must allow the parties to reap the benefits of such an alternate mechanism instead of summarily rejecting it so as to preserve the jurisdiction of public forums. It is the duty of the court to impart a sense of business efficacy to commercial understanding.[114]

The test of 'exclusive jurisdiction', in its present form, appears to be in direct conflict with the principle of *kompetez - kompetenz*. In the wake of this, it is imperative that the courts conservatively apply the test, if not completely abandon it. The judiciary in India must adopt a pro-arbitration bias by increasing the threshold of the test. This would help calibrate a balance between judicial intervention and judicial restraint and act as "*partners, not superiors or antagonists*".[115]

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[113] Kashish Sinha & Manish Gupta, *Arbitrability of Consumer Disputes: Excavating the Hinterland*, 7(1) IND. J. ARB. L. 131 (2013).
[114] A. Ayyasamy v. A Paramasivam, (2016) 10 SCC 386 (India), ¶ 48.
[115] O.P. MALHOTRA, Foreword to LAW AND PRACTICE OF ARBITRATION, (1st ed., 2002) quoted in Report No. 246, Shin Etsu Chemicals Co. Ltd. v. Aksh Optifibre, (2005) 7 SCC 234 (India), ¶ 20.

This test proposes an interesting and compelling understanding of the arbitrability of disputes. The test is applaudable for not committing the mistake of "*seeing every arbitration agreement as some catch-all, encyclopaedic repository for the entirety of the universe of disputes between parties*".[116] It is also attentive towards significant undercurrents such as the asymmetry in bargaining power which is predominant in disputes under the Industrial Disputes Act or socio-welfare objectives of public policy in some legislations. This is resonated in numerous judgments which have laid down, in the most unequivocal manner, the necessity of preserving exclusive jurisdictions of public forums for certain kinds of disputes.[117]

However, there is a growing consensus on the waning relevance and importance of public policy in the arbitrability debates.[118] Across

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[116] Rakesh Malhotra v. Rajinder Kumar Malhotra, (2014) S.C.C. OnLine Bom 1146 (India), ¶ 81.

[117] National Textile Corp. & Ors. v. The Rent Control Appellate Tribunal & Ors., RLW 2011 (4) Raj. 2803 (India) (The Rent Tribunal shall have exclusive jurisdiction dispute between landlord and tenant); Natraj Studios Pvt. Ltd. v. Navrang Studios, (1981) 1 SCC 523 (India) (even though the exclusive jurisdiction is not conferred on any special court it is not open for the parties to contract out of the exclusive jurisdiction of a court established under a social welfare legislation like Rent Control Act, 1947); Big Shoppers Supermarkets Pvt. Ltd. v. K.M. Trading & Agencies Pvt. Ltd., 2009 (3) DNJ (Raj.) 1579 (India) (Rajasthan Rent Control Act, 2001 has an overriding effect over Arbitration Act, 1996); Central Warehousing Corporation v. Fortpoint Automotive Pvt. Ltd., 2010 (1) Bom CR 560 (India) (the exclusive jurisdiction conferred on Small Causes Courts with respect to disputes between licencee and licensor under the Presidency Small Causes Courts Act, 1882 cannot be ousted by an agreement between the parties); ITPO v. Int. Amusement Ltd., 2007 Arb LR 17 (Delhi) (Division Bench); Fortune Grand Management Pvt. Ltd. v. Delhi Tourism & Transport Development Corp., 2016 (4) Arb. LR 325 (Delhi) (Disputes arising under Public Premises Act, 1971 cannot be a subject matter of Arbitration).

[118] *See generally* Patrick M. Baron and Stefan Liniger, *A Second Look at Arbitrability: Approaches to Arbitration in the United States, Switzerland and Germany*, 19(1) ARB. INT'L 27, 38 (2003); Edouard Fortunet, *Arbitrability of Intellectual Property Disputes in France*, 26(2) ARB. INT'L 281, 293 (2010).

jurisdictions, the judiciary has responded favourably to a growing clamour for a transition, from protecting the exclusive jurisdiction of special forums, towards preserving party autonomy by extending the domain of arbitration to areas of economic activities involving significant public interest.[119] In our own backyard, the Courts have held that the Arbitration Act must be interpreted in a way "*that is consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of the evolution. Minimizing the intervention of courts is again are recognition of the same principle*".[120]

In this context, the courts in India must take a cue from the seminal decision of the United States Supreme court in *Henry Schein* where it declared in the most unequivocal terms that "*gateway issues of arbitrability must only be decided by the arbitral tribunals and not courts*" under any circumstance.[121] One must be mindful of the fact that majority of tribunals "*with all the trappings of the court*" are essentially resolving the disputes which earlier fell within the exclusive domain of civil courts and High Courts.[122] Therefore, the legislative policy and intent of speedy disposal of cases through

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[119] *See* Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc, 473 U.S. 614 Sup. Ct 3346 (1985) (in context of antitrust claims); Ganz v. Nationale des Chemins de Fer Tunidiens (SNCFT), (1991) Rev. Arb. 478 (in context of matters pertaining to fraud); Labinal v. Mors, (1993) Rev. Arb. 645 (in context of competition claims); Eco Swiss China Time v. Benetton Int., (1999) ECR I 3055 (with respect to competition claims); Fincantieri-Cantieri Navali Itaiani & Oto Melara v. M and Arb. Tribunal, (1995) XX YBCA 766 (with respect to claims arising out of illegal activities).

[120] A. Ayyasamy v. A Paramasivam, (2016) 10 SCC 386 (India), ¶ 53.

[121] Henry Schein Inc., et al. v. Archer & White Sales Inc. 586 US (2019).

[122] HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del. 4815 (India), ¶ 11-12

specialized tribunals must not be interpreted to hold such disputes as *per se* non-arbitrable. Additionally, the mandate of the *Kingfisher* case and the *HDFC* case must be the yardstick in the test of 'exclusive jurisdiction'. The Indian judiciary must also be considerate of the falling and failing relevance of doctrine of public policy in arbitrability across jurisdictions.[123]

It is the right time for the judiciary to break away from its over-protectionist mould and to intervene only to facilitate the arbitration process. There entails a great responsibility on the courts to interpret in a spirit that helps advance the legislative intent. The courts, while deciding the issue of arbitrability, must be considerate towards a growing clamour for further relaxation of arbitrability norms (by an economy bolstered by an adventurous investment policy of the executive), on one side, and the wisdom of a cautious approach that mandates economic progression to be reflective of and in tune with the socio - economic realities of its time and must be assessed on the constitutionally guaranteed objective of securing distributive justice. In view of the above, it is of utmost importance that only limited disputes are categorized as non-arbitrable. It would be the most appropriate step to remind ourselves of the cue or *mantra* that "*even if different forums are provided, recourse to one of them which is capable of resolving all their issues should be preferred over refusal of reference to arbitration*".[124]

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[123] *See generally* Patrick M. Baron and Stefan Liniger, *A Second Look at Arbitrability: Approaches to Arbitration in the United States, Switzerland and Germany*, 19(1) ARB. INT'L 27, 38 (2003); Edouard Fortunet, *Arbitrability of Intellectual Property Disputes in France*, 26(2) ARB. INT'L 281, 293 (2010).

[124] Chloro Controls (India) Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors., (2013) 1 SCC (India).

It would be not wrong to say that the courts have started responding to this urgency with utmost sincerity by adopting a more pragmatic, efficient, and pro-arbitration interpretation of arbitration clauses in tune with the legislative intent reflected through recent amendments.[125] However, this pro-arbitration leaning is not without challenges and is still far from being a settled notion.[126]

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[125] *See generally* Ameet Lalchand Shah & Ors. v. Rishabh Enterprises & Ors., (2018) 15 SCC 678 (India); Vidya Drolia & Ors. v. Durga Trading Corporation, (2019) SCC OnLine SC 358 (India); Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710 (India); HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del. 4815 (India), ¶ 14 (observing that mere institution of a special tribunal only to ensure speedy disposal of cases meant that subject matter falling within the scope and jurisdiction of debt recovery Tribunal were arbitrable).

[126] *See, e.g.* Central Warehousing Corporation v. Fortpoint Automotive Pvt Ltd., 2010 (1) Bom CR 560 (India); Smt. Veena v. Seth Industries Ltd. & Ors., 2011 (1) Mh LJ 658 (India) (It was held that the exclusive jurisdiction conferred on Small Causes Courts with respect to disputes between licencee and licensor under the Presidency Small Causes Courts Act, 1882 cannot be ousted by an agreement between the parties *as it would be violative of the public policy* [*emphasis supplied*]); REDFERN & HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, (4th ed., 2004) argue that in-arbitrability is in essence a matter of public policy; *see also* Y. Fortier, *Arbitrability of Disputes* in GLOBAL REFLECTIONS ON INT'L. LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER (Gerald Aksen et. al., eds., 2005); K..H BOCKSTIEGEL, PUBLIC POLICY AND ARBITRABILITY 177 (P. Sanders ed., 1987); T. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION, (2nd ed., 2007).