

ARBITRATION ACT & SECTORAL REGULATORS

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Abstract

Arbitration serves as a vital means to expedite legal proceedings, thereby contributing to the increased reliance on alternative dispute resolution mechanisms as the most efficient method. Despite its significance, arbitration is not a universal solution applicable across all sectors and cases. It is regarded as a specialized legal avenue, notably emphasized in the Arbitration & Conciliation Act, 1996 (referred to as the 'Arbitration Act'). This Act extends beyond traditional court procedures, providing an efficient framework for dispute resolution. However, the applicability of the Arbitration Act becomes nuanced when put against sector-specific legislation that addresses disputes within specific sectors. This situation tends to diminish the influence of the Arbitration Act, particularly when other specialized laws come into play. Hence, this article seeks to delve into the intricate relationship between the Arbitration Act and various sectoral regulations prevailing in India. Specifically, this exploration involves examining how arbitration functions within distinct sectors in India, namely the Telecom Sector, the Anti-trust/Competition Law Sector, the Electricity Sector, and the Petroleum and Natural Gas Sector. These sectors, each governed by their specialized laws, present unique challenges and requirements that might intersect or conflict with the provisions of the Arbitration Act. Furthermore, this article aims to shed light on the dynamic interaction between these two distinct legal frameworks: the Arbitration Act, designed for broad dispute resolution, and the sectoral laws tailored to address specific industry-related disputes. This investigation into the interplay between these legal paradigms aims to elucidate the circumstances under which the Arbitration Act's applicability might be curtailed or supplemented by sector-specific legislation. In

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essence, while arbitration stands as a crucial mechanism for dispute resolution, its application and efficacy might be influenced by sectoral regulations, necessitating a deeper exploration into their compatibility and potential intersections to provide clarity on the extent of the Arbitration Act's reach in various sectors across India.

Key-words: Arbitration Act, arbitrability of disputes, telecom disputes, anti-trust disputes, petroleum related disputes.

INTRODUCTION

The primary aim behind arbitration is to enable speedy trial, which is also a primary reason for the popularity and rise of alternate dispute resolution mechanisms. Arbitration, however, is not absolute and applicable to all sectors and cases. Arbitration holds the status of being a special law, and it is through this status of special law that the Arbitration & Conciliation Act, 1996 [Act No. 26 of 1996] ('Arbitration Act') asserts its influence and provides for an effective mechanism beyond court procedures. However, in cases where the Arbitration Act and the status of an arbitration agreement are juxtaposed against another special sectoral legislation that provides for the special treatment of disputes relating to the sector, the position of the Arbitration Act stands diluted. It is in this context, that this article explores the positioning of different sectoral regulators that exist across India qua Arbitration Act. The Article examines arbitration *via a vis* sectoral regulation in India governing the Telecom Sector, the Anti-trust/Competition Law Sector, the Electricity Sector, and the Petroleum and Natural Gas Sector. Building on this, the Article discusses the interplay between the two special laws, i.e., the Arbitration Act and the special sectoral acts therein.

TEST OF ARBITRABILITY

One of the terms frequently used in arbitration proceedings is 'arbitrability' concerning a dispute, which has not been defined in the Arbitration Act. Its meaning and application have therefore evolved through a process of judicial interpretation. Primarily, arbitration is a process that only facilitates the resolution of private disputes. It is neither advisable nor appropriate that disputes where public interest issues are involved, are resolved through private mode without interference by courts.

The Supreme Court of India has dealt with this issue in detail in *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*² To determine whether a dispute is arbitrable, the Supreme Court in this case prescribed a three-pronged test. This test provides that the court goes into three aspects relating to a dispute:

- (i) the nature of the dispute and whether it is to be resolved by arbitration or in courts;
- (ii) the presence of the matter of the dispute in the arbitration agreement, and
- (iii) the nature of redressal sought by the parties through arbitration.

Interestingly, the Arbitration Act does not categorize any dispute as ‘non-arbitrable’ per se. Therefore, primarily the assumption is that all disputes that arise in human transactions are arbitrable. However, there are some provisions in the Arbitration Act that make inroads into this broad generalization.

For instance, Section 2(3) of the Arbitration Act provides that the Arbitration Act would be consistent with the laws that exclude certain disputes from being arbitrable. Further, section 48(2) of the Arbitration Act elaborates upon the power of national courts to set aside or disapprove enforcement where “the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force” or “if the award is in conflict with the public policy of India.” Therefore, the broad and generalized assumption that all disputes are arbitrable is whittled down by the application of these provisions.

Thus, being consistent with the law prescribed by the courts vide various judgments, it is important to enquire and determine whether the dispute is arbitrable. There are categories under which the dispute must fall to be amenable to arbitration. Firstly, it must be ascertained whether the dispute revolved around rights in rem or right in personam. The dispute falling under the former category is arbitrable while the one revolving under the latter is not arbitrable as held by the Supreme Court in the *Booz Allen* case. Although certain sub categorisation within the same exists and permit arbitrability of the disputes such as for claims between parties (right in personam) stemming from a dispute incorporating a right in rem aspect.

Further dissecting the arbitrability of disputes, a fresh criterion for determining if a dispute is suitable for arbitration exists, that is, if a dispute revolves around rights in personam, arbitration might be refused if the dispute is designated for resolution in a public forum due to prevailing laws or governmental policies. This doesn’t imply that disputes assigned to specialized tribunals are automatically ineligible for arbitration. Rather, a dispute is considered

² (2011) 5 SCC 532.

non-arbitrable when certain rights and duties are solely granted to tribunals by laws governing the dispute, excluding interference of national courts.

Thus, it is clear that a two-fold inquiry is required to determine the arbitrability of an issue in the context of arbitration in India. At first, one needs to determine whether the subject matter of the dispute is a 'right in rem' or 'right in personam'; rights in rem are not amenable to arbitration. If the subject matter of the dispute is a right in personam, then a second level inquiry is required to identify whether the dispute is reserved by legislative enactments to be resolved by a public or special tribunal. If the second inquiry is answered in the affirmative, the dispute cannot be subject to arbitration.

TELECOMMUNICATION LAW (TRAI)

The Telecom Industry in India is regulated under the Telecom Regulatory Authority of India Act, 1997 [Act No. 24 of 1997] ("TRAI Act"). Section 14 of the TRAI Act establishes the Telecom Disputes Settlement and Appellate Tribunal also known as the 'TDSAT' and further outlines the jurisdiction and scope of the TDSAT. Section 15 of the TRAI Act provides that no civil court has the jurisdiction to hear suits or proceedings that are squarely covered within the TDSAT's scope and powers. The TRAI Act also restricts courts or other authorities from granting injunctions for disputes/ actions taken or to be taken under the TRAI Act. Going by the principles of Arbitrability discussed above, the matters addressed in the TRAI cannot be subject to arbitration, thereby implying that provisions within the TRAI Act take precedence over the general provisions in the Arbitration Act. This aligns with the well-established legal maxim/principle of "*generalia specialibus non deroant*". The said determination arises from the fact that the TRAI Act holds as a specialized legislation position under which disputes governed by the said Act are adjudicated by the TDSAT alone. Hence, the TRAI Act is a self-contained code, intended to deal with all disputes arising out of the telecommunication services provided in the country. Any dispute under the TRAI Act is likely to affect consumers/subscribers immensely and therefore such matters cannot be referred to arbitration.

The Delhi High Court in the case of *Gaur Distributors v. Hathway Cable & Datacom Ltd.*³, while deciding whether a dispute between two service providers would fall under the exclusive jurisdiction of the TDSAT, held that the Arbitration Act is a general act and as such applies to all arbitration agreements, but the TRAI Act is a special act that specifically applies to the telecom sector. The intention of the legislature in ousting the jurisdiction of other courts and authorities is apparent and ensures that only one single authority deals with telecom-related matters i.e., TDSAT.

³ 2016 SCC OnLine Del 4605.

The intent of the legislature was further examined by the Kerala High Court in the case of *A. Salim v. Asianet Satellite Communication Ltd.*⁴, wherein the Hon'ble Court rejected the application of the petitioner (being a party to an arbitration agreement), for seeking appointment of an arbitrator, thereby affirming that arbitration is barred in respect of matters within exclusive jurisdiction of TDSAT under TRAI Act.

The Supreme Court in the case of *Cellular Operators Assn. of India v. Union of India*⁵, held that the jurisdiction of the TDSAT under Section 14 cannot be merely held to be supervisory jurisdiction and that it is the only forum for addressing the grievances of aggrieved party in as much as the appellate jurisdiction to the Supreme Court is only on the substantial question of law and jurisdiction of Civil courts for filing a suit is ousted.

COMPETITION LAW (CCI)

Competition Law and the offenses therein such as cartel formation, anti-competitive activities, and abuse of dominant position are all activities that affect the public at large and are regulated under the Competition Act, 2002 [Act No. 12 of 2003] ("Competition Act") therefore, such offenses must not be subjected to arbitration as the general view confirms that arbitral tribunal is well competent to decide issues in personam but fails in deciding rights in rem⁶.

The Competition Act also being a special act raises the question of the relevance, scope, and applicability of the Arbitration Act. The Delhi High Court in the case of the *Union of India v. CCI*⁷, discussed the maintainability of the proceedings before the Competition Commission of India (CCI) where an arbitration agreement exists between the contracting parties and held that CCI has the jurisdiction to hear the matter, even though the arbitral tribunal has the mandate to adjudicate. The Hon'ble Court relied on the decision in *Thirumurugan Coop. Agricultural Credit Society v. M. Lalitha*⁸, whereby it was held that the investigative and deliberative scope set by CCI differs significantly from that of an Arbitral Tribunal. An Arbitral Tribunal lacks the ability to delve into the intricate details of a party's abuse of dominant position and does not focus on the specific contractual terms within a dispute. The Hon'ble Court affirmed that the arbitral tribunal lacks the authority, necessary expertise, and resources to investigate, resulting in a comprehensive report that is critical in addressing concerns related to the potential abuse of a dominant position by one of the contracting parties.

⁴ MANU/KE/3986/2022

⁵ (2003) 3 SCC 186; (2003) 1 Comp LJ 1 (SC).

⁶ S. 61 of the Competition Act, 2002.

⁷ 2012 SCC OnLine Del 1114; AIR 2012 Del 66 (India).

⁸ (2004) 1 SCC 305.

PETROLEUM AND NATIONAL GAS LAW (PNGRB)

The Petroleum and Natural Gas Regulatory Board Act of 2006 [Act No. 19 of 2006] (“PNGRB Act”) bestows upon the Board established under the PNGRB Act, the authority to safeguard the interests of consumers and entities engaged in specific activities related to petroleum, petroleum products, and natural gas. The Board is entrusted with the responsibility of regulating various aspects of the petroleum and natural gas sector, such as refining, processing, storage, transportation, distribution, marketing, and sale.

Section 12 of the PNGRB Act establishes the powers regarding complaints and resolution of disputes by the Board. The section empowers the Board to adjudicate and decide upon disputes relating to refining, processing, storage transportation, and others. However, the only caveat to the same is that the parties should not have agreed to arbitration.

In the decision of *Reliance Industries Ltd. v. GAIL (India) Ltd.*⁹, the Board was confronted with the question of whether it is within their jurisdiction to intervene in instances where the agreement (which is the subject of dispute) has an arbitration clause. The Respondents, in that matter, contended before the Court that Section 8 of the Arbitration Act is mandatory in nature, and the Court/Board must not question the applicability of the clause.

However, the Board stated that it is a settled position of law that the inclusion of an arbitration clause does not oust or exclude the jurisdiction of a regulatory body to intervene as the scope of arbitration may be limited to substantive clauses of the agreement, however, the purview of a regulatory body may extend beyond that. The Board additionally stated that no agreement may justify an act/omission that is in contravention of Section 11(a) of the Act.

On the question of an arbitration clause and the jurisdiction therein, it is pertinent herein to examine the decision of the Board in the case of *Sardarmal Bagaria Industries (P) Ltd. v. Assam Gas Co. Ltd.*¹⁰, wherein the court established that the Board has no jurisdiction to adjudicate disputes that involve an arbitration clause. In cases wherein there exists an arbitration clause, the arbitration mechanism should be preferred in the first instance. In such cases, the board does not have jurisdiction to intervene in the matter, as the scope and powers of the Board are limited due to the inclusion of an Arbitration Agreement, regulated by the terms and provisions of the Arbitration Act.

⁹ *Reliance Industries Ltd. v. GAIL (India) Ltd.*, Legal/211/2016, decided on 26/12/2016 (PNGRB).

¹⁰ *Sardarmal Bagaria Industries (P) Ltd. v. Assam Gas Co. Ltd.*, Legal/25/2021, decided on 19/04/2023 (PNGRB).

ELECTRICITY LAW (CERC/APTEL)

Electricity Act, 2003 [Act No. 36 of 2003] (“Electricity Act”) is a special legislation governing the generation, transmission, distribution, trading, and use of electricity and for taking measures conducive to the development of the electricity industry, promoting competition, protecting the interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies.

Under Section 86(1)(f) of the Electricity Act, the sole jurisdiction over the cases rests with the State Electricity Commission. The Supreme Court in the case of *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.*¹¹, observed that the question of appointment of an arbitrator under Section 11(6) of the Arbitration Act does not arise, where the Electricity Act empowers only the State Electricity Commission to refer any dispute for arbitration. The Supreme Court also held that if Section 86(1)(f) of the Electricity Act is not interpreted in the above manner, it would lead to an ‘anomalous situation’ whereby the State Electricity Commission would be erroneously tasked with both, adjudicating a dispute as well as referring the same to an arbitrator.

Additionally, the Supreme Court also noted that Section 174 of the Electricity Act expressly states that the provisions of the Electricity Act would have an overriding effect in the event of a clash or conflict with any other existing law in force. In such cases, even where one of the parties has not objected as to maintainability or jurisdiction at the stage of the first application for appointment of the arbitrator before the High Court, under Section 11(6) of the Arbitration Act, the Supreme Court held that objections as to maintainability are basic in nature and it is the duty of the court to address the same. Moreover, an objection as to the maintainability goes to the very root of the case, and therefore not raising such an objection at an earlier stage does not preclude the court from entertaining it at a later stage.

The extent of applicability of the Arbitration Act can then be understood from Section 158 of the Electricity Act, which reads as under:

“Section 158. (Arbitration): Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the licence of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party; but in all other respects

¹¹ (2008) 4 SCC 755.

the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996”

The provision therefore limits the interference of the State Commission (or any other appellate bodies) under the Electricity Act to ‘reference’ or ‘initiation’ of arbitration proceedings along with the appointment of an arbitrator. However, once the said process is complete, then for all other purposes, inter alia, including removal of an arbitrator, procedure of arbitration, seat of arbitration, venue of arbitration, writing of arbitral awards, challenging arbitral awards, enforcement of arbitral awards, the provisions of the Arbitration Act become applicable.

CONCLUSION

The Supreme Court in **Booz Allen** rightly observes that disputes that revolve around rights in *personam* are arbitrable, whereas those disputes that relate to rights in *rem* are incapable of being resolved by arbitration. This principle has aided the legal framework provided for various regulatory forums for almost over two decades now. However, some learnings must be drawn from the ‘nature of disputes’ being raised before the regulators. It may be considered, in cases, where it is permissible to settle a dispute with a subordinate right in *personam* arising from right in *rem*, that arbitration proceedings may be permissible.

In *Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan*¹², the Supreme Court approved arbitration for a settlement of claims between parties (right in *personam*) arising out of a dispute that had the element of right in *rem*.

Following *Booz Allen*, in *Kingfisher Airlines Ltd. v. Prithvi Malhotra*¹³, a new condition for arbitrability of a dispute was introduced. In this case, the Bombay High Court observed that even in an *personam* dispute, arbitration can be denied if that dispute is reserved for a public forum by virtue of laws in force or policies of government.

Therefore, the exclusive jurisdiction of regulators must not act as a limiting factor in developing and using arbitration for resolving underlying disputes, that can be settled in *personam*. While, in case exploring ways to liberalize dispute redressal mechanisms by way of arbitration under this sector, could lead to the prioritization of the most important dispute in the country and the focus of its resources on these. However, if such an exploration is given effect, then a legislative change is required.

¹² (1999) 5 SCC 651.

¹³ 2012 SCC OnLine Bom 1704; (2013) 7 Bom CR 738 (India).