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SHOULD CONSUMER DISPUTES BE ARBITRABLE IN INDIA?

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Introduction

While several regional arbitration centres in Asia have become prevalent international arbitration centres, India still lags behind. Investors prefer to invest in jurisdictions that are arbitration friendly. In this context, India has been sending mixed signals to the investor community.

There have been numerous efforts to make India an arbitration-friendly jurisdiction. Unfortunately, all such efforts have overlooked the concept of arbitrability. Consequently, the rampant discussion on arbitrability of disputes is still in muddy waters, just like the arbitrability of consumer disputes.

As India aspires to be a pro-arbitration state, there is a strong need to balance the judicial trend wherein the Courts have been increasing the scope of 'arbitrable subject matters' in consonance with the global trend of upholding the right to avail arbitration to resolve disputes rather than going to civil Courts.

The stance of Indian Courts

In the past, India generally had a conservative and rigid outlook when it comes to trying and adopting out-of-the-box policies in the field of public policy and law. Indian Courts have been reluctant to accept the pro-arbitration approach when it comes to the arbitrability of numerous subject-matters. The position is the same when the question of arbitrability of consumer disputes arises.

In India, people are unaware of their consumer rights and lag extremely behind in understanding arbitration as a dispute resolution mechanism. Opponents generally argue that the arbitration clause can restrict the consumers' grounds to raise their disputes. In contrast, the Consumer Protection Act may grant the consumer various grounds on which they can file their complaint. Such grounds may not be otherwise permitted in the standard form agreement having the arbitration clause, which is drafted keeping in mind the interest of one party only.

Opponents believe that consumers often have less bargaining power than service providers and are not put through the relatively cumbersome arbitration process when more efficacious and affordable public law remedies exist. And, due to this power dynamics, if consumer disputes are allowed to be settled through arbitration, the condition will become similar to the employment law arena where employees face issues with employers forcing employees to agree to arbitrate any and all employment disputes as a condition of employment given that they are in a superior position compared to the employees. However, this is just a mere assumption which diminishes the confidence of the public in a quick and effective dispute resolution mechanism.

There are certain concerns with respect to unequitable bargaining power between consumers and producers. However, a fair disposal can also be accomplished through arbitration. As seen in various other jurisdictions like Europe, USA, etc. this unequal bargaining power can be done away with when arbitration is taken recourse to. Another advantage of arbitration in the present context is that the presiding arbitrator is appointed by the consensus of both the parties, thereby reducing the chances of biasness. As far as the argument that the appointment of an arbitrator being expensive exists, it can be countered by the fact that cases before the consumer Courts go on for a comparatively longer time as there are multiple layers of appeal and adjudication involved. Therefore, this makes arbitration less expensive than dispute resolution by consumer Courts by virtue of the time difference in the duration of the two.

In most cases with large companies, stock arbitration clauses are inserted, making appointment of a sole arbitrator unilateral. Such mandatory arbitration clauses have been dealt with in Perkins judgment [1] wherein the Supreme Court of India invalidated such unilateral appointment. The same reasoning can be adopted in the consumer dispute cases wherein there is a clause providing for the unilateral appointment of a sole arbitrator by the Courts. This can result in an influx in litigation. However, in the long run, it can help reduce the unequal arbitration agreements usually entered into by large companies thereby putting an end to the debate of unequal bargaining power in consumer disputes. Hence, in such cases, the consumer Courts can interfere and act as an additional remedy to arbitration making the agreement voidable.

[1] *Perkins Eastman Architects DPC & Anr v HSCC (India) Ltd* 2019 SCC OnLine SC 1517.

In the absence of any specific provision in the Indian Arbitration Act, 1996,[2] or any other legislation defining its scope, "subject-matter arbitrability" has depended heavily on the Indian judiciary to clarify and decide ambiguous issues of consumer dispute arbitrability.

In M*/s Emaar MGF Land Limited v Aftab Singh*,[3] the Hon'ble Supreme Court held that consumer disputes are non-arbitrable. This is on the reasoning that certain categories of disputes that are governed by statutory enactments to sub-serve a particular public policy are not arbitrable and that such a scheme has been recognised by Section 2(3) of the Arbitration and Conciliation Act, 1996. Moreover, the Court enlisted the different categories of subject matters which have been reserved by the legislature for adjudication in the public fora, due to public policy concerns– such as (i) criminal offences; (ii) matrimonial disputes and guardianship matters; (iii) insolvency; (iv)Antitrust and Competition laws, etc.[4]

The public policy argument behind reserving consumer disputes for the special public forum can be attributed to the inability of the arbitral tribunals to provide the consumers with a real opportunity to present their case and obtain justice in its natural sense. This line of argument can be backed by the case of *National Insurance Co Ltd,*[5] wherein the Hon'ble Supreme Court held that the primary purpose of the Consumer Protection Act is to relieve the consumer of being played unequally in the arbitration proceedings.

However, in the case of *Vidya Drolia v Durga Trading Corporation*,[6] the Court held tenancy disputes under the Transfer of Property Act, 1882 ("ToP Act") as arbitrable, which were previously mentioned as non-arbitrable. The Hon'ble Supreme Court opined that tenancy disputes are not actions '*in rem*' as they relate specifically to subordinate rights '*in personam'* because the Transfer of Property Act does not expressly or impliedly bar arbitration of disputes arising under it. Similar reasoning can be applied in consumer disputes as well.

In *A Ayyasamy v A Paramasivam,*[7] the Hon'ble Supreme Court held that the dispute would not be arbitrable if the Civil Court's jurisdiction had been exclusively given to a tribunal or the special Court.

However, the remedies provided under the Consumer Protection Act are not in exclusion of the existing laws but are in addition to it. Therefore, regardless of having entered into the arbitration

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[2] Indian Arbitration Act 1986.
[3] *M/s Emaar MGF Land Ltd v Aftab Singh* (2019) 12 SCC 751.
[4] *Booz Allen & Hamilton Inc v SBI Home Finance Limited* (2011) 5 SCC 532.
[5] *National Insurance Co Ltd v Hindustan Safety Glass Works Ltd* (2017) 5 SCC 776.
[6] *Vidya Drolia v Durga Trading Corporation* 2019 SCC OnLine SC 358. [7] *A Ayyasamy v A Paramasivam* (2016) 10 SCC 386.

agreement, the consumer can invoke section 3 of the Consumer Protection Act, which states that "the provision is in addition to, and not in the derogation of any other law for the time being in force.[7] A similar stance was taken by the Supreme Court in the case of National Seed Corporation Ltd.[8]

The public policy debate surrounding consumer disputes can be concluded by the fact that the special public forum does not exclude resolution of consumer disputes by arbitration, instead, it acts like an additional remedy to the Consumer Protection Act.

The Indian position with respect to consumer disputes being arbitrable can be termed as restrictive because it is considered to be against the public policy. However, looking at the approach taken by the Courts in *Vidya Drolia* and *Ayyasamy case*, it can be concluded that consumer disputes can be resolved through Alternative Dispute Resolution mechanisms like arbitration due to the fact that Consumer Protection Act does not expressly bar such kind of dispute resolution mechanism.

International Outlook

With the advent of the Internet and e-commerce, consumer shopping has expanded its frontiers to cross-borders. The growth in transactional traffic increases the need for effective dispute resolution mechanisms. Litigation, especially in international transactions, may not be the most desirable choice for the parties due to foreign relations and state's biasness. Further, failure to instill confidence in a viable dispute resolution system may discourage consumers from participating in the market.

As of now, there is no specific law dealing with internet jurisdiction in international consumer transactions that provide enforcement power for a foreign court judgment. The conflict of laws and the absence of clear rules for international consumers to pursue e-commerce disputes through the Courts mean that the Court may not be the most effective way to protect consumer interests.

Commercially active Nations, such as the United States of America and the Member States of the European Union, use the ADR methods available very differently to resolve consumer disputes.

Europe's perspective on arbitrability of Consumer disputes

[7] *Fair Air Engineering Pvt Ltd & Anr v N K Modi* (1996) 6 SCC 385; *Rosedale Developers Pvt Ltd v Aghor Bhattacharya & Ors* (2015) 1 WBLR 385 (SC).
[8] *National Seed Corporation Ltd v M Madhusudhan Reddy & Anr* (2012) 2 SCC 506.

Contrary to the Indian position, European Union law has increased private dispute resolution mechanisms across diverse legal fields, including consumer disputes. One of the things that drives such a trend is the need for a speedy and effective mechanism to deal with the disputes arising out of e-commerce.

Being a pro-arbitration destination, European Union provides a favourable environment for developing private resolution mechanisms pertaining to consumer disputes. The same is reflected by the changes and variations brought to the European Union consumer protection law by the introduction of the Regulation on Consumer Online Dispute Resolution ["ODR Regulation"] and the Directive on Consumer Alternative Dispute Resolution ["ADR Directive"] in 2013. Such developments have earned the European Union the reputation of being an inventor in creating a comprehensive out-of-court dispute resolution system for Business Consumer conflicts. At the same time, the European Union also secures the delicate balance between the need for arbitration and the need for protecting the interest of the consumers. This balance has been facilitated by the existence of directives that check the terms of the arbitration agreement for fairness, equality and ensure general access to the Courts. This balance between the ability to arbitrate consumer disputes and safety valves to protect consumer interests makes the European Union the perfect model for consumer arbitration.

In its observation in *Oceano Grupo Editorial SA v Rocio Murciano Quintero*,[9] the European Union Court of Justice held that in cases where the consumer is not aware of the protection accorded to them, the Court can, on its own motion, check the arbitration agreement for fairness. This checking procedure is an edifice of the protectionist regime that the European Union provides for in consumer arbitration cases which is a specific need.

Such a specialized need has led to the fragmentation of consumer rights enforcement. This is not merely a European Union trend but an international one.

USA's perspective

As a general rule, the American law largely respects the party autonomy in arbitration when it comes to the choice of forum, even in consumer contracts. Although the same approach has been subjected to severe criticism, the Courts are inclined towards ruling in favour of such express choice.

Unlike the regulations in the European Union, the fora of consumer arbitration in the USA remain largely unregulated. Moreover, pre-dispute arbitration agreements are legal and binding. Consequently, the law stipulates mandatory access to Courts as a requirement in the arbitration

[9] *Oceano Grupo Editorial SA v Rocio Murciano Quintero* (C-240/98) 27 June 2000.

agreement. However, the American judiciary has taken a pro-capitalistic stance in the recent past that has adversely affected the consumer dispute resolution regime.

The European Union legislation prohibits pre-dispute binding arbitration agreements in consumer contracts, it considers forcing consumers to arbitration as unfair. At the same time, the American law imposes no such limitation.

Even though the USA and the European Union demonstrate different outlooks towards consumer arbitration, both the legal systems broadly allow for arbitration in consumer contracts.

France's perspective

The French Courts, unlike their counterparts, do not have a bright-line rule for deciding on the question of arbitrability of consumer disputes but make room for case-by-case analysis. The Supreme Court's decision in the *PwC Landwell case*[10] indicates the position that the court is completely side-stepping the Principle of *Kompetenz Kompetenz*, which has otherwise been referred to as an arbitration-friendly principle. The French Supreme Court in this case refuses to refer the parties to arbitration in an International Consumer Contract by observing that the arbitration agreement is not binding on the consumers. The Court also observed that these clauses must be considered unfair and cannot be opposed to consumers.

The road ahead for India

India has had a rigid approach concerning arbitration agreements in consumer contracts in the past, as observed in the *Emaar case*[11] wherein the dispute in question did not affect the rights of third parties or the public at large. So, the categorization of all consumer disputes as non-arbitrable did not express the true spirit of the Consumer Protection Act[13]. The court's holding in the case *Bhatia International v Bulk Trading*[12] that Indian Courts had exclusive jurisdiction to test the validity of an arbitral award made in India even when the law of the contract is of another country, went down as one of the darkest chapters in the textbook of arbitration. This ruling had earned India the infamous tag for being an unfriendly jurisdiction for arbitration.[13]

India's approach needs to be a little flexible to align itself with the global trend. It should not be averse to the idea of arbitration of consumer disputes majorly because of the many benefits of dispute resolution by way of Arbitration which include speedy resolution of disputes as compared to that in the overburdened Courts as the resolution of consumer disputes by way of

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[10] *PwC Landwell v LY* FR:CCASS:2020:C100556.

[11] *M/s Emaar MGF Land Ltd v Aftab Singh* (2019) 12 SCC 751. [13] Consumer Protection Act 1986.

[12] *Bhatia International v Bulk Trading S A* (2002) 4 SCC 105.

[13] Clyde & Co, 'India: Fifteen Years On From Bhatia: The Indian Government Looks At How To Institutionalise Arbitration In The Subcontinent' (*Mondaq,* August 4, 2017) <https://www.mondaq.com/india/arbitration-dispute- resolution/616610/fifteen-years-on-from-bhatia-the-indian-government-looks-at-how-to-institutionalise-arbitration- in-the-subcontinent> accessed 15 September 2022.

arbitration can offer a cheaper and quicker alternative to the Courts for disputes where a consumer is not able to resolve their complaint directly with the business from whom they made their purchase.

With respect to the higher threshold for appeal in an arbitral award than a consumer complaint, the parties can attack an arbitral award on certain grounds as mentioned under §34 of the Arbitration and Conciliation Act. Further, an appeal can also lie under §37, where the court refuses to set aside an arbitral award.

The Courts can give some leeway only in cases where higher stakes are involved, such as cases dealing with medical negligence, by interfering with the arbitral award and looking into the fairness of the agreement.

To achieve its goal of becoming a pro-arbitration nation, India can take inspiration from both the European Union and the United States of America since their policies would be applicable to India because of the existence of § 34 of the Arbitration and Conciliation Act which empowers the Courts to look into the fairness of the arbitration agreements as done by foreign Courts. Although the approach adopted by the United States of America is quite different from that of the European
Union, both have created provisions in the law for consumer arbitration. In the current situation, India lacks clarity in post dispute solutions because of the absence of a legislative framework facilitating the same. The nation needs to come up with legislation that can act as a double-edged sword by including the process of arbitration for the resolution of consumer disputes in addition to outlining the protections awarded to a consumer so that it can create a balance between the protectionist national consumer law and the mandatory nature of the arbitration. The release of the Consumer Protection (Mediation) Rules, 2020,[14] to provide for the introduction of Mediation to resolve consumer disputes, has acted as the light at the end of the tunnel for India. The nation can rely more on the Principle of *Kompetenz Kompetenz*, thereby limiting the judicial intervention in Arbitration disputes.

India can follow the European practice of the introduction of an online dispute resolution mechanism which is regulated by directives that aim to strike a balance between dispute resolution and consumer protection. This can help in facilitating consumer dispute resolution without disregarding consumer's rights.

Conclusion

[14] Ministry of Consumer Affairs, Food and Public Distribution, 'Mediation Rules' (Department of Consumer Affairs, July 15 2020) <https://consumeraffairs.nic.in/sites/default/files/Mediation%20Rules.pdf> accessed 11 July 2022.

In the presence of a valid arbitration agreement, the Court is mandated to refer the matter to arbitration.[15] The arbitral tribunal has an implied duty to follow the principles of natural justice to deliver an enforceable award.

The reasoning given by the Courts has reduced consumer arbitration to a nullity that does not hold water anymore. Although consumer Courts exist as special forums for the redressal of such complaints, of late, these forums have proved to be ineffective. Even though the statute provides a range of three to six months as an ideal period for the disposal of a complaint, this is far from reality. For instance, in various district consumer Courts, there are 18,517 pending cases and 3,549 cases at the State-level.[16]

To give reasonable assurances that such procedure will be conducted properly, it would be laudable to allow pre-dispute arbitration agreements only when the procedure is to be conducted under specific procedural rules on consumer disputes under the supervision of an arbitration institution.
This would provide for trust in the procedure, keep it manageable and help in overseeing it.

There has been growing acceptance of arbitration, at least in the International Commercial Arbitration arena, taking precedence over public policy limitations. Thus, India should adopt a

lenient approach while deciding the arbitrability of issues and refer to the European Union model of consumer arbitration as it inspires a pro-arbitration state.

[15] *M/S Magma Leasing & Fin Ltd & Anr v Potluri Madhavilata & Anr* (2009) 10 SCC 103.

[16] Mini Muringatheri, 'Delayed justice from consumer courts' (*The Hindu*, July 22 2019) <https://www.thehindu.com/news/national/kerala/delayed-justice-from-consumer-courts/article28662030.ece> accessed 12 July 2022.