# Arbitrality Of Consumer Arbitration Agreements

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***'At all events, arbitration is more rational, just and humane than the resort to the sword'***

***-By Richard Cobden***

## ABSTRACT

Arbitration is a form of alternative dispute resolution, in which a disinterested third-party listen to both sides of a dispute and makes a - usually binding - decision. The arbitration process is used as an alternative to lengthy and binding lawsuits, on the other hand, Mediation, is another form of an alternative dispute the resolution, involves both parties in a discussion of an issue with a trained mediator who helps the parties come to an agreement. Most consumer arbitration agreements contain clauses that disallow arbitration on a class-wide basis. Commentators have viewed the ability to prevent consumers from obtaining relief on a class-wide basis as a principal reason for businesses to add arbitration provisions to their consumer contracts. In response to a court decision ruling arbitration agreement unconscionable, some businesses began adding "consumer-friendly" provisions to their arbitration clauses. This research paper deals with the Enforcement of an arbitration agreement under the UNCITRAL Model Law and the New York Convention and also talks about Need for Arbitration in Consumer Disputes Pertaining to the E-Commerce Regime deals with the purview of the Existing The interplay between the Indian Consumer Protectionist Law and Arbitration which will tell the overlook of the arbitrability of consumer arbitration agreements.

## INTRODUCTION

Arbitration clauses have engendered a significant amount of debate, much of which focuses on the proper response the law should make to "one-sided" clauses - i.e., those that limit the

procedures and remedies available to individuals in arbitration. But the clause may not be as one-sided as it seems. In fact, the drafter of this "one-sided" clause may have anticipated that it would yield, in at least some disputes, a more "even-handed" process in which punitive damages are available and arbitration hearings take place in a location convenient for the individual disputant. Conversely, drafters of apparently "even-handed" clauses may sometimes expect them to yield a "one-sided" disputing process.

Arbitration is a form of alternative dispute resolution, in which a disinterested third-party listen to both sides of a dispute and makes a - usually binding - decision. The arbitration process is used as an alternative to lengthy and binding lawsuits on the other hand Mediation, is an another form of alternative dispute resolution, involves both parties in a discussion of an issue with a trained mediator who helps the parties come to an agreement. Mediation is usually not binding. When there is meaningful consent to arbitrate and where fair procedures exist, arbitration can provide an effective means to resolve disputes. Such determination is primarily based on the public policy and the legislative mandate of each jurisdiction. In the context of arbitrability of consumer disputes, the Indian Supreme Court recently had the opportunity to demystify the uncertainties surrounding the same in Emaar MGF v. Aftab Singh (2018). Contrary to the anticipation of all, the Court, following a regressive trend, turned down the opportunity presented to fine-tune the interplay between the remedies available under the arbitration law and the national consumer legislation. Without a doubt, there is a need for a consumer protection regime to balance out the bargaining power between the consumers and traders, but the same should not be carried out in a manner that damages the essential fabric of arbitration.

Although the Supreme Court in its 2009 ruling opined that, in the presence of a valid arbitration agreement, the Court is mandated to refer the matter for arbitration, the binding force of the same has been diluted over the course of time. The primary cause of this is the advent of the 'arbitrability (or non-arbitrability) doctrine[i]'. The benefits-cum-marketing gimmicks of e-commerce, like one-day guaranteed delivery and 100% cash backs, have resulted in such an infiltration of the consumer market that they have completely changed the outlook of the Indian consumer towards e-commerce. Although it may sound unreal, today the same Indian consumer, who was once categorized as over-cautious and sceptical when it came to e-commerce, is the primary driving force behind the rise of mobile giants like Redmi and

OnePlus, thanks to their flash sales online. However, such a meteoric rise of the e-commerce giants in India has not been a fairy-tale. This phase, signifying their rise in the market, has been marred with instances where consumers have been duped by the giants with no effective remedy to resort to. Although consumer courts exist as special forums for the redressal of such complaints, of late, these forums have proved to be ineffective. This is the consequence of the mechanism being over-loaded and corruption laden and has become a cause of concern for consumers[ii]. Even though the statute provides for a range of three to six months as an ideal time period for the disposal of a complaint,[iii] this is far from being the reality. At ground zero, in 2014, consumers were waiting for two-three years for an order[iv]. Although the consumer protectionist legal regime provides for a balance of convenience tilted in favour of the consumer, the same has been unable to provide a cost-effective mechanism to the consumers for resolution of disputes.

**Objectives**

- To determine the nature of arbitration agreements.
- To know the need of arbitration in consumer disputes
- To deal with consumer protection and arbitration

**Scope**

Although it is difficult to define the arbitrability of a dispute in precise terms, it is a precondition for the enforcement of an arbitration agreement. Therefore, if an arbitration agreement seeks to provide an avenue for resolution of a dispute by a private redressal mechanism, the same should not fall within the narrow contours of proceedings reserved for adjudication by the national courts. In simpler terms, if the subject matter of a dispute qualifies to be a non-arbitrable subject, the courts will not be obligated to refer the parties to arbitration and such a ruling will be binding on the arbitral tribunals, an arbitral tribunal cannot be seen to oust the jurisdiction of a special court.

**Hypothesis**

Although it is difficult to define the arbitrability of a dispute in precise terms, it is a precondition for the enforcement of an arbitration agreement. The disputes are non-arbitrable only when the subject-matter falls exclusively within the Court's domain, and outlined certain instances such

as matrimonial disputes and guardianship matters which would be outside the purview of arbitration.

## CONCEPT AND ENFORCEMENT OF ARBITRATION AGREEMENT

***Definition: Arbitration agreement, arbitration clause and submission agreement***

In general, the arbitration agreement provides the basis for arbitration. It is defined as an agreement to submit present or future disputes to arbitration. This generic concept comprises two basic types:

a) A clause in a contract, by which the parties to a contract undertake to submit to arbitration the disputes that may arise in relation to that contract (arbitration clause); or

b) An agreement by which the parties to a dispute that has already arisen submit the dispute to arbitration (submission agreement).

The arbitration clause therefore refers to disputes not existing when the agreement is executed. Such disputes, it must be noted, might never arise. That is why the parties may define the subject matter of the arbitration by reference to the relationship out of which it derives. The submission agreement refers to conflicts that have already arisen. Hence, it can include an accurate description of the subject matters to be arbitrated. As we shall discuss later, some national laws require the execution of a submission agreement regardless of the existence of a previous arbitration clause. In such cases, one of the purposes of the submission agreement is to complement the generic reference to disputes by a detailed description of the issues to be resolved. Enforcement of an arbitration agreement By entering into an arbitration agreement, the parties commit to submit certain matters to the arbitrators' decision rather than have them resolved by law courts. We shall call these two main effects of the agreement "negative" and "positive", respectively.

***Negative enforcement: Lack of jurisdiction of courts***

An arbitration agreement precludes judges from resolving the conflicts that the parties have agreed to submit to arbitration. If one of the parties files a lawsuit in relation to those matters, the other may challenge the court's jurisdiction on the grounds that the jurisdiction of the courts

has been waived. The judge's lack of jurisdiction is not automatic, nor can it be declared ex officio. Instead, it must be raised by the defendant no later than when filing the answer to the complaint. That is so because arbitral jurisdiction is waivable, and the waiver would be presumed if the plaintiff filed a complaint and the defendant failed to challenge the court's jurisdiction. To sum up, once a conflict has arisen over any of the subjects included in the arbitration agreement, the courts will have no jurisdiction to resolve it unless both parties expressly or tacitly agree to waive the arbitration agreement.

***Positive enforcement: the "submission agreement"***

The arbitration agreement grants jurisdiction to arbitrators. By "jurisdiction" we mean the powers conferred on arbitrators to enable them to resolve the matters submitted to them by rendering a binding decision. The negative enforcement of the arbitration agreement is universally accepted and does not depend on the kind of agreement. Conversely, the positive enforcement is inextricably linked to the applicable law. That is so because some local arbitration laws still do not grant the arbitration clause an autonomous status. In fact, some traditional laws require that, even when there is a previous arbitration clause, the parties execute a new agreement called "submission agreement", which must contain the names of the arbitrators and clearly identify the matters submitted to them.

When a submission agreement is required, the arbitration clause becomes insufficient. Once there are concrete issues in dispute, the parties must enter into an agreement, whether or not they have previously signed an arbitration clause. Under those laws, the arbitration clause at best compels the parties to sign the submission agreement. However, since this obligation is not always complied with voluntarily, such laws provide for a court's intervention to enforce the arbitration clause. The judge must supplement the content of the submission agreement, and his judgment – which replaces the will of the party who has refused to sign it – is treated as a submission agreement. Lack of cooperation by one of the parties in the execution of the submission agreement or insuperable differences between the parties as to what should go into it are settled by a court.

***Enforcement of an arbitration agreement under the UNCITRAL Model Law and the New York Convention***

The Model Law defines the arbitration agreement as: "An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not" . According to the New York Convention, "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractua1 or not, concerning a subject matter capable of settlement by arbitration" . article 7.1 article II.1

It is the law governing the judicial proceeding that will determine whether an appeal can be made to the court's decision to admit the defendant's request and refer the case to arbitration, or to retain its jurisdiction on the grounds that the arbitration agreement is null and void, inoperative or incapable of being performed. The Model Law (article 8.2) provides that while this question is being addressed in court, arbitral proceedings may nevertheless be commenced or continued. What is more, the law even empowers the arbitral tribunal to render an award. This rule is meant to protect arbitration from dilatory tactics, thus preventing the mere filing of a legal action from postponing the commencement of the arbitration process while the issue is pending before a court.

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. article 8. According to Model Law article 16 the respondent may raise the defence in the arbitral tribunal that the tribunal has no jurisdiction. This may happen after the court has found that the arbitration agreement was not "null and void, inoperative or incapable of being performed" pursuant to Model Law article 8.2. It more often arises because the arbitration has commenced prior to any action in court. The issue may even arise during the course of the arbitration if one of the parties alleges that the arbitral tribunal is exceeding the scope of its authority. The grounds for the plea of lack of jurisdiction may be similar to those in article 8.2, but they may also be based on the argument that the claim put forth by the claimant is not comprehended by the arbitration agreement. The defence must be raised not later than the submission of the statement of defence or as soon as the matter alleged to be beyond the scope of the tribunal's authority is raised during the arbitral proceedings. The court always has the last word, however. If no appeal to the court from a

decision of the arbitral tribunal recognizing its own jurisdiction is permissible during the course of the arbitration, the courts of the place of arbitration would have the authority to set aside the eventual award.

## NEED FOR ARBITRATION IN CONSUMER DISPUTES PERTAINING TO THE E-COMMERCE REGIME

The benefits-cum-marketing gimmicks of e-commerce, like one-day guaranteed delivery and 100% cash backs, have resulted in such an infiltration of the consumer market that they have completely changed the outlook of the Indian consumer towards e-commerce. Although it may sound unreal, today the same Indian consumer, who was once categorized as over-cautious and sceptical when it came to e-commerce, is the primary driving force behind the rise of mobile giants like Redmi and OnePlus, thanks to their flash sales online.

In the wake of the meteoric rise in e-commerce, it is essential that India begins the process of institutionalization of online dispute resolution in time[v]. The transition to online dispute resolution is necessary to avoid a situation wherein the consumers are left without any real remedy, which is worth its weight in gold, even if it is a leap of faith[vi]. This is because if India starts to facilitate online arbitration that consumers can resort to by virtue of a binding arbitration agreement, the same, unlike the Online Consumer Mediation Centre, will not be toothless to force the vendors to come for dispute resolution. It is interesting to note that the Indian courts have recognised the validity and enforceability of individual online arbitration agreements, even the ones concluded over e-mail, thereby laying down the foundation for online arbitration. In simple terms, online arbitration is drawn out on similar schematics as traditional arbitration, the only difference lies in the manner the two are conducted. Unlike traditional arbitration which is costly, online arbitration proceedings happen online, saving time and cost. For instance, under online arbitration, evidence can be uploaded, and the parties can present their cases in a chatroom, saving the millions of dollars spent on hotel rooms[vii]. Such a model provides for time and cost efficiency, the quintessential need in consumer disputes. Due to the advantages that it has to offer, there exists a pressing need for an online dispute resolution mechanism that can facilitate consumer arbitration without requiring consumers to pen down every procedure for arbitration.

## THE EXISTING INTERPLAY BETWEEN THE INDIAN CONSUMER PROTECTIONIST LAW AND ARBITRATION

As discussed above, the determination as to the capability of the dispute to be resolved through arbitration hinges on two factors, first, the nature of the remedy sought in the dispute i.e. whether the remedy sought is in rem or in personem and second, whether the remedy sought can exclusively be granted by a special court or tribunal or by an arbitral tribunal i.e. a private forum.[viii] These two factors are the primary determinants that influence considerations of arbitrability and the same has been reaffirmed in the recent holding of the Supreme Court in ***A. Ayyasamy v. A. Paramasivam***. In the evaluation of the arbitrability of consumer disputes, the first factor, namely, the nature of the remedy sought, does not seem to raise eyebrows. Accordingly, the arbitrator has to merely provide remedies against the parties to the dispute itself i.e. in personam and not against the world at large i.e. in rem[ix]. However, evaluation of the second factor has been a different ball game altogether. The statutory creation of consumer forums as a separate mechanism dedicated for consumer dispute redressal, presents a major blockade for arbitration in consumer matters as the merchant is left at the misery of the consumer for a reference to arbitration[x]. Therefore, in this part, we analyse the rationale behind labeling consumer disputes as inarbitrable and see if the same still holds relevance.

***How Did Consumer Disputes come to be Inarbitrable***

The Troika of Three Supreme Court Rulings in the Year 1996, where it all started: ***Fair Air Engineers Pvt. Ltd. and Anr. v. N.K. Modi.*** The trend of giving precedence to the 'welfare legislation' and allowing the consumer to resort to the consumer forum despite the existence of a valid arbitration agreement dates back to 1996[xi]. In the pre-1996 period, the questions pertaining to the mandatory reference of consumers to arbitration were settled for the first time in ***Fair Air Engineers Pvt. Ltd. and Anr. v. N.K. Modi***[xii].

The Supreme Court, taking a pro-consumer stand, endorsed the idea of giving precedence to the beneficial consumer legislation over the mandatory provisions of the Arbitration Act, 1940. The rationale for the same was based on the very reason for the genesis of a separate dispute resolution forum for consumers i.e. to relieve consumers of cumbersome arbitration and civil court proceedings. As a consequence, although the courts were obliged to mandatorily refer the parties to arbitration in the presence of a valid arbitration agreement, this legislative mandate

was diluted. In doing so, the court endowed the consumers with a choice to either proceed with arbitration or take the dispute before the consumer forum. The court facilitated the same on the grounds of a twofold reasoning, first, the legislature intentionally provided such remedy, based on the fact that the consumer legislation came at a later date in time i.e. it succeeded the Arbitration Act, 1940, and second, the remedy provided under the COPRA, is an additional remedy available to the consumers.

Under Indian law, the later law supersedes the earlier, on the ground that the legislators would have given due heed to all existing laws at the time of formulation of the later law and would have intended to give it an overriding effect in case of an overlap with a prior law. Further, the fact that the COPRA is a special law (lex specialis) gives it precedence as the Arbitration Act merely deals with arbitration proceedings in general (lex generalis).

Acceding to the fact that consumer fora qualify as 'judicial authority' under the Arbitration Act, 1940, the Court proceeded to analyse the extent of the embargo placed upon the intervention of the courts in this regard. For this, the Court relied upon the wording of Section 3 of the COPRA, which provides that the act should be in addition to and not in derogation of the provisions of any other law for the time being in force[xiii]. By a plain reading of the section, the Court observed that the remedies provided in the COPRA are additional remedies and the Arbitration Act, 1940 cannot operate to curtail the same[xiv]. To substantiate the same, the court looked into the implied intention of the legislators. The court noted that the Act was enacted to provide for better protection of the interests of consumers and for the aforesaid purpose, it established consumer councils and other authorities for the settlement of consumer disputes.

Even if there exists an arbitration clause in an agreement and a complaint is made by the consumer, in relation to a certain efficiency of service, then the existence of an arbitration clause will not be a bar to the entertainment of the complaint by the Redressal Agency, constituted under the Consumer Protection Act, since the remedy provided under the Act is in addition to the provisions of any other law for the time being in force. Deploying the beneficial rule of interpretation: ***Thirumugugan Cooperative Agricultural Credit Society v. M. Lalitha*** Out of the vast variety of legislations that exist in a legal regime, few are enacted with the object of promoting general welfare and curbing a specific kind of wrong.

In the Indian context, the COPRA qualifies to be one such beneficial legislation enacted to curb the abuse that consumers are subjected to in the dispute resolution process[xv]. Regarding the contours of interpreting the same, the unanimous stand has been that it should be subjected to the broadest construction possible[xvi]. In light of this, the staunch deities of consumer legislations often see arbitration in consumer fora as an unacceptable proposition. Purposive reading of the statute evidently hints that unlike other legislations that create dispute resolution mechanisms between level players, this legislation establishes a level-playing field between unequal players i.e. consumers and large corporations[xvii].

The single judge bench in M. Lalitha, reiterating the same, held that the schematics of the COPRA reflect the intention of the drafters to relieve the consumers of being played unequally in cumbersome arbitration proceedings or civil actions before ordinary courts Consequently, this decision deprived Section 8 of the Arbitration Act of its fullest effect and recognized the supplanting effect of consumer legislation over the arbitration regime. This has been one of the biggest factors because of which consumer disputes have been categorized as inarbitrable. This line of reasoning has found recognition by the Supreme Court in a decision as late as 2017, i.e. ***National Insurance Co. Ltd. v. Hindustan Safety Glass Works Ltd***., wherein the Court observed: "In a dispute concerning a consumer, it is necessary for the courts to take a pragmatic view of the rights of the consumer principally since it is the consumer who is placed at a disadvantage vis-a-vis the supplier of services or goods. It is to overcome this disadvantage that a beneficent legislation in the form of the Consumer Protection Act, 1986 was enacted by Parliament.

***Parties cannot opt out of the exclusive jurisdiction of the consumer forum***

***A.Ayyasamy v. A. Paramasivam and Ors.*** The famous judgment of the Supreme Court in the A. Ayyasamy case laid down a definitive list of inarbitrable disputes, which includes 'consumer disputes'[xviii]. In the face of glaring dichotomy, the Court arrived at this conclusion by relying on the decisions in ***National Seeds Corporation Ltd. v. M. Madhusudhan Reddy*** ["National Seeds Corporation"] and Skypak Couriers in the years 2012 and 2013, respectively. Placing reliance on both the judgments,[xix]it was expected that the Supreme Court would leave an avenue for the consumer to opt for arbitration, if they wished to. Instead, the Court arrived at a completely contrasting observation.

In **A. Ayyasamy**, the Court opined that since the jurisdiction of the ordinary civil court is excluded by the conferment of exclusive jurisdiction on a consumer court, matters pertaining to consumer disputes become inarbitrable as a matter of public policy as well.[xx] The Court noted that parties are prohibited from contracting out of the legislative mandate, when it is a matter governed by a welfare legislation.[xxi] Thus, the decision in the A. Ayyasamy case put the final nail in the coffin and made consumer dispute completely inarbitrable.

The attribute that made the 2012 ruling in the National Seeds Corporation case stand out in consumer arbitration jurisprudence, was that it provided the best possible way to balance the consumer's interest. It provided a stand that was the perfect blend of flexibility and rigidness to the consumer, on account of providing the consumer with a choice as to which forum it wants the dispute to be adjudicated in[xxii]. Even though the Court observed that Section 8 of the Arbitration Act could not operate to bar the consumer's choice of resorting to a specialized tribunal, they provided a check against the same: the safety valve put in place was such that, once the consumer makes such a choice, the same cannot be undone and there can be no subsequent reference to arbitration.[xxiii] Such reasoning even found resonance in the matters deciding the arbitrability of other subject matters like labour disputes, which is governed by a similar beneficial legislation.

## TERMINATION OF THE ARBITRATION AGREEMENT

### *Termination of the arbitration agreement by mutual consent*

Just as arbitration arises out of an agreement, the parties may terminate it by mutual consent. This new agreement can be express or tacit. It is express when the new agreement between the parties is executed in accordance with the provisions previously agreed upon. Implied waiver operates when one of the parties files a lawsuit about matters contained in the arbitration agreement, and the other does not timely object to the court's lack of jurisdiction.

### *Other possible grounds for termination*

- ***Grounds related to the parties***

The death of one of the parties does not, as a rule, cause the termination of the arbitration agreement. Under legal systems that adopt the principle of universal succession, the mortis causae successor to a person inherits all the rights and duties of the deceased, except those that could have only been exercised or performed personally (intuitu personae). However, this is a question to be solved under the applicable law: Prior to the year 2000 the Paraguayan Procedural Code (article 793) provided that if one of the parties died before the rendering of the award, the arbitration proceeding would be terminated and the parties or their successors could go to court.

With respect to legal entities, other examples of universal succession could be mergers and acquisitions, liquidation or general bankruptcy. In general, mergers, acquisitions or liquidations will bear no impact to the arbitration agreement. The universal successor will be bound by the arbitration agreement. Bankruptcy proceedings are issues resolved by domestic legislations and generally they cannot be displaced by private agreements. The legislation of each country will determine the impact of bankruptcy on the arbitration agreement. In Argentina, for example, the Bankruptcy Law provides that arbitration proceedings may continue even if one of the parties is declared in bankruptcy where the arbitration tribunal has already been appointed.

- ***Grounds related to the arbitrator***

The death of the arbitrator is not a ground for termination of the arbitration agreement, either. Again, although we should analyze the provisions of the applicable law, the common solution is to replace the arbitrator.

Thus Section 27 provides the way to fill the vacancy. In that case, the parties are free to agree whether and, if so, how the vacancy is to be filled. If there is no such agreement, the provisions of sections 16 (procedure for appointment of arbitrators) and 18 (failure of appointment procedure) apply in relation to the filling of the vacancy as in relation to an original appointment. • The Brazilian law provides that the submission agreement is extinguished when one of the arbitrators dies or he cannot render his vote, provided that the parties have expressly declared that they will not accept substitutes (article 12).

## CONCLUSION

Since its inception, the Arbitration Act has been subjected to a variety of head-turning interpretations by the judiciary; whether be it the holding in Bhatia International v. Bulk Trading 119 that earned India the infamous tag of being an unfriendly jurisdiction for arbitration, or the recent observation in IMAX v. E-City, which was a reminder of the spill overs from the prospective over-ruling in the BALCO case. The recent judgments on arbitrability of consumer disputes also reflect a similar trend. The treatment of consumer matters as being completely outside the purview of arbitration must go down as one of the darkest chapters in the textbook of arbitration. Although the arbitrability of consumer disputes presents a very complex interplay between the protectionist national consumer law and the mandatory nature of arbitration, one still expects the courts to balance the interests of both.

The need for this has become even more apparent in the wake of the exponential increase in consumer disputes and the limited toothless mechanisms that are akin to civil courts and unable to provide remedies the way they were intended to. In such cases, a speedier form of adjudication like arbitration may possibly be of greater utility to all those involved. The Indian courts, and most conspicuously, the Supreme Court in Aftab Singh, 122 had the golden opportunity to analyse the global trend and decide if there should be a mandatory reference to arbitration. If the Court had grabbed this opportunity with both hands, the fate of consumer arbitration might have been entirely different.

The Court had an opportunity to analyse and allow for mandatory arbitration in cases where there existed a post-dispute arbitration agreement. By not acting on the same and taking a tight-lipped approach, the Supreme Court has made it almost impossible for any kind of ODR mechanism to work successfully in India. Therefore, the hypothesis proved to be as justiciable as the arbitrability of a dispute in precise terms, is a precondition for the enforcement of an arbitration agreement. All said and done, arbitration is based on parties' consent and if the parties provide for arbitration, then the courts should endeavour to further it. Now, the legislature remains the last ray of hope and has the duty to reform the Indian consumer dispute resolution mechanism and align it with global practices.

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