

# LEGALFOXES LAW TIMES

## Critical Analysis of *Booz Allen Hamilton v. SBI Home Finance*

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### **I. Introduction**

“Arbitrability” basically connotes whether the dispute at hand is capable of being resolved by the arbitrator, be in reference to the ambit of arbitration clause or agreement; or in essence per se.

The Arbitration and Conciliation Act, 1996 does not explicitly enumerate scenarios underlining the issue of arbitrability. Nevertheless, some provisions are of importance in this regard. Firstly, Section 2(3) which states that that Part I will not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration, i.e. excluding subjects which are barred by statutes from the scope of arbitration explicitly. Secondly, Section 34(2)(b)(i) and Section 48(2)(a) which provides for setting aside and refusal of enforcement of an award respectively on the ground of in-arbitrability of matter.

And, since the legislation skipped on providing an insight on the matters which are incapable of arbitration, the Supreme Court stepped in and for the first time discussed the “test of arbitrability” in the ***Booz Allen Hamilton v. SBI Home Finance***

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<sup>2</sup> (Hereinafter referred as Booz Allen).

## II. Analysis of Booz Allen case

The key findings in the Booz Allen with respect to arbitrability can be listed down as follows:

1. The Hon'ble Supreme Court ruled that one of the areas which has to be determined by the Courts is 'whether the matter before it is arbitrable or not' which came to be known as "test of arbitrability". It was stated, "*... if the defendants file an application under section 8 stating that the parties should be referred to arbitration, the court (judicial authority) will have to decide (i) whether there is an arbitration agreement among the parties; (ii) whether all parties to the suit are parties to the arbitration agreement; (iii) whether the disputes which are the subject matter of the suit fall within the scope of arbitration agreement; (iv) whether the defendant had applied under section 8 of the Act before submitting his first statement on the substance of the dispute; and (v) whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration.*" Determination of point (iii) is that of "Contractual arbitrability" and determination of point (v) is that of "Substantive arbitrability". The latter is generally referred to as the test of arbitrability.
2. It was observed that issue of arbitrability is not to be decided by the Courts when an application is made for appointment of arbitrator under section 11 of the Arbitration and Conciliation Act, 1996 but by the arbitral tribunal later on.
3. The Supreme Court listed three facets of arbitrability, namely:
  - a) whether the disputes are capable of adjudication and settlement by arbitration? [Substantive arbitrability]
  - b) Whether the disputes are covered by the arbitration agreement? [Contractual Arbitrability]
  - c) Whether the parties have referred the disputes to arbitration? That is the disputes which parties have referred to arbitration
4. Every dispute, civil or commercial which can be resolved by the Court can be subject matter of arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly [S. 2(3) of the 1996 ACT] or by necessary implication.

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<sup>2</sup>(2011) 5 SCC 532.

5. The Supreme Court in para 36 stated, “*The well-recognized examples of non-arbitrable disputes are: -*
- (i) *disputes relating to rights and liabilities which give rise to or arise out of criminal offences;*
  - (ii) *matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;*
  - (iii) *guardianship matters;*
  - (iv) *insolvency and winding up matters;*
  - (v) *testamentary matters (grant of probate, letters of administration and succession certificate); and*
  - (vi) *eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction”*
6. The Court provided the above non-exhaustive list of non-arbitrable disputes by drawing distinction between “actions in personam” and “actions in rem”. While the former means “actions determining the rights and interests of the parties themselves in the subject matter of the case”, the latter denotes, “actions determining rights and interests of the parties, not merely among themselves but also against all persons at any time claiming an interest”. While observing that “actions in rem” are required to be adjudicated by the Courts or the public tribunals as mandated by the respective statutes and not by the arbitration tribunals, it also cautioned that *first*, this general rule is not rigid or inflexible and *second*, disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable.
7. The Supreme Court referred to,
- a) **Haryana Telecom Limited vs. Sterlite Industries India Ltd**<sup>3</sup> –, where it was held that matter relating to winding up of companies are provided for in the Companies Act and power to order so is conferred on the Courts. Therefore, arbitrators have no jurisdiction to decide on such disputes irrespective of the agreement between the parties.

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<sup>3</sup> 1999 (5) SCC 688.

b) **Olympus Superstructures Pvt Ltd vs. Meena Vijay Khetan and others**<sup>4</sup>, where the Court decided that the Specific Relief Act, 1963 contains no explicit prohibition for referring the matter of specific performance of contract relating to immovable property to arbitration. Thus, such disputes are arbitrable.

The Court in this decision also noted that while matters like criminal offences and matrimonial disputes may not be subject matter of resolution by arbitration, matters incidental thereto such as right to damage from personal injury or determination of terms on which husband and wife want to separate may be referred to arbitration

c) **ChiranjilalShrilal Goenka vs. Jasjit Singh and Ors.**<sup>5</sup>- The court observed that grant of probate is judgment in rem and thus not amenable to arbitration.

8. Finally, while deciding on the facts of the case at hand, observed that while agreement to sell and agreement to mortgage are arbitrable but the mortgage suit for sale of the mortgaged property or for enforcement of mortgage are in nature of right in rem and have to be decided by the courts of law. The reason for declaring such disputes as non-arbitrable is that the courts can protect interests of persons other than the parties to the suit which the arbitral tribunals are not armed with.



### III. Post Booz Allen case position

In **Vimal Kishor Shah v. Jayesh Dinesh Shah**<sup>6</sup>, the Apex Court added a seventh category of cases to the six non-arbitrable categories set out in Booz Allen, namely, disputes relating to trusts, trustees and beneficiaries arising out of a trust deed and the Trust Act.

In **A. Ayyasamy Vs. A. Paramasivam and Others**<sup>7</sup>(hereinafter referred as “A. Ayyasamy”) the Supreme Court observed that

*“the courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. The following categories of disputes are generally treated as non-arbitrable: (i) patent, trade-marks and*

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<sup>4</sup> 1999 (5) SCC 651.

<sup>5</sup> 1993 (2) SCC 507.

<sup>6</sup> (2016) 8 SCC 788.

<sup>7</sup> (2016) 10 SCC 386.

*copyright; (ii) anti-trust/competition laws; (iii) insolvency/winding up; (iv) bribery/corruption; (v) fraud; (vi) criminal matters. Fraud is one such category spelled out by the decisions of this Court where disputes would be considered as non-arbitrable.”*

In **M/S. Emaar Mgf Land Limited v. Aftab Singh**<sup>8</sup>, the Court ruled, “*Not only the proceedings of Consumer Protection Act, 1986 are special proceedings which were required to be continued under the Act despite an arbitration agreement, there are large number of other fields where an arbitration agreement can neither stop or stultify the proceedings. For example, any action of a party, omission or commission of a person which amounts to an offence has to be examined by a criminal court and no amount of agreement between the parties shall be relevant for the said case. ... Similarly, there are several issues which are non-arbitrable. There can be prohibition both express or implied for not deciding a dispute on the basis of an arbitration agreement...*”

The Court further held that it is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration.

Thus, what follows from the Booz Allen and later decisions on “arbitrability” is that matters are non-arbitrable if, firstly, matter even if brought within the scope of arbitration agreement or clause, falls within the category of “rights in rem”; and secondly, if excluded by necessary implication.

#### **IV. Shortcomings of Booz Allen case**

The decision of Booz Allen has fallen short on various counts, such as:

1. This case drew a distinction between arbitrable and non-arbitrable matter on lines of actions in rem and actions in personam. However, it failed to appreciate that there might be some matters which though actions in personam might have elements of criminality. One such example can be given of fraud. As early as in 1943, the Patna High Court in **Narsingh Prasad Boobna and others v. Dhanraj Mills**<sup>9</sup> enunciated where existence of fraud is evident then the ordinary courts will be better suited for adjudication as opposed

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<sup>8</sup> (2019) 12 SCC 751.

<sup>9</sup> AIR 1943 Pat. 53.

to the arbitral tribunals. Later in in **Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak**<sup>10</sup>, the Supreme Court opined that in case of allegation of serious fraud the accused can demand the case to be tried by ordinary court as opposed to arbitration. However, the Court further observed that allegation which merely touched upon fraud would not count to interfere with arbitration proceeding. In 2009, the Apex Court in **N. Radhakrishnan v. Maestro Engineers and Ors**<sup>11</sup> reiterated Abul Kadir and thus excluding serious allegation of fraud from scope of arbitration as in the case dwelling into the allegation of malpractice and manipulation of account books and finances would require detailed investigation. Thus, the Supreme Court while deciding in the Booz Allen case, did not consider this aspect even.

However, in **A. Ayyasamy case**<sup>12</sup>, while clarifying the **N. Radhakrishnan** case it held that simple allegation of fraud which affects only the internal affairs of the party without any ramification on the public domain as such are arbitrable but where allegation of fraud went to the roots of the agreement itself are matters of complex fraud. Finally, in 2019, three judges' bench in **Rashid Raza v. Sadaf Akhtar**<sup>13</sup> approved the categorization of fraud into simple and complex for deciding the arbitrability and laid down two-pronged test, i.e. first to decide whether fraud runs the entire contract as well as arbitration agreement to render it void and second, to decide whether fraud is simple or complex.

Recently, in **N.N. Global Mercantile Pvt. Ltd v. Indo Unique Flame Ltd.**<sup>14</sup>, the Apex Court while referring to the **Avitel Post Studioz Ltd. &Ors. v. HSBC PI Holdings (Mauritius Limited)**<sup>15</sup> ruled that the civil aspect of fraud (which is defined in section 17 of the Contract Act, 1872) is arbitrable with exceptions being allegations with respect to a) arbitration agreement being vitiated by fraud or fraudulent inducement or b) fraud goes to the validity of underlying contract and thereby impeaches the arbitration clause.

The Court in **N.N. Global** case went on to hold the rationale for excluding the fraud until now was the need to go through voluminous evidence but now arbitral tribunal are anyhow required to go through bulky evidences in commercial disputes. Hence, "*The*

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<sup>10</sup> AIR 1962 SC 406.

<sup>11</sup> (2010) 1 SCC 72.

<sup>12</sup> Supra note 6.

<sup>13</sup> (2019) 8 SCC 710.

<sup>14</sup>Decided on 11 January 2021 by the Supreme Court of India.

<sup>15</sup> (2020) SCC OnLine SC 656

*ground that allegations of fraud are not arbitrable is a wholly archaic view, which has become obsolete, and deserves to be discarded.”*

2. The test of arbitrability as laid down is premised on the fact whether the subject matter at hand is arbitrable or not, brushing off the arbitrability of reliefs prayed for in the case. There might arise situations, where the relief sought cannot be granted by the arbitrator or the arbitral tribunal. The decision of **Rakesh Kumar Malhotra v Rajinder Kumar Malhotra**<sup>16</sup>, which determined the arbitrability of oppression and mismanagement under the Companies Act of India 1956 highlights this issue. Herein the Court held “[p]arts of the reliefs may be in rem and ... therefore, the nature of the reliefs sought and powers invoked necessarily exclude arbitrability.”. This brought forth the two dilemmas:

First, whether the exclusion of arbitration by implication entails analyses of the remedies provided in the statutes which arbitrator or AT cannot grant?

Second, if the first is answered in affirmative then a party can escape arbitration easily by praying for reliefs which arbitrator cannot grant.

This line of thought and the consequences which might follow are found to be missing in the Booz Allen. But was appreciated in **Eros International Media v Telemax Links**<sup>17</sup>, where the court has held that IP disputes may be arbitrable subject to the relief sought.

## V. Conclusion

In whole, it can be said that the Booz Allen case provided a starting point for the “test of arbitrability” with some blind spots. The trend of decisions delivered by the Supreme Court of India aftermath reveals general acceptance towards the core principle delineated by the Booz Allen case however exceptions so listed from the arbitrability of a matter are being evolved.

<sup>16</sup>Decided on 20 August, 2014 by Bombay high Court.

<sup>17</sup> Decided on 12 April, 2016 by Bombay High Court.