Arbitrability of Fraud in India: An Evolution from Contention to Clarity

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ABSTRACT

Currently arbitration is the most dynamic form of justice delivery mechanism in India and has become a convenient way for resolution of disputes after a surge in the commercial disputes leading to the matters adjudicated by the arbitrators, considering its time efficiency. Fraud in the world of legal jurisprudence have always been scrutinized by stringent measures and precedents. However, when it comes to arbitrability of fraud in India, it has seen its fair share of vague advancements and a tumultuous evolution. Recently there have been various decisions by the courts which aims to solidify the scattered decisions of previous judgements to give a concrete test for determining the arbitrability of arbitral frauds in India. This article aims to explain the philosophy behind the initial anomalies present in the decisions pertaining to arbitral frauds and critically analyze the recent legal developments which actively try to diminish the disparities present in the legislative realm of arbitral fraud cases.

Key Words: Arbitration, Mediation, Conciliation, Criminal Laws

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1. INTRODUCTION

Arbitration is one of the most common means of conflict settlement because it is rapid, respects party autonomy, and maintains party equality, all of which are foundations for arbitration.

"The rise of arbitration in India is not attributable to the success of arbitration, rather to the failures of the Court," *Justice Fali S. Nariman* has said several times.[1]

The aforementioned statement accurately and forcefully expresses the evolution of Indian arbitration law. The understanding and application of the theoretical frameworks and principles of arbitration in the realm of Indian law has grown steadily, and substantial developments in its jurisprudence may be related to the increasing judicial comprehension on the topic.

However, this technique of dispute redressal has a number of shortcomings, and it is critical to evaluate the arbitrability, which is among the most crucial matters and restraints of arbitration, and also whether the Arbitration Tribunal's jurisdiction stretches to all types of conflicts or if some of the disputes are beyond the Tribunal's ability to address or solve and must be settled through other means. Various judicial rulings have addressed the topic of whether or not cases involving frauds in arbitration agreements are arbitrable.

2. CONCEPT OF ARBITRABILITY AND FRAUD

Arbitrability denotes to "whether or not a particular type of issue may be resolved by arbitration. In practice, arbitrability solves the question of whether a claim's subject matter is or is not reserved to domestic courts under national legislation". Disagreement if cannot be set through arbitration, the jurisdiction of arbitral tribunal shall remain restricted, and the assertion then must be conveyed before the traditional litigation courts. Arbitrability refers to "whether specific kinds of disputes are banned from arbitration due to national legislation or

[1]VidyaDrolia vs Durga Trading Corporation, AIR 2019 SC 2042

judicial authority". The basis of the bar is frequently referred to as "public policy" by courts.[2]The term `arbitrability' has diverse connotations in different circumstances.

In the case of "*Booz-Allen & Hamilton Inc vs SBI Home Finance Ltd. & Ors"*[3], while presenting the triple pronged test for determining arbitrability, the Supreme Court divided the conflicts related to *"rights in rem*" and "*rights in personam- personal rights*" and ruled that the "personam" would be arbitrable while "rem" would not because it has more probability to distress civilization hugely. The Court also identified some types of disputes that were not arbitrable, and evolving jurisprudence has added new types of disputes to this list.[4]

The three aspects of arbitrability linked to "the arbitral tribunal's jurisdiction" are cited as follows:

(i) Can the conflicts be adjudicated and settled by arbitration? That is, "whether the conflicts, given their nature, might be settled by a private forum selected by the parties (the arbitral tribunal) or whether they would be entirely the domain of public fora (courts)".

(ii) "Do the disputes fall under the purview of the arbitration agreement? That is, "whether the disputes are enumerated or defined as issues to be determined by arbitration in the arbitration agreement, or whether the disputes fall under the 'excepted matters' excluded from the arbitration agreement's purview".

(iii) Whether the parties have referred the disputes to arbitration? That is, "whether the conflicts fit within the scope of the arbitral tribunal's submission or whether they do not derive from the statement of claim and counterclaim presented before the arbitral tribunal."[5]

Arbitrability refers to "whether an arbitrator has the authority to rule on a dispute". This, in turn, depends on "whether certain parties have agreed to have certain disputes between them resolved through arbitration and thereafter is potentially, in any dispute, a question of whether the parties did agree to arbitrate and how the issue should be resolved".[6]According to the

[2]Laurence Shore, **,** *Defining 'Arbitrability' The United States vs. the rest of the world*, New York Law Journal, Litigation, 15/06/2019, available at https://indiacorplaw.in/wp-content/uploads/2016/08/shore-definingarbitrability.pdf **(**Last visited on 22/06/2021)

[3]SC (2011) 5 SCC 532

[4]ShuchiSejwar and ArpitLahoti, *Arbitrability of Fraud: Is the Anomaly Solved*, SCC Online, 27/02/2021, available at *https://www.scconline.com/blog/post/2021/02/27/arbitrability-of-fraud/* (Last visited on 22/06/2021)

[5]*Supra* note 3 para. 21

[6]Baker McKenzie, *Who decides arbitrability?*,Lexology, 30/11/2012, available at https://www.lexology.com/library/detail.aspx?g=c4a9dadf-8b80-4ed5-81f4-c9ba50a35d21 (Last visited on 22/06/2021)

courts, "some types of conflicts may not be competent of adjudication by arbitration." Issues involving public offences, disputes deriving from unlawful agreements, and conflicts involving statuses, such as dissolution of marriage, are not eligible for arbitration.[7]Certain examples of disputes that are not arbitrable disputes[8], "intellectual property rights; anti-trust or competition laws; insolvency and winding up; bribery/corruption; fraud; [9]criminal matters"

Certain restrictions can be there on a party's ability to enter into arbitration agreements, denoting that certain entities (like States or State entities) due to structural considerations, you may not be authorized to enter into arbitration agreements or you may need specific authority to do so ("subjective arbitrability"), or restrictions founded on the main subject material ("objective arbitrability").The arbitrability of a dispute may change from one country to the next, first because of various policy concerns, and second, because of how open the State is to arbitration. [10]In law, fraud is defined as "deliberate deceit for the purpose of obtaining an unfair or unlawful advantage or depriving a victim of a legal right" .Fraud can be a "violation of both civil law or criminal law[11] , or it can result in no loss of money, property, or legal right but yet be an ingredient of another civil or criminal wrong". Fraud may be committed for monetary gain or for other benefits.[12]

The Contract Act describes "fraud" as "a fact knowing it to be untrue, knowingly active concealment of a fact, making a promise without intending to fulfil it or any other act which is capable of deceiving and is committed by a party to a contract, or with his participation, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract".[13]The arbitrator has jurisdiction only to the degree that the arbitration

[7]*A Ayyasamy Vs A Paramasivam & Ors*, AIR 2016 SC 4675 pt. 5
[8]Harshal Morwale**,** *The Concept of Arbitrability of Arbitration Agreements in India*, EFILA Blog, available at https://efilablog.org/2017/12/20/the-concept-of-arbitrability-of-arbitration-agreements-in-india/(Last visited on 22/06/2021)
[9]O.P.Malhotra & Indu Malhotra , *O.P. Malhotra on 'The Law & Practice of Arbitration and Conciliation'* 6.1.9 – 6.1.12, (Thomson Reuters India ,3rd edn, 2014)
[10]*Supra* note 2
[11] Wikipedia, *Fraud*, Criminal Law, available at https://en.wikipedia.org/wiki/Fraud (Last visited on 22/06/2021)
[12]Legal Dictionary, Fraud, Law.com, available at https://dictionary.law.com/default.aspx?selected=785 (Last visited on 22/06/2021)
[13]The Indian Contract Act,1872 (Act No. 9 of 1872) , s.17

provision grants it.[14] . Some issues, irrespective of whether they are enclosed by the arbitration clause, are not sanctioned to be handled by arbitration. For example, disputes ascending out of '*rights in rem*', ie rights enforceable against and affecting the world at large, will normally not be acquiescent to arbitration.[15] While disputes concerning contentions of fraud ascend out of "rights *in personam"*, the arbitrability of fraud has been a vexed question in India.[16]

3. EVOLUTION OF LEGAL JURISPRUDENCE THROUGH PRECEDENTS AND AMEENDMENTS INITIAL JUDICIAL PRONOUNCEMENTS

Over the years, the process of arbitrating fraud in India has undergone a turbulent development. When dealing with issues involving fraud, an arbitrator or arbitral tribunal, as a creature of the arbitration provision in the agreement, may or may not have competent authority. "Section 16 of the Arbitration and Conciliation Act of 1996" allows for a challenge to the decision. This oddity can be traced to the Indian laws' silence on arbitrable and non-arbitrable issues, whether it is the Arbitration and Conciliation Act, 1996[17] (or its recent modifications in 2015 and 2019) or the former Arbitration Act, 1940[18]. Because of this ambiguity, a party or parties may object to arbitration on the basis of nonexistence of the arbitration agreement, invalidity of the arbitration provision, inability of the issue to be addressed via arbitration, or incompetence of the arbitral tribunal in determining the dispute.[19]

[14]*S.P. Singla Constructions Pvt. Ltd. v. Government of NCT of Delhi*, 2015 (1) Arb. LR 33 (Delhi)
[15]EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE (EUIPO), Part E Section 3 (1.2) EUTMs and RCDs as objects of property, available at https://guidelines.euipo.europa.eu/binary/1803468/2000260001 (Last visited on 24/06/2021)
[16]Ritvik M. Kulkarni, *Challenging Arbitrability of Fraud before a Tribunal in India*, Koinos Indian Arbitration Blog, 13/01/2020, available at https://indianarbitrationlaw.com/2020/01/13/challenging-arbitrability-of-fraud-before-a-tribunal-in-india/(Last visited on 24/06/2021)
[17] ACT No. 26 OF 1996
[18]ACT NO. 10 OF 1940
[19]Mekhla Chakraborty, *Arbitrability Of Fraud In India*, White Code via Mediation and Arbitration Center (Latest News), available at https://viamediationcentre.org/readnews/MjUw/Arbitrability-of-fraud-in-India (Last visited on 22/06/2021)

The arbitrability of frauds has been a source of dispute not just in Indian law, but also in the legal systems of the United States, the United Kingdom, and other nations. The question of "arbitrability of fraud" emerged initially in the case of *Russel*, where it was deciphered that" if there is prima facie proof of fraud, the court might refuse to submit the subject to arbitration".[20]

The preceding legislations of the 1996 act i.e., the 1899[21] and the 1940 acts precisely apportioned with the query of "arbitrability of fraud". "Section 19" of the 1899 Act, is crucial because it provided the Court the authority to issue a stay of judicial proceedings. When parties have submitted their issues to arbitration, the stay may be granted.

The query of arbitrability of fraud initially came up in "*Abdul Kadir Shamsuddin Bubere v/s Madhav Prabhakar" Oak* "[22] when the Arbitration Act, 1940 was in presence, on the basis that it contained difficult factual concerns, the SC totally ruled out the possibility of arbitrating issues of fraud.

A succession of pronouncements has molded the evolvotion regarding "arbitrability of fraud" under the "Arbitration and Conciliation 1996" Act. In "*Smt. Bhagwati Devi Bubna and Ors vs Dhanraj Mills Private Ltd"*[23] the Patna High Court discoursed that accusations of fraud shouldn't be taken up by arbitral tribunals and it's better to take the traditional litigation route for the same.[24]

The Supreme Court's judicial pronouncement in "*Abdul Kadir*" sustained to grip its significance over the coming fifty years. The next key judgment came in 2010 by the Supreme Court where in *"N. Radhakrishnan v/s M/S. Mastero Engieers & Ors"*[25], depending upon the case of *Abdul Kadir*, fraud accusations in addition to significant or grave misconducts shall be resolved judicially through the "presentation of comprehensive evidence by either party", and hence the arbitrator shall not be involved.

[20]Russel *v/s* Russel (1880) 14 Ch D 471
[21]Arbitration Act, 1899
[22]AIR 1962 SC 406
[23]AIR 1969 Pat 206
[24]Advait Ghosh and Akash Yadav, *The Arbitrability of Fraud – A Perspective*, The Arbitration Workshop, 09/12/2021, available at https://www.thearbitrationworkshop.com/post/the-arbitrability-of-fraud-a-perspective (Last visited on 22/06/2021)
[25](2010) 1 SCC 72.

Ban enforced by *N. Radhakrishnan* case clashed with the 1996 Arbitration and Conciliation Act's pro-arbitration objective. More so because, in *N. Radhakrishnan*, the Supreme Court neglected to examine the following crucial factors:

"Hindustan Petroleum Corporation. Ltd /s M/S. Pink city Midway Petroleum's"[26]was also referred in the *Radhakrishnan* case, the ratio was not dealt with. Indeed, the decision of Hindustan oil was contrary to *N. Radhakrishnan's* decision. *Hindustan Petroleum* had, following an examination of the text of "Section 8 of the 1996 Act", concluded that it was obligatory to civil court that it should refer the argument to an "arbitrator", if there existed an "arbitration clause" in a contract or agreement.

In *"P. Anand Gajapathi Raju & Ors v/s P.V.G. Raju & Ors"*[27] the same was quoted. The SC decided not to succumb the plaintiffs and defendants to an arbitral proceeding, notwithstanding the unambiguous wording of Section 8, as the case contained serious charges of fraud which the civil courts were supposed to handle. The SC decided not to submit them to the arbitration, notwithstanding the unambiguous wording of "Section 8", as the case contained serious charges of fraud which the civil courts were supposed to handle.

The court also neglected "Section 16 of the 1996 Act" which stipulates explicitly that" ipso jure does not entail the illegality of the arbitration clause in the determination of the arbitral tribunal that the contract was null and void".

The fore mentioned judicial pronouncement caused in an impediment in a legislative development on the "arbitrability of fraud" in the 1996 Act as it demonstrated distrust in "arbitral tribunals to adjudicate on the disputes related to fraud" and it also displayed "unwillingness of courts to refer parties to arbitration, despite the unambiguous linguistic of Section 8".

[26]Hindustan Petroleum Corpn. Ltd. v/s Pinkcity Midway Petroleums (2003) 6 SCC 503.
[27]P. Anand Gajapathi Raju v/s P.V/SG. Raju (2000) 4 SCC 539

In *Swiss Timing Ltd. v/s The Commonwealth Games Organizing Committee*[28], the decision in the *N. Radhakrishnan* has been found to be "per incuriam" for above grounds. The *Swiss Timing* judgement rejected the argument that, if a contract had been declared "invalid ab initio, the courts exercising jurisdiction under Sections 8 and 11 of the 1996 Act would have no competence to submit issues to arbitration". The *Swiss* case judgement diverged *from N. Radhakrishnan's* ratio. The SC specifically reaffirmed the nomination of an only arbitrator noting that "accusations of fraud do not lead to the arbitral tribunal being removed from competence."[29]

4. LANDMARK JUDGEMENT: TESTING THE ARBITRABILITY OF FRAUD

In 2016 the SC established the legal position with the *A. Ayyasamy v/s Paramasivam and Ors*[30] that originated after the "Section 8 of the 1996 Act" concerning fraud arbitrability. In order to analyze fraud arbitrability, the SC devised a dual paradigm. The Apex Court ruled those problems of complicated fraud cannot be addressed by arbitration but the arbitration panel can decide situations of simple fraud. In the case dealing with a question of simple fraud the Apex Court appointed an arbitrator. A larger SC bench in the instance of Rashid Raza has now reaffirmed the proportion of SC.

The *Ayyasamy and Booz-Allen case* was also bound by the decision of the case of *N. Radhakrishnan*. Unavoidably, the judiciary gave substantial strain on the prerequisite of "seriousness of allegations of fraud" for an arbitrable dispute. However, the Court executed a harmonizing act by integrating the principles enumerated in the test for enumerating fraud arbitrability in "*Booz-Allen".*

Although "*Swiss Timing"* decision gave us a positive approach on the contention of "arbitrability of fraud", it agonized from a different context of discontent, and as a result, it was "impliedly overruled" as having no judicial worth in *Ayyasamy*. The proposition of law

[28](2014) 6 SCC 677
[29]*Supra* note 24
[30](2016) 10 SCC 386

set forth in *N. Radhakrishnan* has to be resurrected as a result of this. Nevertheless, it was widely agreed that *Radhakrishnan case* did not present the accurate legal position. The Supreme Court in *Ayyasamy* warned against putting too much faith in *N. Radhakrishnan* and defined the legislation on arbitrability of fraud in the simplest terms. It said that "just the claim of fraud is insufficient to render the arbitration agreement between the parties null and void". It also focused on the point that "Arbitration can only be sidetracked in cases involving severe charges of fraud that result in a criminal offence or cases involving complex allegations of fraud that necessitate a civil court decision based on extensive evidence. Thus, fraud that effectively nullifies the validity of the contract itself, the entire contract that contains the arbitration provision, or the validity of the arbitration clause, such as forgery/fabrication of documents in furtherance of the fraud plea, would necessitate the involvement of the civil court."[31] Also that "Where there are basic charges of fraud involving the party's internal operations that have no public implications (the dispute has to be about activities in rem), the arbitration clause does not need to be evaded, and the parties can be assigned to arbitration".[32]

As a result, the Court has integrated the "Booz-Allen test", which determined that issues involving "acts in rem" essentially can't be arbitrated. This obligation of "implication in the public domain" was accredited in *"Ameet Lalchand Shah v/s Rishabh Enterprises"*[33]. Nevertheless, while it was deemed one of the conditions in that situation, he did not classify it as an essential criterion.[34]

The *Ayyasamy* judgement was clarified in this case and laid that to differentiate between "serious allegations" and "simple allegations" of fraud, the principles can be explained in these two examinations:

[31]ibid para. 25
[32] Naresh Thacker, *Revisiting Arbitrability of Frauds in India* ,Economic Laws Practice, Lexology, 20/04/2021, available at https://www.lexology.com/library/detail.aspx?g=cfde86e9-07d0-4558-815a-4ec760718010 (Last visited on 22/06/2021)
[33] CS(COMM) No.195/2016 Delhi HC
[34]Shubham Jain **and** Prakshal Jain**,** *Arbitrability of Fraud in India – Is Ayyasamy only about "Seriousness"?* India Corp Law, 21/12/2017, available at https://indiacorplaw.in/2017/12/arbitrability-fraud-india-ayyasamy-seriousness.html (Last visited on 22/06/2021)

"(1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or

(2) Whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain" [35]

More recently the courts have argued that merely alleging illegality does not absolve a tribunal of its responsibility to resolve the issue, including the matter of illegality.[36]

5. THE RELEVANCE OF CONTRADICTING PROBLEMS

The contemporary law illustrates the intricacy of the arbitrability of fraud and most crucially, it has been overcrowded with many tests that make it more likely to interfere with the judiciary. There is no logic to differentiate among "fraud simpliciter" and "fraud complex" because the arbitrators are also authorized to pursue support to record evidence in accordance with section 27 of the 1996 Law on Arbitration and Conciliation, thus determining the question of fraud on the basis of evidence, as is ordinarily done by courts. It is obvious that this distinction is needless and unworkable because the SC itself has suggested a new and complex element after proposing this differentiation in *Ayyaswamy* case and has made it erratic and hesitant.

Even the Law Commission, in its 246th Report, proposed "adding sub-section (6) to Section 16 of the Act, empowering the Tribunal to pass an award even if there were allegations of fraud, leaving the parties with the option of raising the issue of arbitrability before the arbitrator at the pre-award stage, thus adhering to the principle of Kompetenz-Kompetenz, and if rejected, raising the issue of arbitrability before the arbitrator under Section 34[37] at the post-award stage, thus adhering to the principle" .[38]

[35]Bhavana Sunder , Kshama Loya Modani and Vyapak Desai, *Arbitrability Of Fraud – 'Simply' Put By SC*, Nishith Desai Associates, Mondaq, 23/12/2019, available at https://www.mondaq.com/india/white-collar-crime-anti-corruption-fraud/877876/arbitrability-of-fraud-simply39-put-by-supreme-court (Last visited on 22/06/2021)
[36]Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press 2017) pg. 35
[37] The Arbitration and Conciliation Act 1996, s.32cl.2 sub cl.b
[38]Law Commission of India, Report No. 246 on Amendments to the Arbitration and Conciliation Act, 1996 2014.

Further, the SC in the case of "*Mauritius World Sport Group Ltd*. v/s *Singapore MSM Satellite Pte. Ltd".*[39], the court determined that any sort of "fraud is arbitrable" and that therefore there is no reasonable contrast among international and domestic arbitration while engaging with an international seated panel of arbitration.

Upon inspection of the ideologies laid down in *Ayyasamy*, when benches are approached with an request for nomination of an arbitrator under "Section 11 of the Act", one could argue that the SC has potentially decreased the bar for identifying "serious allegations of fraud."

It should be emphasized, however, that in *Ayyasamy*, an "application under Section 8" of the Act was filed. This section gives the Court more leeway in evaluating charges of fraud for the purpose of directing or refusing the issue to arbitration. In an application under Section 11 of the Act, on the other hand, courts have a limited jurisdiction to consider only the presence of an "arbitration agreement" when choosing an arbitrator. It is thus questionable whether *Ayyasamy's* suggested working standards for deciphering the "arbitrability of the accusation" in profundity which then inspire the judges to not just analyze the presence of an "arbitration agreement" and investigate the "seriousness or simplicity" of the charges pertaining to fraud.[40]

Some can contend that the Supreme Court examined the existence of the "arbitration agreement" while setting forth the first operational test, namely, if the "arbitration agreement's" existence has not really been irrevocably tainted by the claim of fraud. On the other hand, the other functional assessment is focused on the impact of "deception/fraud" between the counterparties or in the "public domain". There'll always be an influence "inter se" between both the sides if this rule were applied uniformly to corporate conflicts. Due to the fact that fraud is both a "civil and criminal offence", the investigation would be a matter of fact in all specific cases.

[39] "CIVIL APPEAL No. 895 OF 2014- SC of India"

[40] Mr. Naresh Thacker and Mr. Samarth Saxena, "*DOES FRAUD VITIATE ARBITRATION? REVISITING ARBITRABILITY OF FRAUDS IN INDIA"*, RGNUL Student Research Review (RSRR), 07/02/2021, available at rsrr.in/2021/02/07/arbitrability-fraud-india/ (Last visited on 22/06/2021)

In all cases, the SC's decision establishes a favorable and can be relied upon judgement, requiring courts to exercise care and minimal interference in cases including cases of arbitration and charges of fraud. It also establishes faith in the "arbitral tribunal" to resolve these disputes.[41]

6. RECENT LEGAL DECISIONS AIMING TO SOLVE THE PROBLEM

In "*Rashid Raza v/s Sadaf Akhtar"*[42] a controversy emerged between one partner in the partnership act against another on the claims of syphoning monies and several commercial misappropriations. The partner went to HC for arbitration in accordance with paragraph 11. The HC held nonetheless that the fact that the case is fraud-related and is not arbitrary. The petitioner therefore challenged the SLP's opinion of the HC in the SC. The fundamental question was whether serious claims of fraud can be addressed with in an arbitration. The Supreme Court stated that when serious allegations of forgery or fabricating documents are made in addition to the plea, or when the allegation is of fraud in the arbitration clause itself, or when the alleged fraud is applicable to the entire contract, such fraud will have an impact on the contract's or arbitration clause's validity. This would have ramifications not only for the parties' internal issues, but also for their external affairs. Before dealing with the significant claims of fraud, the court should determine whether the arbitral tribunal's jurisdiction has been revoked. The main source of concern should not be the forfeiture of the jurisdiction of court. The court should determine whether the dispute is arbitrable or not, even if an agreement for arbitration exists. If there is an "arbitration agreement" between the said sides to the contrary, the question should be whether the nature of the dispute prevents it from being sent to arbitration. Furthermore, when substantial claims of fraud are made, it is critical that special attention be paid to the investigation when such allegations are made in order to distort the arbitration agreement. The charges are arbitrable, according to the Supreme Court, because they come under the class of "simple allegations". Overturning the High Court's decision, it progressed to employ an arbitrator under "Section 11 of the Act" to address the parties' differences. By using the *Ayyasamy* test, the SC determined that no such claim existed that

[41] *Supra* note 35
[42] (2019) 8 SCC 710

would invalidate the whole partnership agreement, including the arbitration clause. Moreover, any charges of fund syphoning fall under allegations against the partnership and have no bearing on the public domain. As a result, the SC overturned the HC's decision because both tests were negative. It should be noted that this judgement only pertains to India-seated arbitration, not international arbitration, as international arbitration would be controlled by the World Sport case and would have the authority to arbitrate on any sort of fraud.[43]

The "*Avitel Post Studioz Limited and Ors. v/s HSBC PI Holdings (Mauritius) Limited and Ors".*[44]was the primary case to clarify the legal ambiguity surrounding the arbitrability of fraud. The SC stated that the "judgement in this case would be based on Indian substantive law on the arbitrability of fraud". When deliberating the lawful locus in profundity, the Supreme Court referred to the "*Swiss Timing"* decision, noting that while the decision was not binding, it had a strong persuasive value.[45] The SC then dependent upon the judgment of "*Booz Allen"*[46]and "*Afcons Infrastructure Ltd. v/s Cherian Varkey Construction Co. (P) Ltd"*[47] , to deal with a condition in which the similar set of particulars can lead to both "civil and criminal" action. The Supreme Court concluded that "the mere fact that criminal proceedings could be brought or have been brought in relation to the same subject matter does not mean that a dispute that is otherwise arbitrable has lost its arbitrability". This decision reaffirms the 1996 Act's dramatic departure from precedent in order to improve the effectiveness of the adjudication of arbitration. It was deciphered that "as long as the arbitration agreement is found to exist, mere allegations of fraud or the filing of criminal charges will not make the disputes non-arbitrable. Only under exceptional circumstances, when a contract containing an arbitration clause is deemed to be void, does the arbitration clause become void as well".

[43]Diganth Raj Sehgal, *Important judgments on the Arbitration and Conciliation Act*, 1996, iPleaders, 01/12/2020, available at https://blog.ipleaders.in/important-judgments-arbitration-conciliation-act-1996/ (Last visited on 23/06/2021)
[44]2020 (4) ArbLR 1 (SC), CIVIL APPEAL NO. 5145 OF 2016
[45]Sayantan Bhattacharyya, MokshRanawat, *The arbitrability of civil fraud in India: analysing the SC of India's decision in Avitel Post Studioz Ltd,* Arbitration International, Volume 37, Issue 1, March 2021, Pages 355–360,**2**6/11/2020, aviablabe at https://doi.org/10.1093/arbint/aiaa042 (Last Visited On- 22/06/2021)
[46]*Booz Allen and Hamilton Inc.* v/s *SBI Home Finance Ltd*SC (2011) 5 SCC 532

According to Section 17 of the Contract Act, "an inter-se allegation of fraud by one of the parties merely renders the contract voidable, and applying the principle of reparability of the arbitration clause/agreement from the underlying contract, parties cannot be allowed to avoid arbitration solely on the basis of such allegations of fraud". Conversely, where "serious charges of fraud" have public ramifications, the court may consign the parties to civil court rather than arbitration if the court determines that "it will be just and in the best interests of all parties not to proceed with arbitration".[48]

In "*Deccan Paper Mills v/s Regency Mahavir"*[49], The Supreme Court cited its decision in *Avitel Post Studioz*, which stated that "when the claimed fraud falls within the limits of contract performance or falls under Section 17 of the Indian Contract Act, 1872, the dispute is arbitrable". The Supreme Court went on to say that the "*N. Radhakrishnan* decision was bad law and didn't stand up to scrutiny". It was emphasized that just because a transaction has criminal undertones does not make the subject matter of the transaction un-arbitrable. It was noted, in light of recent rulings, that "there has been a sea of change in Section 8 as we perceive it in the Arbitration Act today, compared to Section 20 of the 1940 Arbitration Act". If a case is filed in court and all of Section 8's requirements are completed, the court must send the parties to arbitration unless it determines that there is no legitimate "arbitration agreement" prima facie.

In *Vidya Drolia v/s Durga Trading Corporation*[50], the law on arbitrability in contemporary jurisprudence was thoroughly examined by a three-judge bench of the Supreme Court. While the major issue was the law governing the "arbitrability of landlord-tenant conflicts", the court also did consider the "arbitrability of fraud". According to the decision in *Vidya Drolia*, "It would be completely incorrect to mistrust arbitration and see it as a faulty or inferior adjudication method unfit to deal with public policy issues of legislation". The Supreme Court of India made a comparison between arbitral tribunals and courts. Arbitrators, like courts, are required to be impartial and independent, to follow natural justice, and to follow a fair and

[48]VikasGoel and Vivek Gupta, "*The Viewpoint: Does allegation of fraud vitiate Arbitration Agreement*, Singhania& Partners, Bar and Bench" ,09/08/2020, available at https://www.barandbench.com/view-point/the-viewpoint-does-allegation-of-fraud-vitiate-arbitration-agreement (Last visited on 22/06/2021)
[49]AIR 2020 SC 4047
[50] "CIVIL APPEAL NO. 2402/2019- SC of India"

just procedure. The judges in *Vidya Drolia* reverentially approved with the conclusion in "*Avitel Post"* on the legitimacy of the "*N. Radhakrishnan*" decision. Finally, the *N. Radhakrishnan* decision was overturned, and the *Vidya Drolia* bench stated that "claims of fraud might be considered the subject of arbitration where they arose out of a civil dispute. The only exception to this rule is a disagreement deriving from fraud, which would render the arbitration clause null and void".

In *"M/S N.N. Global Mercantile v/s M/S Indo Unique Flame Ltd"*[51],the SC stated that the "former rule that fraud was non-arbitrable was still in effect because it would require a large amount of evidence and be too sophisticated to be decided in arbitration". In today's arbitrations, however, tribunals must sift through large amounts of information in a variety of conflicts. As a result, the Supreme Court ruled that the "notion that claims of fraud, forgery, or fabrication are non-arbitrable is a relic of the past and must be abandoned".[52]

7. ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021

The Arbitration and Conciliation (Amendment) Act, 2021[53] was enacted on March 11, 2021, following the introduction of the Arbitration and Conciliation (Amendment) Bill, 2021 in the Lok Sabha on February 4, 2021. It aims to amend the 1996 Arbitration and Conciliation Act. The Act includes rules for domestic and international arbitration, as well as a definition of the law governing conciliation proceedings. The Bill repeals an Ordinance enacted on November 4, 2020 that had the same requirements. The judgments, as well as the subsequent revision to the primary act of 1996, have clearly shows the legislators' determination to advance India as an "arbitration-friendly and pro-arbitration environment".

The Act includes two significant amendments. The first is to allow awards to be automatically stayed in specific circumstances if the court discovers prima facie evidence of "fraud" and

[51] "CIVIL APPEAL NOS. 3802 - 3803 / 2020- SC of India"
[52]Vasanth Rajasekaran , Saurabh Babulkar & Reshma Ravipati, "*The Evolving Jurisprudence Of 'arbitrability Of Fraud' In India – Where Do We Stand?"*, Phoenix Legal (Mondaq), 24/02/2021, available at https://www.mondaq.com/india/arbitration-dispute-resolution/1039916/the-evolving-jurisprudence-of-39arbitrability-of-fraud39-in-india-where-do-we-stand (Last visited on 23/06/2021)
[53]The Arbitration and Conciliation (Amendment) Act, 2021 (NO. 3 OF 2021), available at https://egazette.nic.in/WriteReadData/2021/225832.pdf (Last visited on 24/06/2021)

"corruption" in the contract on which the award is based. Other is the regulations, qualifications, experience, and standards for arbitrator certification were removed from the basic Act's eighth schedule[54].

The adjustment to "Section 34" governing the automatic stay of awards granted under the Principal Act of 1996 is the most prominent change in the Act of 2021. A party can move to the Court under "Section 34 of the 1996 Act" to have a judgement of the arbitration proceeding set aside under the current system. However, following the 2015 modification to the Act, an automatic stay on the award's implementation would not be granted simply by filing an application to set it aside.

The Amendment made a significant change by adding a proviso under section 36(3)[55] to "ensure that if courts are prima facie satisfied by the case based on either (i) the arbitration agreement or contract that is the basis of the award; or (ii) the award was induced or influenced by fraud or corruption, the award will be upheld. It will stay the award indefinitely pending the outcome of the challenge".

It is interesting to note that the above stated circumstances have previously been anticipated and effectively enumerated by the Act's current sections.

Fraud or corruption in the arbitration agreement or contract: At any given time, the parties want to claim and thereafter substantiate the accusations pertaining to fraud in an "arbitration agreement", the very suitable place to do it is in tribunal where arbitration proceedings are held and the most viable is doing at the phase of reference. It has already been seen that tribunal where arbitration proceedings are held are very much proficient to do an in-depth analysis on the evidence and the case to decipher if there is a taint of "corruption or fraud" in the said arbitration agreement or fraud. If any contenders of the fraud claim are dissatisfied with the decision/finding of the tribunal or if it not considers their "allegations of fraud" altogether, litigants can set aside the same after giving an application under "Section 34 of the 1996 Act". After this also if the litigants are not content, they have the option to appeal the order under "Section 37(1)(c)".

[54] *ibid* . pt.4
[55] *ibid*. pt.2

During the awarding process, if there was fraud or corruption.: Section 34(2)(b) [Explanation 1] (i) The parties have the right to ask for the award to be set aside if the arbitral tribunal's decision was influenced by fraud or corruption, or if the award is in contradiction of India's "public policy". Yet again, if the litigants are not content, they have the option to appeal the order under "Section 37(1)(c)". The current amendment doesn't appear to give somewhat of a reasonable fresh provision or liberation to the "aggrieved party" who is faced with a situation of "fraud" as defined in the revision. Consequently, this isn't unreasonable to conclude that enacting of the amendment is just analogous to imposing a supplementary phase of judicial or legal inspection in regards of "appellate review", which was intended as a stopgap measure with no effective safeguards. The ramifications of this expanded area of meddling are disastrous.[56]

8. CONCLUSION

All the aforementioned Supreme Court cases have tried their level best to give a clarity on the scattered and erroneous topic of arbitrability of contentions pertaining to fraud (severe accusation of fraud). The court has also cleared its stance as to by what means it is coherent to the Indian communal policy and is for sure evolving to achieve a pro arbitration approach. However the view laid by the Supreme Court that "those frauds which vitiate or renders the arbitration clause invalid would still be non-arbitrable" leaves a half empty contention as still there can be a scope for judicial intervention in the arbitrability cases where court can still strongly present its stance into the validity of arbitration clause and leaving a scope for intervention in the said matter. This intervention goes against the primary principle of arbitration law that is Kompetenz-Kompetenz. The doctrine of kompetenz establishes that a tribunal which arbitrates is permitted and competent to regulate the jurisdiction of its cases themselves, which includes determining all the matters with regards to the jurisdictional as well as the actuality or reasonableness of an arbitration agreement.[57]

[56]Mr. Shubham Joshi, *IMPLICATIONS OF THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021: ENSURING (UN)EASE OF DOING BUSINESS IN INDIA?*, RSSR, 20/03/2021, available at http://rsrr.in/2021/04/20/implications-of-the-2021-arbitration-amendment-act/ (Last visited on 24/06/2021)

[57]Vasanth Rajasekaran & Saurabh Babulkar, "Kompetenz-Kompetenz Principle Reiterated By Supreme Court Of India : Issue Of Limitation Is Not To Be Examined At The Section 11 Stag"e**,** Phoenix Legal (Mondaq),

In a number of judgments, including the historic *Henry case*[58], the US Supreme Court has declared that "in all matters involving arbitrability, the issue should be resolved by the arbitrator rather than the civil courts. In circumstances when a party to a dispute claims that the allusion to arbitrability is unfounded or even without basis, the arbitrator should decide." The approach taken by the Supreme Court of the United States of America is perfectly in line with the foundational concepts of arbitration, which will aid in the establishment of a more favorable pro-arbitration regime. Although the Indian Supreme Court has given judgements in consonance of propagating the pro arbitration regime but severely lacks in adhering to the primary principle of Kompetenz-Kompetenz.[59]

Through the passing of the amendment act 2021 the law makers have impliedly tried to make fraud not proficient of arbitration, thus diminishing its arbitrability. The parties to the dispute now have to make a consciously driven decision to take the route of arbitration or not when allegation of serious fraud is alleged by them or the opposite party. Another contention is that if there is an existence of an arbitration agreement between the parties then it will become tedious to move to the civil court for the dispute resolution as the court believes in minimum intervention and interference regarding these matters. Only during the staying of the enforcement proceedings or in the event of appeal to the arbitral award can it be determined whether the accusation of fraud is serious or not. This will negate the arbitration mechanism's main benefit of quick disposal of cases and monetary effectiveness.

The law makers could have shown its seriousness about resolving the ambiguity in the claims pertaining to arbitrability of fraud or more specifically the severe allegations thereof it should have focused on amending the Sections 8[60] and 11[61]of the 1996 act rather than completely focusing on the staying and enforcement of arbitral award post judgement. The contrast and interdependence between the above-mentioned sections, as well as the plethora of cases decided on the issue of arbitrability of fraud, will go in opposition to the said amendment

16/12/2019, available at "www.mondaq.com/india/arbitration-dispute-resolution/875332/kompetenz-kompetenz-principle-reiterated-by-supreme-court-of-india-issue-of-limitation-is-not-to-be-examined-at-the-section-11-stage" (Last visited on 23/06/2021)

[58]*Henry Schein Inc.* v. *Archer and White Sales* 586 U.S.___, 139 S. Ct. 524 (2019)

[59]*Supra* note 4

[60] Indian Arbitration and Conciliation Act, 2021 "s.8- Power to refer parties to arbitration where there is an arbitration agreement"

[61] Indian Arbitration and Conciliation Act, 2021, "s.11- Appointment of arbitrators"

of section 36, that infringes on the unconditional adjudication of the awards if there is a claim of fraud in coherence to the fundamental arbitral agreement. [62]Many legislators in the Lok Sabha criticized the 2021 Bill regarding the unconditional stay on awards. Many legal experts that the phenomenon of unconditional stay will present an obstacle in the direction of the active effort of towards the implementation of ace arbitration administration. The primary reason for this is the ease for the opposite party to allege serious fraud and automatic stay on the enforcement of arbitral award.

The main purpose of ADR mechanism is defeated by compelling the parties to see the doors of court and taking the route of litigation. One of the most prominent drawbacks of the amendment is that it does not aim to elucidate the legislative meaning of either corruption or fraud which creates a vagueness for the dispute parties where the party at the defense side may have to endure the extensive litigation process even if they are not wrong. The retrospective nature of the amendment may also open a way for the abundant litigation cases over burdening the courts.

The case petitioners in cases pending adjudication for an application under Section 36(2) [63] the court will now have to renew their petitions based on the primary grounds outlined in the current modification. This will in turn delay and increase the cost of the cases unless the courts on its own motion (suasaponte) take notice of the provision in the current amendment and dispose off the said cases with the filing of new submissions.

Under response to criticism of the revision, the law minister claimed that, "notwithstanding any utilization of phrases, fraud and corruption were essential in Section 34 because corruption did not offer an automatic stay of the award. He went on to say that the administration wants to avoid predatory attempts by parties to gain from an award contaminated by corruption as soon as possible."[64]

[62]*Supra* note 24

[63] Indian Arbitration and Conciliation Act, 2021, s.36(2)- "Enforcement- Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose"

[64]Shubham Prakash Mishra, *Impact of The Arbitration and Conciliation (Amendment) Act, 2021 on India's Pro Arbitration Outlook, Bar and Bench*, 30/03/2021, available at https://www.barandbench.com/apprentice-

This amendment takes a reverting and degenerating way and doesn't ease the objective to obtain pro-arbitration dominion in India. Statements and claim by the law minister are unpersuasive as he doesn't provide a viable reason for the same. The legal luminaries supporting the amendment claim that the changes in the amendment will help relive the claimants and parties adversely distress with regards to the elements of fraud in the enforcement of arbitration award. Same was seen in the case of *Venture Global Engineering Llc vs Tech Mahindra Ltd &AnrEtc*[65].

The fraud in the aforementioned case came to light 3 years subsequent to award enforcement and it resulted in the revisiting of the award and then accordingly was set aside. Although, it still remains unclear how the broadening of the act's scope would in turn help in protecting numerous guiltless parties wherein the allegation is solely contemplated for the prolongation of the award enforcement.

Despite the probable scope for misuse in the two prominent examinations for formatting the fraud arbitrability in India i.e., in *Ayyasamy* and *Avite*l case, the Supreme Court have actively tried to offer as to what makes a claimant's allegations a case of "serious fraud". We can see the substantial difference in the initial and current position of the Supreme Court as we can see the apparent change in the arbitration aversion approach leading to minimum intervention in the matters of the same. The court has eventually adopted a pro-arbitration regime rhetoric albeit and with it having a pro-protectionist approach. This is developed to re instate the rights of citizen in the public forum and not to create a deficiency of self-assurance in the realm of arbitration. However, precluding the use of the second test (about "states and their instrumentalities") as a pretext to avoid arbitration, a legal tendency of constant solicitation of the latter test (in regards to the "states and their instrumentalities") must be shaped. As a result, in practice, a pragmatic approach to arbitration is required.[66]

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lawyer/impact-of-the-arbitration-and-conciliation-amendment-act-2021-on-indias-pro-arbitration-outlook (Last visited on 24/06/2021)

[65] SC CIVIL APPEAL NO(s.) 17756 OF 2017

[66] Sarah Ayreen Mir, "*The Tests for Determining Arbitrability of Fraud in India: Clearing The Mist, Kluwer Arbitration Blog"*, 08/06/2021, available at http://arbitrationblog.kluwerarbitration.com/2020/10/06/the-tests-for-determining-arbitrability-of-fraud-in-india-clearing-the-mist/ (Last visited on 24/06/2021)

Visibly the arbitration mechanism while dealing with arbitrability and arbitral referral among the allegations of “serious” fraud has had a tumultuous path.

The recent judicial decisions are a positive step forward. By embracing supplementary concepts of contemporary jurisprudence of arbitration law, the arbitral regime of India will be able to come closer to its aim of being a mature jurisdiction. The verdicts not only accomplish the goal of eliminating judicial interference in the arbitral process, but they also demonstrate the Indian courts' trust and faith in alternative dispute resolution mechanism.

In a court of justice where implementation of a verdict or award has been difficult, a radical change from courts of India after enforcement methodology to enabling courts to bestow an unequivocal reservation on arbitral award enforcement is counterproductive to the inalienable entrenched privilege of implementation, finality, and legally enforceable essence of an arbitral award. This has an influence on contract enforceability and is likely to cause businesses to be uneasy about operating in an environment where it is more probable for the parties to get into more litigations after arbitral award enforcement, depriving them of the arbitral award's benefits.

The amendment act, on the other hand, is a two-edged blade that can be used in either direction. In India the applicants frequently utilize fraud as an initial defense to evade any kind of arbitral procedure. Recent court judgments continuously limited the latitude in regards to the judicial intervention in any kind of cases related to fraud, the amendment can possibly be a setback. In future we shall lookout the judicial decisions to witness the interpretation of Indian courts of the expression included in the current amendment including "inducement," "fraud," and "corruption” as these words are not expressly defined in the amendment act which poses disparities in future cases.

Respondents desiring to avoid the arbitral procedure will continue to allege accusations of fraud as we move forward. These instances would next be evaluated in light of almost all of the prior guidelines. Albeit the rules underlying in India regarding the "arbitrability of frauds" are certainly solid, their efficiency in restraining potential respondents who seek to avoid arbitration is yet to be determined. From the legislative approach seen in the 2021 amendment we can decipher that we still have not reached the ultimate clarity needed in the

cases pertaining to arbitrability of fraud in India. It will be interesting to see the implementation of the recent precedents in consonance with the current amendment in the future case.

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