NONARBITRABILITY

INTRODUCTION

(A) WHAT IS ARBITRABILITY

Some areas are reserved for adjudication only by courts. Those matters are not arbitrable. The question of arbitrability (or nonarbitrability) mainly is: what disputes can be resolved by arbitration (the private process) and what disputes are only for the courts to decide (the state process)?

In India (and other countries also) the term has been used to signify more. A 2-judge bench of the Supreme Court in *Booz Allen and Hamilton Inc.* v. *SBI Home Finance Limited and others*, (2011) 5 SCC 532 considered the following two also as part of arbitrability: whether the arbitration agreement covers the disputes, and whether the parties have referred the dispute to arbitration?[1] The court also considered these "three facets of arbitrability" as questions of jurisdiction of the arbitral tribunal.

(B) THE VALIDITY OF AN ARBITRATION AGREEMENT VERSUS ARBITRABILITY

Many authors and commentators, including Mr. G.B. Born, distinguish between the validity of an arbitration agreement and nonarbitrability. Validity refers to contractual rules. For example, is the arbitration agreement induced by undue influence? Arbitrability refers to rules prevailing in a coun-

[1] *See* N. Blackaby, et al. (eds.), *Redfern and Hunter on International Arbitration*, pg. 24, (5th ed. 2009) (Using the term 'arbitrable' to signify these is criticized: "In a confusing use of language, some writers (and indeed some judges, particularly in the US) will describe a dispute as being not 'arbitrable' when what they mean is that it falls outside the jurisdiction of the tribunal, because of the limited scope of the arbitration clause or for some other reason…(reference being made after the relevant time) … [T]his unfortunate misuse of the term 'arbitrable' is so deeply entrenched that it cannot be eradicated: all that can be done is to watch out for the particular sense in which the word is being used".) The underlying principle on which *Booz's* conception of arbitrability is based on (the much criticized) public policy ground and rights *in rem*. Its analysis is, for space limitations, outside the scope of this Yearbook

try, whether set out in statute or case laws, which make a dispute or a class of disputes non-arbitrable. Also, an arbitration agreement may be validly made (under contract) and yet maybe about a non-arbitrable matter.[2] Or, the same arbitration agreement may involve both types of matters.

Many authors similarly also caution that arbitration is a condition precedent for the tribunal to assume jurisdiction (a jurisdictional question) rather than a condition of validity of an arbitration agreement (a contractual requirement).[3]

But there is also a view in which arbitrability relates to the validity of the arbitration agreement. For example, in his frequently quoted paper, 'The law applicable to arbitrability,' Bernard Hanotiau notes, "[A]rbitrability is indeed a condition of validity of the arbitration agreement and, consequently, of the arbitrators' jurisdiction."[4]

(C) ARBITRABILITY UNDER THE NYC

Article II (1) of the Convention requires each contracting State to recognize an agreement in writing concerning a subject-matter capable of settlement by arbitration. Article V (2) (a) provides that recognition and enforcement of an arbitral award may also be refused if the competent authority finds that the subject-matter of the difference is not capable of settlement by arbitration under the law of that country.

Mr. Born notes, "together, these provisions permit the assertion of "nonarbitrability" defenses to the recognition and enforcement of otherwise valid

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2 *See*, Gary B. Born, *International Commercial Arbitration*, pg. 949 (2nd. ed.), Kluwer Law International.

3 L Mistelis and S Brekoulakis (eds), *Arbitrability*: *International & Comparative Perspectives*, 2009, Kluwer Law International. *See*, Chapter 2, Stavros L. Brekoulakis, On Arbitrability: Persisitng Misconceptions and New Areas of Concern.

4 Arbitration International, Volume 12, Issue 4, 1 December 1996, Pages 391–404. The example is cited by Brekoulakis too.

and binding international arbitration agreements and awards under the Convention."[5]

(D) ARBITRABILITY UNDER THE MODEL LAW AND ACA

Article 1 (5) provided that the Model Law shall not affect those laws of the State by which certain disputes may not be submitted to arbitration. The legislative history suggests that it was discussed to limit the number of nonarbitrable subject matter or at least list them. But this was deemed unnecessary, primarily because it was thought that in many, if not all, jurisdictions such agreements would be null and void and therefore not enforceable under the terms of Article 8.

Article 8 of the Model Law contains presumptive validity of the arbitration agreement and requires a court before which an action is brought in a matter, which is the subject matter of an arbitration agreement, to refer it to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.[6]

Section 8 ACA, which requires the court to refer the parties to a domestic arbitration, when enacted in 1996, did not have this latter language of "null and void, inoperative or incapable of being performed."

After the 2015 Amendments, Section 8 ACA requires the court to find *prima facie* that a valid arbitration agreement exists.

Section 45 ACA, which requires a court to refer the parties to an international arbitration, contained from the start the requirement that the court investigates if the agreement was null and void, inoperative or incapable of being performed. Arbitrability has always been an issue within this section.

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5 *See* Gary B. Born, *International Commercial Arbitration,* pg. 946 vol. 1 (2nd ed.), Kluwer Law International.

6 Howard M. Holtzmann & Joesph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary,* pg. 38, Kluwer Law International (2015).

Under Article 34 of the Model Law, which provides for "application for setting aside as exclusive recourse against arbitral awards" one of the grounds is that the subject matter of the dispute is not capable of settlement by arbitration [Article 34 (2) (b) (i)]. It will be useful to bear in mind that in that Article 34 (2) (b) (ii) is the ground of public policy.

Section 34 ACA has similar wording.

Section 11 ACA relates to the appointment of arbitrators. Before 2015 Amendments, though there is some authority to suggest that examination of the issue of "arbitrability" is not a matter in the scope of this section and instead is arbitrator's domain under Section 16 ACA[7], there are a host of other authorities which examined arbitrability (in its wider sense) under the provision.

Irrespective of the specific section of the ACA, whenever the issue of arbitrability comes up, *Booz Allen* is referred to as the leading authority.

(E) ARBITRABILITY IN 2019

Several cases in 2019 involved the question of arbitrability. Many, as set out later in this Chapter, involved an application for the appointment of an arbitrator under Section 11. Some of these cases also involved the question of the existence of an arbitration agreement.

We noted in the Chapter on the appointment of arbitrators that in *Vidya Drolia*, a 2-judge bench of R.F. Nariman and Vineet Saran JJ has referred to a larger bench of three judges the question if an inquiry that the arbitration agreement exists includes arbitrability. Another question if a tenancy dispute under the TPA is arbitrable has also been referred.

In *Rashid Raza*, a 3-judge bench speaking through Nariman J while considering an appeal from a matter under Section 11 referred the matter to arbitration. The question involved if, given the allegations of siphoning funds,

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7 *See*, e.g., *Booz Allen* at para 32 (SCC).

cheating, creating fake agreements (frequently referred under the rubric of 'fraud'), the matter was arbitrable. On the same facts the High Court considered that the matter was not arbitrable because the dispute was complex; the Supreme Court though they could be decided by the arbitrator. Both relied on *Ayyasamy's* principle.

The court in *Rashid* did not refer either to Section 11 (6A) or *Vidya Drolia* or *Mayavati Trading* (discussed in Chapter 2).

Mitr Guha is a judgment of a 3-judge bench of September 2019 which arose out of setting aside of an award because the matters decided were "excepted matters" under the agreement and hence not arbitrable. The Supreme Court affirmed the finding. One of the grounds of setting aside under Section 34 is that the "arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration …".

The 3-judge bench did not directly refer to the specific ground under Section 34 the decision was based on but it is clear from the judgment that the "excepted matter" was considered a part of arbitrability.