SECURITIES ARBITRATION IN THE INDIAN SCENARIO

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ABSTRACT

Alternative dispute redressal (ADR) mechanism is envisaged as an ultimate resort with changing times. It is considered as the new dynamics for resolving lawsuits. Securities arbitration is an ADR practice which peculiarly settles dispute between trading participants and their clients on exchange. "*Securities and Exchange Board of India"* is the authoritative body that formulates by-laws for any type of stock exchange. SEBI itself expounds arbitration as the alternative settlement procedure for settling exchange disputes. This paper majorly focuses on intensifying the provisions of SEBI act that entails arbitration as an ADR practice and also exemplifies the functioning of "*Market Intermediaries Regulation and Supervision Department"* for the same. This paper also encompasses the issue of arbitrability of disputes and various facets of Securities arbitration and investor dispute redressal.

Keywords- Securities Arbitration, Stock Exchanges, Investor Dispute.

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INTRODUCTION

Arbitration is a dispute settlement procedure and is an alternative to a conventional court case. Rather than have a case heard by a judge and a jury, the parties to the arbitration proceedings have settled their issue by neutral people who are competent of the areas of dispute. Arbitration has been noticed as an impactful substitute to the traditional and inefficient legal procedure of the courts. Arbitration has been observed as a speedier mechanism that accelerates the resolving of lawsuits between the parties. India's arbitration law has been laid down in *The Arbitration and Conciliation Act 1966,* as amended in 2019, which largely relies upon the UNICITRAL Model Law. *Securities Arbitration* can be described as a form of Alternate Dispute Resolution Mechanism, where disputes between trading participants and their clients are resolved in respect of exchanges.[i] In addition, the procedure for the conduct of such arbitration is laid down in the by-laws of the Exchange itself. **Securities and Exchange Board of India (SEBI)** it performs public functions, it deals with various matters which are related to securities that have an effect on the public and the economic development. The "Securities and Exchange Board of India (SEBI) describes arbitration as an alternative conflict settlement process offered by the stock exchange to settle conflicts between trading participants and their clients in respect of exchanges". The SEBI Act[ii] provides and controls special rights. Courts in India has ruled that where there is a law regulating special rights and obligation, and the adjudication is reserved solely for a single authority (SEBI in this case), it is contrary to public policy to provide for arbitration. In view of this, there appears to be a limit on the settlement of securities cases. However, SEBI itself has enacted some rules that promote arbitration in conflicts of this kind. A circular setting out protocols and criteria for arbitration in the redress of investor claims has been written. In addition, SEBI by-laws also allow for arbitration to settle conflicts arising out of trade between members. Related clauses are also used in the by-laws of the National Stock Exchange. It then seems obvious that both company law in India and securities law in India reach the same conclusion – that, as long as the right involved are in personem, they shall be subjected to arbitration if the arrangement so requires.

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SECURITIES LAW

Parallels can be drawn between the activities of the specialised tribunals, they constitute and the "**Securities and Exchange Board of India Act, 1992"** ("the SEBI Act") for a clearer understanding of the above statutes. *"The latter's **Preamble**[iii] provides for the establishment of the Securities and Exchange Board of India ('SEBI') to protect the interests of investors in securities and encourage their growth, as well as to regulate business on stock exchanges and the securities market".*

Under "**Chapter IV of the SEBI Act"**, SEBI is required to bring out illegal and unethical practises, which include stock trading, by retaining supervision, conducting auditing functions, and controlling major purchase of shares or takeover of firms. The prosecution and exposure of such malpractices fosters public confidence in investors, which benefits economies and economic growth as a whole. According to the "*SEBI Act"*, "SEBI" conducts required public functions. SEBI deals with specialised technological aspects of securities transactions that affect a broader segment of the public and economic growth.

Furthermore, ***Section 15U*** of the SEBI Act exclusively grants the "**Securities Appellate Tribunal** ('SAT') extensive", special powers. The SAT has the same privileges as civil courts (including the ability to appeal), however according to *"Section 15Y of the SEBI Act, the latter has no jurisdiction to hear any action or action in any subject".* Arbitral tribunals, according to HDFC Bank, are just replacements for civil courts; as a result, no unique powers or authority are granted to them.

"The SEBI Act", without a doubt, is a separate piece of legislation that grants and controls unique advantages and obligations that are exceptions to the norm of rights in-personam. Given the preceding decisions (particularly Kingfisher Airlines), there is an implied prohibition on securities law arbitration since unique powers are given or controlled by specialised tribunals such as the SAT, which civil courts disregard.

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BACKGROUND

A current discussion of arbitration is whether such *'public law'* problems concerning *'public interest'* can be addressed by '*alternative, private decision-making mechanisms*.' Such questions are answered by examining a dispute's **arbitrability**, or its ability to be the subject matter of arbitration. *"This concept of arbitrability encapsulates three aspects:*

1. *Whether the disputes, by virtue of their nature, could be resolved by a private arbitral forum or whether they are exclusively reserved for public fora;*
2. *Whether the disputes are covered by the arbitration agreement between parties; and*
3. *Whether the parties have referred the disputes to arbitration"*

There is no clarity if some issues are arbitrable or not under "*section 81(1)(a) of the English Arbitration Act, 1996"*. Instead, arbitrability is determined by the courts based on the facts and circumstances of each case. In "***Fulham Football Club (1987) Ltd v. Rischard"***[iv]***,*** *"a case is not arbitrable if the dispute in question engages 'third party rights' or matters of public interest which are incapable of being determined within confines of private contractual processes."*

At a nutshell, all contractual and non-contractual trade disputes are arbitrable. Disputes involving fraud, intellectual property rights, employment law, consumer rights, and some antitrust law matters are included. Arbitration is not permitted in insolvency cases unless they are governed by a regulatory regime. Similarly, criminal and family law matters are not arbitrable.

In India, the Arbitration & Conciliation (Amendment) Act, 2015, makes no mention of categorising non-arbitrable disputes. Instead, *Section 7* implies that any conflict that arises as a result of any kind of legal arrangement is arbitrable, regardless of its existence.

"However, under *Section 34(2)(b) of the Arbitration and Conciliation Act, 1996*, Indian courts are empowered to set aside arbitral awards or refuse enforcement in case *the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force."* [v]

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This unclear statutory limit on arbitrability places the ball in the hands of the courts. Certain limits on the freedom of parties to arbitrate have been imposed via key judgements, resulting in conceptual crystallisation of arbitrability to some extent.

ROLE OF ARBITRATION IN SECURITIES MARKET

"Securities Arbitration" was adopted by "SEBI" as part of its risk control scheme. It is also included in the bylaws of the major stock exchanges.[vi] While much of the mechanism is identical to that of the USA, some procedure are distinct within India. To begin, in terms of litigation, there are two sections under which a complaint may be filed against the broker: first, in situations of non-payment, and second, in situations of misconduct. In the event of a delay, the matter may be sent to the SEBI Department of the Secondary Sector, which will subsequently refer the case. The existence of the contract note or purchase of sale note is required for the arbitration procedure to begin. If there is a dispute between the parties, the reverse of such a letter gives the option for arbitration.[vii]

In addition to arbitration and judicial processes, the member may file a complaint with the Stock Exchange or the "*Office of Investor Assistance and Education"* (**OIAE**).[viii] "The OIAE is part of the *Market Intermediaries Regulation and Supervision Department* (**MIRSD**)". He is in charge of receiving complaints about investor concerns. He handles fundamental concerns such as payment delays, refund orders, and so on.[ix] Broker-related issues, such as non-payment and misbehaviour, are particularly addressed by stock exchanges. Thus, if a member wishes to seek arbitration, he must receive a form from the appropriate Stock Exchange and file a lawsuit. There are two basic measures that have been introduced in India for the appointment of arbitrators. To continue, each exchange has its own panel of arbitrators. As a result, the investor has a clear choice from this panel. If the arbitrators are chosen by the negotiator, the names are submitted to the member for approval. When there is a misunderstanding or disagreement, the appropriate stock exchange intervenes. It then chooses the arbitrators needed to solve the issue. The SEBI bye-laws provide for a three-month timeframe from the date of entry upon reference for the award to be granted and a judgement to be made. However, in some circumstances, an extra three months have been allowed for the medal to be conferred. As a result, the maximum time frame within which an award must be granted is six months from the date of reference.

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ENUNCIATION OF THE COURTS

In the case of ***"Booz Allen and Hamilton Inc. v. SBI Home Finance Limited & Others"***[x], the Apex Court, "while dealing with the issue of arbitrability of disputes, held that arbitral tribunals are *'private fori'* chosen by the parties, in place of courts or tribunals, the *'public fori'* as per the laws of the country. All disputes relating to *'right in-personam'* are arbitrable whereas, all disputes relating to *'right in-rem'* are unsuited for private arbitration and are to be adjudicated by courts as well as public tribunals".

"Booz Allen[xi] *decision closely followed English law standards and addressed relevant arbitrability concerns; nonetheless, securities law as a viable subject-matter of arbitration remains largely unexplored. Thus, in order to determine whether securities legislation is arbitrable or not, it is necessary to analyse specific judgements that expand on the rationale put out in Booz Allen*".

In ***"Kingfisher Airlines Limited v. Prithvi Malhotra Instructor"***[xii], *"Arbitrability was further limited by the Bombay High Court. It held that a disagreement over any subject-matter is arbitrable if a new statutory enactment imposes or regulates special rights, responsibilities, and gives special powers (including jurisdiction) to subject-matter dominated tribunals. Civil courts are, by definition, free from the jurisdiction of certain specialised tribunals*".

In "***HDFC Bank v. Satpal Singh Bakshi"***[xiii], *"The Delhi High Court examined the legislative intent behind the establishment of several specialised tribunals, as well as the nature of the rights and responsibilities bestowed upon them". It was determined that the "Rent Control Act" and "the Industrial Disputes Act" both provide specific rights and grant unique powers to industrial adjudicators or tribunals, "because these powers are not available to civil courts, issues arising under these statutes cannot be resolved by arbitral tribunals, which are effectively replacements for civil courts".*

In ***"Aircel Digilink India Ltd. V. Union of India"***[xiv], the **Telecom Disputes Settlement and Appellate Tribunal ('TDSAT')** held that *"the Telecom Regulatory Authority of India Act, 1997 was a special legislation aiming to protect the interests of the service providers and the consumers of the telecom sector. Proper functioning of various stakeholders in this sector, as well as speedy adjudication by a specialised tribunal having requisite knowledge and*

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*expertise of the sector, such as the **TDSAT**, was vital for its development. Emphasizing on this, exclusive jurisdiction was accorded to the **TDSAT**; civil courts and arbitrators had no authority to interfere with this jurisdiction."*

ANALYSING ARBITRATION AND SECURITIES DISPUTE

The answer to the question of whether securities law issues should be arbitrated is not simple. When parties bound by a pre-existing, private contractual arrangement disagree, the issue becomes contentious. A shareholders agreement, a joint venture, or a joint partnership arrangement between shareholders or stock owners of either firm might be used to create the partnership. If the agreement includes a provision requiring all matters arising from or related to the conflict to be addressed by arbitration, it may be hard to define the arbitral tribunal's scope or jurisdiction in resolving such a subject-matter.

In accordance to these arrangements, there are substantive regulations permitting arbitration, which were created under *"SEBI* press circular in 2013" and give out advice and extensive procedures on the arbitration procedure for investor grievance redressal. Arbitration, according to the circular, is the ideal avenue for expediting investor dispute resolution processes at stock exchanges and boosting overall efficacy in ensuring investor protection.

Furthermore, the SEBI's by-laws provide for arbitration as a means of resolving claims, disputes, or conflicts, among trading members. "***The National Stock Exchange (NSE)***[xv] by-laws also have similar provisions".

"Without a doubt, the circulars and bylaws provide for investor-broker arbitration as well as arbitration between trading members on a stock market. These rules indirectly establish the tendency that securities issues can be arbitrated on the spot for effective restitution and protection of investors. This contradicts the conventional notion drawn from a study of case rules on arbitrability".

Nevertheless, it should be emphasised that in the mentioned regimes, securities concerns are classed as arbitrable merely because they are rights in-personam, or rights that affect exclusively private people, i.e. specific investors, brokers, or trading members in stock

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exchanges. In contrast, a review of the abovementioned case laws reveals that the rights pertaining to securities are exceptions to the rights in-personam.

"In support of this contention, in cases of oppression and mismanagement", it has been held that *"any matter relating to the rights of or benefits to the shareholders in their capacity as members of the company is not required to be referred to arbitration, even if the parties have an agreement to submit all disputes to such forums."*[xvi] A petition under "*Sections 241-244* of the Companies Act, 2013 is a proceeding *in-rem*. It is an action by shareholders for the larger benefit of the company. Similarly, a securities matter will not be arbitrable if the dispute potentially affects public interest or the economy on the whole".

CONCLUSION

In the case of securities, there is no obvious distinction between what constitutes a "*right in-rem and a right in-personam"*.

This study has acknowledged the nature of securities law rights, namely whether they may be addressed by a private arbitral tribunal or if they are solely reserved for adjudication in public fora (courts). The research illustrates the ambiguous stance of law on the arbitrability of securities problems by analysing the interaction between court rulings on arbitrability and the securities regime in India.

A new analysis undertaken in the United States revealed a number of flaws and gaps in the structure of mandatory arbitration of securities disputes.[xvii] Over the last decade, the rate of return for investors has dropped significantly, from 59 percent in 1999 to 44 percent in 2004.[xviii] Furthermore, compensation ratios have been substantially decreased, and it was found that the bigger the brokerage company, the lesser the amount recovered through the arbitration procedure Regardless of the critiques, it is impossible to deny that securities arbitration has shown to be a fair and efficient means of settling a huge number of client disputes, and has served tens of thousands of participants over the years. According to a recent research, cases filed in securities arbitration are resolved around 40% faster than cases filed in court.[xix] Furthermore, regardless of what is said and done, this platform is far more accessible than courtroom lawsuit processes.

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As a result, the present system built is in the best interests of investors. Investors can seek minor claims under pre-dispute arbitration agreements. It reduces the expenses for investors seeking redress of concerns. It entails highly skilled and competent arbitrators who are well-versed in the financial sector. As a result, impartiality and justice are provided. As a result, such forms of arbitration within India's numerous stock exchanges must be established more quickly, with more laws and standards, to allow for the development of an investor-friendly market.

ENDNOTES

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[iv] "(2010) EWHC 3111 (Ch)"

[v] Section 34(2)(b), Arbitration and Conciliation Act, 1996.

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[xi] "*ibid*"

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