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The Doctrine of Arbitrability in India: Evolving Tests after Vidya Drolia

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ABSTRACT

The doctrine of arbitrability determines whether a particular dispute is capable of being resolved through arbitration rather than through adjudication by courts or statutory tribunals. In India, arbitrability has emerged as a crucial doctrinal filter shaping the limits of arbitral autonomy and judicial intervention. Despite the pro-arbitration objectives of the Arbitration and Conciliation Act, 1996¹, Indian courts have historically adopted an inconsistent approach towards arbitrability, often relying on broad public policy considerations and categorical exclusions². This uncertainty weakened the effectiveness of arbitration as an alternative dispute resolution mechanism. The Supreme Court's decision in *Vidya Drolia v. Durga Trading Corporation*³ marked a significant shift by consolidating prior jurisprudence and introducing a structured four-fold test to determine arbitrability, while simultaneously reaffirming the principle of kompetenz-kompetenz. This paper undertakes a doctrinal and analytical study of the evolution of arbitrability in India, tracing its development from pre-*Vidya Drolia* jurisprudence to subsequent judicial applications. It critically evaluates whether *Vidya Drolia* has conclusively settled the law or whether ambiguities persist in judicial practice. The paper argues that although *Vidya Drolia* has brought conceptual clarity and strengthened arbitral autonomy, its practical implementation continues to be shaped by judicial discretion, necessitating further legislative and jurisprudential refinement to ensure consistency and predictability.

INTRODUCTION

Arbitration has gained prominence as a preferred mode of dispute resolution due to its perceived advantages of efficiency, flexibility, confidentiality, and party autonomy⁴. In

¹ Arbitration and Conciliation Act, 1996 (India)

² *SBP & Co. v. Patel Eng'g Ltd.*, (2005) 8 SCC 618

³ *Vidya Drolia v. Durga Trading Corp.*, (2021) 2 SCC 1

⁴ *P. Anand Gajapathi Raju v. P.V.G. Raju*, (2000) 4 SCC 539

India, the legal framework governing arbitration is primarily contained in the Arbitration and Conciliation Act, 1996, which is based on the UNCITRAL Model Law and reflects an intent to align domestic arbitration practice with international standards⁵. Over the years, legislative amendments and judicial pronouncements have sought to transform India into an arbitration-friendly jurisdiction. However, despite these efforts, judicial intervention has remained a defining feature of Indian arbitration law⁶. One of the most contested areas of judicial intervention concerns the doctrine of arbitrability. Arbitrability determines whether a dispute is capable of settlement by arbitration and operates as a threshold question at the referral stage. It reflects the tension between party autonomy, which underpins arbitration, and public interest considerations that justify state adjudication of certain disputes. While arbitration is fundamentally consensual, not all disputes can be left to private adjudication, particularly those involving sovereign functions, statutory rights, or third-party interests. Indian courts have historically struggled to articulate consistent principles governing arbitrability. Early jurisprudence relied heavily on categorical exclusions and broad notions of public policy, resulting in uncertainty and unpredictability. Courts often undertook detailed merits-based analysis at the referral stage, thereby undermining the principle of minimal judicial interference and delaying arbitral proceedings. This fragmented approach adversely affected the credibility of arbitration in India. The Supreme Court's decision in *Vidya Drolia v. Durga Trading Corporation* is widely regarded as a watershed moment in Indian arbitration jurisprudence. The judgment sought to reconcile conflicting precedents and establish a principled framework for determining arbitrability. By introducing a four-fold test and reaffirming the doctrine of *kompetenz-kompetenz*, the Court attempted to strike a balance between arbitral autonomy and public policy concerns. This paper examines the evolution of the doctrine of arbitrability in India, with particular emphasis on the legal position after *Vidya Drolia*. It adopts a doctrinal and analytical methodology to assess whether the judgment has succeeded in providing lasting clarity or whether the application of arbitrability principles continues to be influenced by judicial discretion. The paper is structured into ten parts, beginning with the conceptual foundations of arbitrability and concluding with suggestions for reform.

CONCEPTUAL FOUNDATIONS OF ARBITRABILITY

Arbitrability refers to the suitability of a dispute for resolution through arbitration. It encompasses both subjective arbitrability, which concerns the capacity of parties to enter into an arbitration agreement, and objective arbitrability, which relates to the nature of disputes that may be resolved through arbitration. Subjective arbitrability is generally uncontroversial and depends on the legal capacity of the parties and the validity of the arbitration agreement. Objective arbitrability, however, raises complex questions of

⁵ UNCITRAL Model Law on International Commercial Arbitration, 1985

⁶ *SBP & Co. v. Patel Eng'g Ltd.*, (2005) 8 SCC 618

public policy and statutory interpretation. A central conceptual distinction in arbitrability jurisprudence is between rights in rem and rights in personam. Rights in rem are enforceable against the world at large and typically involve status or proprietary interests, whereas rights in personam operate only between specific parties. Traditionally, disputes involving rights in rem have been considered non-arbitrable because their adjudication may affect third-party rights and public interest. In contrast, disputes involving rights in personam are generally regarded as suitable for arbitration, as they concern private obligations between consenting parties. Public policy considerations further shape the contours of arbitrability. Matters involving criminal offences, matrimonial disputes, insolvency proceedings, winding up of companies, and testamentary issues have often been excluded from arbitration on the ground that they involve public rights or require authoritative state adjudication. However, modern arbitration jurisprudence favours a restrictive interpretation of non-arbitrability, limiting exclusions to disputes that inherently require judicial determination. This shift reflects the growing recognition that arbitration can effectively resolve complex commercial disputes without undermining public interest.

EVOLUTION OF ARBITRABILITY IN INDIA: PRE-VIDYA DROLIA JURISPRUDENCE

Prior to Vidya Drolia, Indian courts adopted an inconsistent and fragmented approach to arbitrability. A significant early development occurred in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*, where the Supreme Court drew a distinction between rights in rem and rights in personam and identified illustrative categories of non-arbitrable disputes. These included disputes relating to insolvency, matrimonial matters, guardianship, criminal offences, and testamentary issues⁷. While the judgment provided initial guidance, it did not offer a comprehensive test for determining arbitrability. Subsequent decisions applied the *Booz Allen* framework rigidly⁸, often treating the illustrative categories as exhaustive exclusions. In *A. Ayyasamy v. A. Paramasivam*, the Supreme Court addressed the arbitrability of fraud-related disputes. The Court held that mere allegations of fraud would not render a dispute non-arbitrable, but carved out an exception for serious and complex fraud involving public law elements. This distinction introduced ambiguity, as courts were left to determine the threshold for “serious” fraud. The uncertainty was further exacerbated in cases involving tenancy disputes and statutory remedies. In *Himangni Enterprises v. Kamaljeet Singh Ahluwalia*, the Court held that disputes governed by the Transfer of Property Act were non-arbitrable, a position that conflicted with earlier and subsequent decisions. Similarly, in insolvency-related disputes, courts frequently excluded arbitration on the ground that insolvency

⁷ *Booz Allen*, (2011) 5 SCC 532

⁸ *Himangni Enters. v. Kamaljeet Singh Ahluwalia*, (2017) 10 SCC 706

proceedings involve rights in rem, even when the underlying dispute was contractual in nature. This jurisprudence reflected judicial ambivalence rather than principled reasoning. Courts often undertook detailed examination of facts and legal issues at the referral stage, thereby encroaching upon the jurisdiction of arbitral tribunals. The absence of a structured test for arbitrability resulted in unpredictability and undermined the objective of promoting arbitration as an effective dispute resolution mechanism.

THE VIDYA DROLIA JUDGMENT: RE-DEFINING ARBITRABILITY

The decision in *Vidya Drolia v. Durga Trading Corporation* sought to address the inconsistencies in arbitrability jurisprudence. The case arose from a landlord-tenant dispute governed by the Transfer of Property Act, 1882, and raised the question of whether such disputes were arbitrable. The Supreme Court undertook an extensive review of domestic and international arbitration jurisprudence before articulating a principled framework for determining arbitrability⁹. The Court laid down a four-fold test to identify non-arbitrable disputes. According to this test, a dispute is non-arbitrable if it involves actions in rem rather than actions in personam; if it affects third-party rights or has erga omnes effect; if it relates to sovereign or public interest functions of the state; or if it is expressly or impliedly barred by statute. This test sought to replace categorical exclusions with a nuanced inquiry based on the nature and impact of the dispute. A significant aspect of the *Vidya Drolia* judgment is its reaffirmation of the principle of kompetenz-kompetenz. The Court emphasised that arbitral tribunals are the primary authority to determine their own jurisdiction, including issues of arbitrability. At the referral stage under Sections 8 and 11 of the Arbitration and Conciliation Act, courts are required to conduct only a prima facie review to ascertain whether a valid arbitration agreement exists and whether the dispute is manifestly non-arbitrable. Detailed examination of merits is to be avoided. The judgment also clarified the scope of judicial intervention by overruling inconsistent precedents, including the broad exclusion of tenancy disputes under the Transfer of Property Act. By doing so, the Court sought to promote arbitral autonomy and reduce judicial interference, thereby aligning Indian arbitration law with international best practices.

POST-VIDYA DROLIA JURISPRUDENCE AND JUDICIAL TRENDS

Following *Vidya Drolia*, Indian courts have shown a cautious but discernible shift towards a more principled application of arbitrability. In *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.*, the Supreme Court addressed issues relating to stamp duty and the enforceability of arbitration agreements. Although the primary issue concerned stamping, the Court reiterated the importance of minimal judicial intervention at the referral stage and reaffirmed the kompetenz-kompetenz principle. High Courts

⁹ *Vidya Drolia*, (2021) 2 SCC 1

have applied the four-fold test in cases involving commercial contracts, partnership disputes, and shareholder agreements. In several instances, courts have referred disputes to arbitration despite the presence of statutory remedies, recognising that the existence of a statutory forum does not automatically render a dispute non-arbitrable. However, in areas such as insolvency and consumer disputes, courts continue to exercise caution, often invoking public interest considerations to exclude arbitration. This trend suggests that while *Vidya Drolia* has provided a structured framework, its application remains context-specific and influenced by judicial perceptions of public interest. The continued reliance on discretionary reasoning highlights the need for consistent application of the *prima facie* standard at the referral stage.

COMPARATIVE PERSPECTIVE ON ARBITRABILITY

A comparative analysis reveals that jurisdictions such as the United Kingdom and Singapore adopt a narrow approach to non-arbitrability. In these jurisdictions, disputes are presumed to be arbitrable unless they are expressly excluded by statute or inherently unsuitable for private adjudication. Courts generally defer questions of arbitrability to arbitral tribunals and intervene only in exceptional circumstances. The UNCITRAL Model Law similarly promotes arbitral autonomy by limiting judicial intervention¹⁰ and recognising the competence of arbitral tribunals to rule on their own jurisdiction. These approaches reflect a strong pro-arbitration bias and prioritise efficiency and party autonomy. India's evolving jurisprudence indicates a gradual movement towards these international standards, though inconsistencies persist due to the broad interpretation of public policy.

CRITICAL EVALUATION OF THE VIDYA DROLIA FRAMEWORK

The *Vidya Drolia* judgment represents a significant advancement in Indian arbitration law by providing a structured test for arbitrability and reinforcing the *kompetenz-kompetenz* principle. Its strengths lie in its emphasis on minimal judicial intervention and its attempt to harmonise conflicting precedents. By moving away from categorical exclusions, the judgment promotes a more nuanced and principled approach. However, certain limitations remain. The broad language employed in the four-fold test, particularly with respect to public interest and statutory prohibition, leaves room for judicial discretion. The continued reliance on the *rights in rem* versus *rights in personam* distinction may also oversimplify complex commercial disputes that have both private and public dimensions. As a result, courts may continue to differ in their application of arbitrability principles.

¹⁰ UNCITRAL, Analytical Commentary on the Model Law (2012)

WAY FORWARD AND SUGGESTIONS FOR REFORM

To ensure consistency in arbitrability jurisprudence, legislative clarification identifying categories of non-arbitrable disputes may be considered. Clear statutory guidance would reduce reliance on judicial discretion and enhance predictability. Judicial training and consistent adherence to the prima facie standard at the referral stage are equally important. Aligning domestic practice with international arbitration norms would strengthen India's position as an arbitration-friendly jurisdiction.

CONCLUSION

The doctrine of arbitrability in India has evolved from a fragmented and inconsistent framework to a more structured and principled approach following the Vidya Drolia judgment. While the four-fold test has introduced conceptual clarity and strengthened arbitral autonomy, its practical application remains uneven. Sustained judicial restraint, legislative support, and consistent interpretation are essential to ensure that arbitrability functions as a facilitator rather than a barrier to arbitration. The future trajectory of Indian arbitration will depend on the effective implementation of the principles articulated in Vidya Drolia.