

DEFINING THE CONTOURS OF THE PUBLIC POLICY EXCEPTION - A NEW TEST FOR
ARBITRABILITY IN INDIA

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Abstract

*There have been several attempts to revise and revamp the arbitration regime in India with the intent of promoting India as an arbitration-friendly country. Unfortunately, all such attempts have ignored the development of inconsistent jurisprudence on the arbitrability of disputes. An analysis on the subject usually begins with the inadequate test propounded by the Supreme Court in *Booz Allen Hamilton v. SBI Home Finance Ltd.* [“*Booz Allen*”] which requires an examination of whether the dispute is an action in rem or in personam. This paper critically examines the test, and attempts to engage in an objective analysis of the public policy exception and the question as to why nations reserve, or ought to reserve, resolution of disputes by national courts. It highlights the lack of reasoning and clarity in *Booz Allen* with respect to the public policy exception, due to which the test it laid down has been misinterpreted and misapplied. This paper then proposes an alternative test, and critically examines it against various subject matters to conclude that the new test does not violate the current notion of public policy, but at the same time, brings the jurisprudence in line with international standards.*

I. Introduction

India has been making several policy changes to portray the country as a hub for domestic and international arbitration. For instance, recently, the New Delhi International Arbitration Centre Bill, 2018 and the Arbitration and Conciliation (Amendment) Act, 2018 [“**2018 Amendment**”] were passed by the Lok Sabha,¹ merely three years after the last amendment.² However, most such exercises at revamping the Arbitration and Conciliation Act, 1996 [“**Arbitration Act**”] have completely skipped the jurisprudence of arbitrability of disputes which has, time and again, choked arbitration in this country.

Internationally, arbitration is known to be ‘a private proceeding with public consequences’.³ An arbitrator is empowered to do all that a civil court can,⁴ subject to the public policy exception, which mandates that certain disputes cannot be resolved through arbitration, and that only the national courts will have jurisdiction over such disputes. Generally, a dispute is arbitrable if it is ‘capable of settlement by arbitration’.⁵ It is necessary to state that the term ‘arbitrability’ can

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¹ PTI, *Lok Sabha Passes Arbitration and Conciliation (Amendment) Bill 2018*, THE NEW INDIAN EXPRESS (Aug. 10, 2018), available at <http://www.newindianexpress.com/nation/2018/aug/10/lok-sabha-passes-arbitration-and-conciliation-bill-amendment-2018-1855978.html>.

² The Arbitration and Conciliation (Amendment) Act, No. 3 of 2016.

³ N. BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 2.126 (6th ed. 2015).

⁴ *Eros International Media Ltd v. Telemax Links India Pvt. Ltd.*, 2016 SCC Online Bom 2179 [hereinafter “*Eros International*”].

⁵ See The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(1) and art. V(2)(a), June 7, 1959, 330 U.N.T.S. 38; United Nations Commission on International Trade Law [UNCITRAL], Model Law on International Commercial Arbitration art. 34(2)(b) and 36(1)(b)(i), 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res 61/33 (Dec. 18, 2006) [hereinafter “UNCITRAL Model Law”].

mean different things⁶ i.e. (i) whether there is an arbitration agreement, (ii) whether the dispute is beyond the scope of the arbitration agreement, and, (iii) whether the subject matter of the dispute is arbitrable.⁷ Therefore, questions of arbitrability are usually procedural questions as to which forum shall exercise jurisdiction rather than questions of applicability of substantive laws.⁸ This article refers to arbitrability of disputes only in the last context i.e. whether an arbitral tribunal can adjudicate over the subject-matter of the dispute, or is the subject matter such that it is reserved for adjudication by the courts alone?

In India, the issue of arbitrability of disputes is not governed by statute but by case law. This is because the only reference to arbitrability is contained in Section 2(3) of the Arbitration Act which merely provides that “certain disputes may not be submitted to arbitration”,⁹ while not providing any category of cases that are non-arbitrable.¹⁰ Further, Sections 34(2)(b) and 48(2) of the Arbitration Act empower the courts to set aside an award if the dispute was not capable of settlement by arbitration or if the award conflicts with the public policy of India, thus, leaving the question of arbitrability with the courts. It is pertinent to mention here that arbitrability and public policy are two separate grounds under the aforesaid sections. Nonetheless, arbitrability inextricably gets mixed with public policy as it may not be in public interest that certain types of matters such as criminal matters, succession etc. should be settled by arbitration, as they affect issues such as national security, sovereignty, law and order, social objectives etc.

The question of arbitrability may arise at different stages i.e. (i) before a court of law where the court has an obligation to refuse to hear the matter and refer it to arbitration under Sections 8(1) or 45 of the Arbitration Act, unless there exist sufficient reasons for not doing so;¹¹ (ii) during an arbitration proceeding¹² as a question of jurisdiction under the principle of *kompetenz-kompetenz*; (iii) at the time of considering an application for setting aside an award;¹³ or (iv) at the stage of enforcement of an award.¹⁴ Usually, the reasons for not honouring an agreement between the parties to have their dispute resolved through arbitration include (i) public interest; (ii) public policy, and (iii) the need for judicial protection.¹⁵ However, ouster of jurisdiction on account of non-arbitrability is not something that should be assumed lightly, but must only be done in those

⁶ Homayoon Arfazadeh, *Arbitrability under the New York Convention: The Lex Fori Revisited*, 17(1) ARB. INT'L 73 (2001) [hereinafter “Homavoon Arfazadeh”].

⁷ Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd, AIR 2011 SC 2507 [hereinafter “Booz Allen”].

⁸ Homayoon Arfazadeh, *supra* note 6, at 75.

⁹ The Arbitration and Conciliation Act, No. 26 of 1996, § 2(3) [“*This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration*”] [hereinafter “Arbitration Act”].

¹⁰ A. Ayyasamy v. A Paramasivam, (2016) 10 SCC 386 [hereinafter “A. Ayyasamy”]; Aftab Singh v. Emaar MGF Land Limited, 2017 SCC Online NCDRC 1614.

¹¹ Robert B. Kovacs, *A Transnational Approach to the Arbitrability of Insolvency Proceedings in International Arbitration*, INT'L INSOLVENCY INST. (June 21-22, 2012), available at <https://www.iiiglobal.org/sites/default/files/transnationalapproachtothe-arbitrability-of-insolvency-proceedings-in-international-arbitration.pdf> [hereinafter “Robert B. Kovacs”]; Sundaram Finance Limited and Anr. v. T. Thankam, (2015) 14 SCC 444, ¶ 13.

¹² Eric A. Schwartz, *The Domain of Arbitration and Issues of Arbitrability: The View from the ICC*, 9(1) ICSID REV. – FOREIGN INV. L. J. 17 (1994).

¹³ Arbitration Act, *supra* note 9, § 34(2)(b)(i).

¹⁴ *Id.* § 48(2).

¹⁵ GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 82 (2d ed. 2015).

limited cases which are clearly non-arbitrable.¹⁶

Currently, the jurisprudence on arbitrability stands overshadowed by the judgment of the Honourable Supreme Court of India [the “**Court**”] in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.* [“**Booz Allen**”]¹⁷ where the Court, while upholding public policy in the face of arbitration clauses, propounded the test of ‘*in rem* and *in personam*’ i.e. rights against particular persons (*in personam*) are arbitrable but those against the world at large (*in rem*) are not.¹⁸ The test has been criticized in subsequent judgments,¹⁹ and is not comprehensive enough to be the sole test for arbitrability of disputes. Some courts have attempted to find alternatives, such as the test of relief sought by the parties i.e. whether the tribunal can grant the relief prayed for, or the test of public policy i.e. where the legislature has enacted a special legislation or special body for adjudication of disputes, however, none of the tests are sufficient or comprehensive enough to be the litmus test for determining whether a dispute is arbitrable.²⁰ In fact, due to the lack of clear reasoning in *Booz Allen*, courts have completely misinterpreted and misapplied the public policy exception while determining arbitrability (as discussed in Part IV).

The first part of this paper states the decision of the Supreme Court in *Booz Allen*. The second part examines the objective limits and the rationale of the public policy exception. The third part discusses the inadequacies of the *Booz Allen* test and its lack of clarity with respect to the public policy exception. The fourth part analyses subsequent judgments which have referenced *Booz Allen* to demonstrate how the lack of clarity and inadequacy of the *Booz Allen* test has led to misapplication and misinterpretation of the test of *in personam* and *in rem*. The fifth part proposes an alternative test to determine the arbitrability of disputes and proceeds to examine various subject matters against the proposed alternative. Lastly, the paper concludes that the dictum in *Booz Allen* has been misinterpreted and misapplied by the courts because the Court in *Booz Allen* first reached a conclusion and then looked for justifications, thereby creating a vague and undefined standard of public policy to determine arbitrability. Furthermore, the test of *in personam* and *in rem* is grossly insufficient and renders most matters inarbitrable, whereas, the alternative proposed in this paper is a more comprehensive test, which does not violate current public policy standards and at the same time, helps in the promotion of arbitration of disputes.

II. The Test of Booz Allen

In *Booz Allen*, the Supreme Court was called upon to consider the question of arbitrability with respect to the enforcement of a bank mortgage by sale. While most of the facts of the case had a purely *inter partes* effect i.e. the entire cause of action was based on agreements being executed

¹⁶ Eros International, *supra* note 4, ¶ 11. The Respondent Counsel made this argument placing reliance on the decision of the Court in *V.H. Patel & Company and Ors. v. Hirubhai Himabhai Patel and Ors.*, (2000) 4 SCC 368.

¹⁷ *Booz Allen*, *supra* note 7.

¹⁸ *Id.*

¹⁹ Rakesh Malhotra v. Rajinder Kumar Malhotra, (2015) 192 Comp Cas 516. The court observed the possibility of ‘dressing up’ reliefs which were *in rem* to avoid arbitration; Eros International, *supra* note 4, ¶ 22; see also Arthad Kurlekar, *A False start - Uncertainty in the Determination of Arbitrability in India*, KLUWER ARB. BLOG (June 16, 2016), available at <http://arbitrationblog.kluwerarbitration.com/2016/06/16/a-false-start-uncertainty-in-the-determination-of-arbitrability-in-india/>.

²⁰ Ajar Rab, *Redressal Mechanism under the Real Estate (Regulation and Development) Act 2016: Ouster of the Arbitration Tribunal?*, 10(1) NAT’L U. JURID. SCI. L. REV. 1, 13 (2017) [hereinafter “Ajar Rab”].

between the parties and the bank,²¹ the Court proceeded to examine the question of arbitrability with the broad tests of (a) whether the subject matter is capable of adjudication by a private forum; or (b) whether the relief claimed can only be granted by a special court or tribunal.²²

The Court agreed that arbitration is a private forum chosen by parties and every dispute, civil or otherwise, is capable of arbitration²³ unless barred (a) expressly or (b) by necessary implication.²⁴ The rationale of the Court was that if a statute confers a right and provides a remedy for its enforcement, then a party can only avail the exclusive remedy under that statute.²⁵ The Court then proceeded to list out examples of matters which are inarbitrable i.e.,

- (i) criminal offences;
- (ii) matrimonial disputes;
- (iii) guardianship;
- (iv) insolvency and winding up;
- (v) tenancy governed by a special statute,

and held that the reason for these disputes being inarbitrable is that they are actions *in rem*.²⁶ Thus, the Court used a rights-based analysis and set the test of public policy based on the distinction between rights *in personam* i.e. rights against particular persons, and rights *in rem* i.e. rights against the world at large.²⁷ Actions or disputes with respect to rights *in rem* would be inarbitrable. However, the Court categorically cautioned that this was not an inflexible rule and subordinate rights from actions *in rem* would be arbitrable, for example, rights under a patent license agreement would be arbitrable but the validity of the patent may not be arbitrable.²⁸

Ultimately, the Court held that a mortgage suit for sale was not arbitrable, being an action *in rem*. The Court examined the nature of the proceedings and pointed out that since any person having an interest or right of redemption may be interested in the proceedings, the same cannot be sent to the private adjudicatory process of arbitration, as the Court has to protect the interests of third-parties and also adjudicate upon their rights and liabilities. Thus, the Court in effect reasoned that permitting an ouster of jurisdiction of a civil court would extinguish the rights of third parties and that cannot be permitted on grounds of public policy.²⁹

III. The Public Policy Exception

²¹ Booz Allen, *supra* note 7, ¶ 53.

²² *Id.* ¶ 33.

²³ *Id.* ¶ 35.

²⁴ *Id.* ¶ 35.

²⁵ Eros International, *supra* note 4, ¶ 14.

²⁶ Booz Allen, *supra* note 7, ¶ 37.

²⁷ P.J. FITZGERALD, SALMOND ON JURISPRUDENCE 235 (12th ed. 2009) [“My right to the peaceable occupation of my farm is in rem, for all the world is a under a duty towards me not to interfere with it. But if I grant a lease of the farm to a tenant, my right to receive the rent from him is *in personam*”].

²⁸ MUSTILL AND BOYD, LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 73 (2d ed. 1989) *cited in* Booz Allen, *supra* note 7, ¶ 41.

²⁹ *Id.*

To analyse and examine the effect of *Booz Allen*, it is necessary to first understand what public policy is and why it is an accepted exception to the general rule of arbitrability of disputes. Public policy pertains to “the most basic norms of morality and justice”³⁰ of a State, the violation of which “would be clearly injurious to the public good or, possibly . . . would be wholly offensive to the ordinary reasonable and fully informed member[s] of the public on whose behalf the powers of the State are exercised”.³¹ Explanation 1 to Section 34(2)(b) and Section 48(2) of the Arbitration Act list out three instances of the public policy exception i.e. (i) the award was induced by fraud or corruption; or (ii) the award is in contravention with the fundamental policy of Indian law; or (iii) the award conflicts with the most basic notions of morality or justice.

The Court, in setting out the test of arbitrability in *Booz Allen*, started with a public policy analysis but did not set out its contours. Instead, it first listed examples of disputes which were inarbitrable and then, due to apparent confirmation bias, sought to reason that they were so because they were *in rem*. Essentially, the Court reached a conclusion and then searched for a reasoning instead of reaching a reasoned conclusion.

It is pertinent to note that arbitrability strikes at the root of procedural maintainability of a proceeding, rather than determining the rights of the parties involved, as it is the first step to determine whether the tribunal has jurisdiction to adjudicate on the subject matter. In *Booz Allen* as well as in subsequent judgments, the courts in India have proceeded to answer procedural questions by examining substantive laws of the dispute.³² The Court stated that the adjudication of certain disputes has been exclusively reserved for the courts by the legislature either expressly or by necessary implication, but did not analyse why such a reservation has been made, or ought to be made. The possible areas for reservation are where—

- (a) an arbitrator is not competent or is incapable of deciding the dispute as it concerns public policy; or
- (b) the dispute is one which affects sovereign functions or state monopoly,³³ i.e. inalienable functions of the State,³⁴; or
- (c) the parties freely alienating their rights to adjudication by public fora in favour of arbitration need judicial protection as they cannot make an informed decision, or the

³⁰ Arbitration Act, *supra* note 9, § 48(2), Explanation 1(iii); *Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de L’Industrie du Papier*, 508 F.2d 969 (2nd Cir, 1974) (U.S.) [*per Smith J.*].

³¹ *Deutsche Schachtbau-und Tiefbohrgesellschaftmbh v. Ras Al Khaimah National Oil Company*, [1987] 2 Lloyd’s Rep 246, 254 (Eng.) [*per Donaldson MR*].

³² *Himangni Enterprises v. Kamaljeet Singh Ahluwalia*, (2017) 10 SCC 706, ¶ 24 [*hereinafter* “Himangni Enterprises”]; *infra* Part IV.

³³ *Union of India v. Competition Commission of India*, AIR 2012 Del 66.

³⁴ *Agricultural Produce Market Committee v. Ashok Harikuni and Anr.*, (2000) 8 SCC 61, ¶ 32 [*hereinafter* “Agricultural Produce Market Committee”]. “Thus, various functions of the State, may be ramifications of ‘sovereignty’ but they all cannot be construed as primary inalienable functions. Broadly it is taxation, eminent domain and police power which covers its field. It may cover its legislative functions, administration of law, eminent domain, maintenance of law and order, internal and external security, grant of pardon. So, the dichotomy between sovereign and non-sovereign function could be found by finding which of the functions of the State could be undertaken by any private person or body. The one which could be undertaken cannot be sovereign function. In a given case even in subject on which the State has the monopoly may also be non- sovereign in nature”.

rights themselves are not alienable;³⁵ or

- (d) the dispute has an *erga omnes* effect³⁶ i.e. it effects the rights and liabilities of third parties,³⁷ and accordingly cannot be decided by a private forum.

In order to fully understand the public policy exception, each of these possibilities needs to be examined in further detail.

A. Competence of the Arbitrators

The origins of the public policy exception were, more or less, based on concerns regarding arbitration as a process.³⁸ It was considered that (i) arbitrators cannot appreciate evidence as well as courts, and thus, have limited fact-finding capability; (ii) arbitrators may not be able to apply public policy considerations since arbitration is a private mechanism; (iii) the resultant awards have no provision for appeal and limited grounds for setting aside; and (iv) the proceedings are confidential.³⁹ Therefore, the judiciary in India has long held mistrust with respect to the competence of arbitrators and their ability to effectively adjudicate disputes.

However, this mistrust may be misplaced. An arbitrator is empowered to do all that a civil court can do.⁴⁰ Moreover, arbitrators are at times more qualified than the judges deciding a dispute as they might be experts in the area.⁴¹ One of the advantages of arbitration as a dispute resolution mechanism is the freedom of the parties to choose an arbitrator of their choice, who can be an expert in a particular field.⁴² Also, the possibility of having three or more arbitrators limits the possibility of adjudication being done by a single judge with a preconceived notion about the dispute. Further, the possibility to challenge an arbitrator's bias or pre-judgement is greater than the possibility to challenge a judge's pre-disposition.⁴³ Therefore, there is no reason to put arbitrators at a threshold below the judges.

In many jurisdictions, there is case law which demonstrates that many regulatory and public policy related disputes are now arbitrable.⁴⁴ In Germany, antitrust disputes are arbitrable as it is assumed that arbitrators would apply competition law in the same manner as the courts would.⁴⁵ In the United States, the Courts have taken a similar view with respect to antitrust disputes.⁴⁶ The French Courts have also leaned in favour of arbitrability with respect to disputes concerning

³⁵ Ajar Rab, *Emaar MGF Land Ltd. & Anr. v. Aftab Singh: The end of the line for consumer arbitration in India*, 6 INT'L J. CONSUMER L. & PRAC. 41 (2018) [hereinafter "Ajar Rab"].

³⁶ Edouard Fortunet, *Arbitrability of Intellectual Property Disputes in France*, 26(2) ARB. INT'L 281, 293 (2010) [hereinafter "Fortunet"].

³⁷ As was the case in *Booz Allen*, *supra* note 7.

³⁸ Stavros L Brekoulakis, *On Arbitrability: Persisting Misconceptions and New Areas Of Concern*, in ARBITRABILITY – INTERNATIONAL AND COMPARATIVE PERSPECTIVES 21-25 (Loukas A. Mistelis & Stavros L Brekoulakis eds., 2009).

³⁹ *Id.*

⁴⁰ *Eros International*, *supra* note 4, ¶ 18.

⁴¹ MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 2 (2d ed. 2012) [hereinafter "Margaret L. Moses"].

⁴² *Id.* at 2.

⁴³ Arbitration Act, *supra* note 9, § 12 read with Schs. 5 & 7.

⁴⁴ Homayoon Arfazadeh, *supra* note 6, at 76.

⁴⁵ Patrick M. Baron & Stefan Liniger, *A Second Look at Arbitrability: Approaches to Arbitration in the United States, Switzerland and Germany*, 19(1) ARB. INT'L 27, 38 (2003) [hereinafter "Patrick M. Baron"].

⁴⁶ *Mitsubishi v. Soler Chrysler-Plymouth*, 437 U.S. 614 (1985) (U.S.).

Intellectual Property Rights.⁴⁷ Therefore, the assumption that arbitrators cannot effectively apply public policy has no basis. Even with respect to the ability to appreciate evidence⁴⁸ and challenge of the award,⁴⁹ all necessary procedural safeguards have been built in, to ensure the sanctity of the award such as notice of arbitration, right to challenge arbitrators on impartiality and independence,⁵⁰ adherence to principles of natural justice,⁵¹ right to challenge the award for procedural unfairness or deviation from agreement of the parties etc.⁵²

Lastly, the assumptions as to the competence of arbitrators should not be used to oust the jurisdiction of the arbitral tribunal, as such concerns strike at the very root of arbitration as a dispute resolution mechanism. Permitting only certain disputes to be arbitrated and not others, on the ground of limitations of the mechanism, runs afoul of the basic principle that an arbitrator is empowered to do all that which a civil court can. Thus, using the public policy exception to oust the jurisdiction of an arbitral tribunal should not be based on a mistrust of the process of arbitration and the competence of arbitrators. This mistrust cannot fall within the domain of the public policy exception.

B. Sovereign Function

The real question or test for the legislature reserving certain disputes exclusively for adjudication by public fora should ideally be the test of sovereign function or State monopoly i.e. functions which the State cannot alienate and has an exclusive right and duty to perform. Since arbitrators are appointed by the parties and not the State,⁵³ there exists an inherent danger that the interest of private parties may trump public interest. Arbitrators want to be appointed again and again, and therefore, they have an interest in ensuring that the party appointing them is happy with the result.⁵⁴

Moreover, since the dispute relates to, or is connected with, the discharge of a sovereign function, for e.g., grant of patents, licences, company incorporation, registration of marriage, etc., the same would have an *erga omnes* effect and would be, as held in *Booz Allen*,⁵⁵ an action *in rem*. Therefore, the same cannot be decided by a private adjudicatory process. Furthermore, the power of the State to maintain law and order or discharge sovereign functions would effectively be delegated into private hands if parties are permitted to resolve disputes related to sovereign functions through arbitration.

⁴⁷ Fortunet, *supra* note 36; *see also* Cour d'appel [CA] [regional court of appeal] Paris, Feb. 28, 2008, *Ste Hidravlika D v. SA Diebolt*, JCP E 2008, 1582 (Fr.).

⁴⁸ Arbitration Act, *supra* note 9, § 27.

⁴⁹ *Id.* §§ 34, 48.

⁵⁰ *Id.* § 12.

⁵¹ *Id.* §§ 18, 23, 24.

⁵² *Id.* §§ 34, 48; Dentons Rodyk, *Sanctity of an arbitration award: When does a breach of natural justice tip the balance?*, LEXOLOGY, available at <https://www.lexology.com/library/detail.aspx?g=796c9bed-5a53-44b0-aa33-d0aebac74222>; *see also* Zoran Jordanoski, *Due Process as Minimal Procedural Safeguard in International Commercial Arbitration*, ACADEMIA.EDU, available at https://www.academia.edu/37522998/DUE_PROCESS_AS_MINIMAL_PROCEDURAL_SAFEGUARD_IN_INTERNATIONAL_COMMERCIAL_ARBITRATION.

⁵³ *Booz Allen*, *supra* note 7, ¶ 41.

⁵⁴ Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 977 (2011).

⁵⁵ *Booz Allen*, *supra* note 7, ¶¶ 37, 41.

It is necessary to clarify at this stage that the reason for criminal matters not being arbitrable is not only that criminal, or penal, actions are actions *in rem*, but also because they are within the exclusive domain of the State as violations of criminal law are offences against the State and not just against the victim.⁵⁶ Very often, penal actions are referred to as being inarbitrable as the arbitrator cannot grant reliefs as envisaged under criminal law, thereby using a relief-based analysis to penal actions.⁵⁷ However, the same is erroneous.

The reason the arbitrator cannot grant relief in criminal proceedings is because the State never granted that authority or right to an arbitrator. Further, there might be offences which would affect national security, homeland security, drug abuse, etc. and would consequently have ramifications *in rem*. More importantly, derogation from criminal law is not permissible by consent between the accused and the State.⁵⁸ Also, there is no agreement to arbitrate prior to the commission of the offence. Thus, criminal matters can only be subject to arbitration by means of a submission agreement. Even if that was hypothetically possible, as it is practically impossible, the accused would never agree on any procedure to take away his/her right to life and liberty. Therefore, criminal matters are inarbitrable for several reasons and not only because of the arbitral tribunal's power to punish and imprison the parties.

C. Inalienable Rights

Under Swiss and German laws, claims involving an economic interest or pecuniary claims are arbitrable⁵⁹ as such rights can be alienated, transferred, renounced, and traded. However, certain rights by their very nature are inalienable. One cannot contract out of a statute to the extent that the law stops applying to him or her, especially with respect to matters related to criminal law, matrimony, insolvency, etc. i.e. public policy.⁶⁰ Thus, where the statute makes a provision for individual benefit and the prohibition is not a matter of public policy, only in such cases can the individual waive or derogate from a statutory provision under the principle of *quilibet palest renunciat juri pro se introducto* i.e. anyone may renounce a law introduced for his own benefit.⁶¹ Therefore, it is only inalienable rights that cannot be adjudicated upon through arbitration.

D. Special Legislation

In certain disputes (such as consumer disputes, real estate disputes, labour disputes and tenancy disputes) the rights *per se* are alienable, and accordingly parties should have the freedom to enter into contract to have their disputes decided by arbitration. However, the legislature, in public interest, or to correct a specific social problem, or to balance unequal bargaining power, grants

⁵⁶ Kumaravelu Chockalingam, *Measures for Crime Victims in the Indian Criminal Justice System*, U. N. ASIA & FAR EAST ASIA INST. (Sep. 3, 2018), available at https://www.unafei.or.jp/publications/pdf/RS_No81/No81_11VE_Chockalingam.pdf.

⁵⁷ Ajar Rab, *supra* note 20, at 10.

⁵⁸ The Indian Contract Act, No. 9 of 1872, § 23.

⁵⁹ ZHENG SOPHIA TANG, JURISDICTION AND ARBITRATION AGREEMENTS IN INTERNATIONAL 94 (1st ed. 2014); LOI FÉDÉRALE SUISSE SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP], FEDERAL CODE ON PRIVATE INTERNATIONAL LAW [CPIL] Dec. 18, 1987, art. 177(II)(1) (Switz.).

⁶⁰ The Indian Contract Act, No. 9 of 1872, § 23.

⁶¹ *Waman Shrinivas Kini v. Ratilal Bhagwandas and Co.*, [1959] Supp 2 SCR 217, 225-26; *Murlidhar Aggarwal v. State of Uttar Pradesh*, (1975) 1 SCR 575 [The tenant waived his right to approach the civil court under the UP (Temporary) Control of Rents and Eviction Act. The lease deed was declared illegal as the provision was for the benefit of the public and could not be waived]; *Indira Bai v. Nand Kishore*, (1990) 4 SCC 668.

special protection to individuals involved in certain kinds of disputes. This is done as the concerned parties may not always make an informed choice when referring their dispute to arbitration. For example, consumers are usually unaware of arbitration as an alternative forum for dispute resolution and they lack the understanding of the arbitral process. Similarly, labour disputes and tenancy disputes also represent the unequal bargaining power of the labourers or tenants. Therefore, even though such individuals or groups have alienable rights, such rights require judicial protection because of a social objective. Hence, they fall within the domain of the public policy exception by creation of special laws i.e. Consumer Protection Act, 1986, Real Estate (Regulation and Development) Act, 2016, Industrial Disputes Act, 1947 etc.

In fact, the jurisprudence prior to *Booz Allen* was based primarily on the public policy exception stemming from a special legislation. In *Natraj Studios (P) Ltd. v. Navrang Studios and Another*⁶² [“**Natraj**”] the Supreme Court had rightly held that the Bombay Rent, Hotel and Lodging House Rates Control Act, 1947 was a welfare legislation with the social objective of protecting tenants from landlords and the scheme of the act clearly showed that the exclusive jurisdiction was conferred on certain special courts such as those under the Provincial Small Cause Courts Act, 1887 pursuant to such social objective.

E. Erga Omnes Effect

Arbitration is a private adjudicatory process by which parties agree to have their dispute resolved by someone other than a court created by the laws of a country. The implication being that arbitration can only take place where (a) the parties have clearly consented to ousting the jurisdiction of a civil court in favour of arbitration; and (b) the dispute is one where the rights and liabilities of third parties is not going to be affected by adjudication of the dispute. Thus, the jurisdiction of the arbitral tribunal is ousted in cases where arbitration proceedings would have an *erga omnes* effect as the arbitrator, whose powers are derived from an agreement between the parties, cannot bind non-signatories to the agreement.⁶³

Unfortunately, the *Booz Allen* test mixes up the issue of *erga omnes* effect with rights *in rem*. For example, a right to property is a right *in rem*, however, a tenancy dispute is purely between a landlord and a tenant and is, therefore, *inter partes*. It has no effect *erga omnes*. Similarly, as impliedly affirmed in *Booz Allen*, validity of a patent is a declaration to the world at large over the use and exclusivity of a process by a party, but an infringement of the same under the terms of a license agreement is *inter partes*.⁶⁴

Therefore, the public policy exception relating to the ouster of jurisdiction of an arbitral tribunal should apply only in cases where the rights and liabilities of third parties i.e. parties other than those who have consented to an arbitration agreement, will be affected by the result of the arbitration, and not because the right involved is *in rem*.

IV. The Inadequacies of *Booz Allen*

Given that the test to determine arbitrability in India was first laid down by the Court in *Booz*

⁶² *Natraj Studios (P) Ltd. v. Navrang Studios and Anr.*, (1981) 1 SCC 523, ¶ 17 [hereinafter “*Natraj Studios*”].

⁶³ MARGARET L. MOSES, *supra* note 41, at 33.

⁶⁴ *Booz Allen*, *supra* note 7, ¶ 35.

Allen, the starting point of any analysis pertaining to arbitrability begins with the test of *in rem* and *in personam*.⁶⁵ Since the Court did not clearly set the contours of what would comprise public policy, not surprisingly, the test is grossly inadequate to address the concerns which ought to make a matter inarbitrable. The test of barring arbitration either expressly or impliedly by referring to public policy, and the assumption that creation of specialized forums entails public policy concerns, is grossly erroneous for the following reasons.

A. The Vague Standard of Public Policy

First and foremost, a dispute that involves public policy issues is not *per se* regarded to be inarbitrable.⁶⁶ If that were to be the test, nearly all disputes would become inarbitrable, since it is very rare that a dispute would not involve a rule of public policy i.e. a law governing the subject.⁶⁷

Second, the standard of public policy is so vague that, without defining its proper limits, it cannot be considered as a test for determining arbitrability. Third, inarbitrability operates only in those spheres where courts have been given ‘mandatory’ competence, and derogation by a contractual agreement to oust that competence cannot be permitted.⁶⁸ The public policy exception does not mandate ouster of jurisdiction of the arbitral tribunal by the mere creation of a specialized forum.⁶⁹ It is only specific matters or specific legislations with a social or economic objective that would fall within the public policy exception.⁷⁰ In fact, while referring to tenancy disputes as being inarbitrable, the Court in *Booz Allen* specifically added the words “*governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes*”.⁷¹ Thus, the mere creation of specialized forums such as tribunals or commissions would not *per se* make the subject matter inarbitrable. Hence, the Court while considering the jurisdiction of the arbitral tribunal being barred by necessary implication failed to make the distinction between:

- (a) special forums created only for efficiency and speedy justice i.e. mere alternatives to civil courts without anything more;⁷² and
- (b) special forums created under a special legislation with additional powers than those exercisable by civil court⁷³ and hence not exercisable by the arbitrator (as an arbitrator can only do all that a civil court can do) for example, appointing an insolvency professional.

The mere creation of a specialized forum does not *ipso facto* raise a presumption of public policy in favour of ousting the jurisdiction of an arbitral tribunal and, more importantly, speaks nothing of the nature of the dispute *per se* but only examines as to which authority is going to resolve

⁶⁵ *Id.*

⁶⁶ Patrick M. Baron, *supra* note 45, at 35.

⁶⁷ Antoine Kirry, *Arbitrability: Current Trends in Europe*, 12 ARB INT’L 373, 390 (1996) [*hereinafter* “Antoine Kirry”].

⁶⁸ Homayoon Arfazadeh, *supra* note 6, at 77.

⁶⁹ *HDFC Bank v. Satpal Singh Bakshi*, 2012 SCC Online Del 4815, ¶ 35 [*hereinafter* “HDFC Bank”].

⁷⁰ *Natraj Studios*, *supra* note 62, ¶ 17.

⁷¹ *Booz Allen*, *supra* note 7, ¶ 36.

⁷² *HDFC Bank*, *supra* note 69, ¶ 5.

⁷³ *Id.* ¶ 14; A. Ayyasamy, *supra* note 10.

such a dispute.

B. Mere Forum Selection

Moreover, such an analysis misses the point that an individual has the right to select a judicial forum of his/her choice under a particular legislation.⁷⁴ Reference to arbitration, even in the presence of an alternative forum where a remedy can be sought, does not take away or exclude that remedy, it is just that the parties have agreed to go to a particular forum to seek that remedy.⁷⁵ The parties do not forgo the substantive protection provided by the statute,⁷⁶ but only trade the judicial procedure and opportunity of review by courts for the simplicity, informality, and expedition of arbitration.

Only if a dispute relates to rights that may not be freely alienated,⁷⁷ does the dispute become inarbitrable.⁷⁸ Innocent consumers cannot freely alienate or waive their rights due to the lack of an informed decision. Accordingly, the Consumer Protection Act, 1986 [**CoPRA**]⁷⁹, the Real Estate (Regulation and Development) Act, 2016 [**RERA**]⁸⁰ and rent control legislations⁸¹ afford protection to such parties. Therefore, special legislations override contractual agreements as these statutes create special rights and obligations⁸² and special fora for enforcement of those special rights.⁸³

C. Special Rights

The real test for ouster of jurisdiction of the arbitral tribunal should be to see whether the legislature intended to prohibit a waiver of adjudication by the courts. Such a bar by ‘necessary implication’ should be determined by examining the “*text of the statute, its legislative history, or an inherent conflict between arbitration and the statute’s underlying purpose*.”⁸⁴ In essence, it is necessary to examine if the statute creates a special right or liability and provides for the determination of such right or liability by a tribunal so constituted, and whether remedies ordinarily within the domain of the civil court are prescribed or not.⁸⁵

Therefore, a public policy consideration can only arise where the intent of a legislation is such that it seeks to grant judicial protection, or to serve a larger public interest and hence, in the interest of fulfilling such a public policy, the legislature has deemed it fit to create a special forum

⁷⁴ Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (U.S.); Wilko v. Swan 346 U.S. 427 (1953) (U.S.) cited in Patrick M. Baron, *supra* note 45, at 29.

⁷⁵ Eros International, *supra* note 4, ¶ 14.

⁷⁶ Shearson/American Express, Inc. v. McMahon 482 U.S. 220, 229-230 (1987).

⁷⁷ Leonardo V. P. de Oliveira, *Arbitrability under the new Brazilian arbitration act: A real change?*, 33(2) ARB. INT’L 295 (2016).

⁷⁸ Antoine Kirry, *supra* note 67, at 377.

⁷⁹ Emaar MGF Land Limited v. Aftab Singh, 2018 SCC Online SC 2771 [decided on December 10, 2018] [Review petition filed against the judgment of the court in Emaar MGF Land Ltd. v. Aftab Singh, Civil Appeal Nos. 23512-23513 of 2017, decided on 13-2-2018].

⁸⁰ AJAR RAB, REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016: A PRACTITIONER’S GUIDE 183 (1st ed. 2019).

⁸¹ Natraj Studios, *supra* note 62, ¶ 22.

⁸² HDFC Bank, *supra* note 69, ¶ 13.

⁸³ A. Ayyasamy, *supra* note 10, ¶ 38.

⁸⁴ Jennifer L. Peresie, *Reducing the Presumption of Arbitrability*, 22(2) YALE L. & POL’Y REV. 453 (2004).

⁸⁵ Dhulabhai v. State of M.P., AIR 1969 SC 78, ¶ 35.

with special powers, which are not with the civil courts,⁸⁶ for adjudication of such disputes.

D. Inadequacy of the *in rem* and *in personam* Distinction

In an attempt to define public policy, the Court examined the well-recognised examples of non-arbitrable disputes and took the view that they are inarbitrable because they relate to actions *in rem*. However, even an action *in personam*, if reserved for adjudication by a public forum as a matter of public policy, would become non-arbitrable.⁸⁷ A closer examination of some of the examples clearly brings out the errors in the reasoning of the Court.

Matrimonial disputes – a dispute between a husband and wife for judicial separation and divorce is not *per se in rem* but strictly *inter partes*. It is the effect of dissolution of marriage which has an effect *in rem* i.e. the world knows that the parties are no longer married and are free to marry again. The reasons for the divorce and the allegations between the parties do not concern the world at large. In fact, the Chennai High Court rejected the public policy argument, under the erstwhile Arbitration Act, 1940, and held that there is no bar to matrimonial disputes being resolved by arbitration, as a decree for restitution of conjugal rights can be enforced by a court.⁸⁸ Similarly, the terms of separation between a husband and wife can be referred to arbitration.⁸⁹ The reason matrimonial disputes are inarbitrable is because matrimonial disputes are concerned with the legal status of persons and conferment or revocation of a legal status is a sovereign function.

Insolvency – it is incorrect to state that all matters relating to insolvency are inarbitrable. It needs to be clarified that insolvency relates to (i) organizing the conduct of insolvency proceedings; and (ii) permitting creditors to join the proceedings.⁹⁰ It is at the stage of enforcement or distribution of assets that the proceedings have an *erga omnes* effect⁹¹ i.e. third parties who have an interest in the rights or liabilities of the person or entity being liquidated need to be provided an opportunity for adjudication of their rights. The dispute between the parties i.e. the debtor and the creditor and the determination of one party being insolvent is *inter partes* or *in personam* and clearly a matter capable of being settled by arbitration.⁹² In fact, Section 41 of the Arbitration Act specifically provides for such a possibility and states that a receiver can adopt the contract and continue arbitration proceedings.

E. Relief Claimed

When the Court ventured on to explore the question of arbitrability in *Booz Allen*, it defined the scope of its enquiry to consider whether the relief claimed by the party is one which can be only be granted by a special forum or tribunal.⁹³ Therefore, the Court implicitly acknowledged the test of remedy or relief sought, as the test for determining arbitrability. Building on its analysis of actions *in rem*, the Court acknowledged that where the remedy sought is such that it would have

⁸⁶ HDFC Bank, *supra* note 69, ¶ 14.

⁸⁷ Kingfisher Airlines Limited v. Prithvi Malhotra Instructor, 2013 (7) Bom C.R. 738.

⁸⁸ Nalla Ramudamma v. NallaKasi Naidu, AIR 1945 Mad 269.

⁸⁹ Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan, (1999) 5 SCC 651, ¶ 35.

⁹⁰ Robert B. Kovacs, *supra* note 11, at 58.

⁹¹ Karl Zemanek, *New Trends in the Enforcement of Erga Omnes Obligations*, MAX PLANCK Y.B. U.N. L. ONLINE (2000), available at http://www.mpil.de/files/pdf2/mpunyb_zemanek_4.pdf.

⁹² Robert B. Kovacs, *supra* note 11, at 67.

⁹³ Booz Allen, *supra* note 7, ¶ 33.

an effect *in rem*, such a relief cannot be granted by private fora and hence, would be inarbitrable.⁹⁴

This is troublesome for three reasons: *first*, as long as the dispute is *inter partes* and can be limited to having an *inter omnes* effect,⁹⁵ the mere fact that there might be an effect *in rem* cannot be a sufficient ground to override the freedom of contract of the parties as it is very rare that a dispute would not involve a rule of public policy i.e. a law governing the subject.⁹⁶

Second, where the dispute is commercial and parties have consciously decided to refer the dispute arising from a contract to an arbitral tribunal, one party is essentially seeking a specific and particular relief against another particular, defined party, and not against the world at large. Consequently, the dispute remains as *in personam*, notwithstanding its effect *in rem*.⁹⁷ In fact, the Court itself alluded to such a possibility and held that subordinate rights *in personam* arising out of rights *in rem* are arbitrable.⁹⁸ For example, claims of oppression and mismanagement arising out of pure breach of contract should be arbitrable, even though the National Company Law Tribunal has been created for adjudication of such rights.⁹⁹ Similarly, a relief for injunction and damages can be granted by an arbitrator for infringement of copyright even though it will have an effect *in rem*.¹⁰⁰

Third, a party would deliberately seek reliefs which cannot be granted by the arbitral tribunal in order to avoid arbitration¹⁰¹ i.e. “dressing up” the claim with vexatious, *mala fide*, and mischievous petitions, to defeat an arbitration clause between the parties.¹⁰² Thus, the test of ‘relief sought’ cannot be sufficient to adequately determine the arbitrability of a dispute.

V. The Curse of *Booz Allen*

It is evident from the foregoing discussion that the test laid down in *Booz Allen* with respect to arbitrability of disputes set the tone for subsequent jurisprudence on the subject. Consequently, given its lack of clarity on the public policy exception, there was little doubt that subsequent jurisprudence would misinterpret and misapply the dictum of the case.

One of the most pertinent examples of such misapplication is the case of *Vimal Kishor Shah v. Jayesh Dinesh Shah*,¹⁰³ [“**Vimal Kishor**”] wherein the Supreme Court had to consider a purely *inter partes* dispute between the trustees regarding the functioning of a trust. It was argued by one of the parties that disputes regarding the trust, including the rights and obligations related to it, are

⁹⁴ *Id. quoting* JOHN SUTTON DAVID ST. & GILL JUDITH, RUSSELL ON ARBITRATION 28 (22d ed., 2003); Donde et al, *Arbitrability of Intellectual Property Disputes: Setting the Scene*, YOUNG ICCA BLOG (July 28, 2016), available at <http://www.youngicca-blog.com/arbitrability-of-intellectual-property-disputes-setting-the-scene/>.

⁹⁵ Dário Moura Vicente, *Arbitrability of Intellectual Property Disputes: A Comparative Survey*, 31(1) ARB. INTL. 163 (2015) [*hereinafter* “Dário Moura Vicente”].

⁹⁶ Antoine Kirry, *supra* note 67, at 378.

⁹⁷ Eros International, *supra* note 4, ¶ 19.

⁹⁸ *Booz Allen*, *supra* note 7, ¶ 38.

⁹⁹ Fulham Football Club (1987) Ltd. v. Richards, [2011] EWCA (Civ.) 855 (Eng.).

¹⁰⁰ Eros International, *supra* note 4, ¶ 18. Though it will in some way involve determining the validity of the copyright itself, which is a right *in rem*.

¹⁰¹ Rakesh Malhotra v. Rajinder Kumar Malhotra, 2017 SCC Online SC 733.

¹⁰² *Id.* ¶ 91.

¹⁰³ *Vimal Kishor Shah v. Jayesh Dinesh Shah* (2016) 8 SCC 788 [*hereinafter* “Vimal Kishor Shah”].

governed by the Indian Trusts Act, 1882 [“**Trusts Act**”], which is a complete code in itself, and the remedy available to stakeholders required taking recourse before the appropriate forum specified under the act.¹⁰⁴ Relying on a decision of the Calcutta High Court under the erstwhile Arbitration Act, 1940 [“**Old Act**”], it was also argued that the terms of the trust deed cannot be deemed to be an agreement and, therefore, in the absence of an agreement, the parties cannot be directed to resolve their disputes through arbitration.¹⁰⁵

The Supreme Court accepted this line of reasoning and then, relying on *Booz Allen*, proceeded to examine whether a dispute *inter se* between trustees and beneficiaries with respect to their appointment, removal, etc. can be settled by arbitration.¹⁰⁶ In answering the question, the Court examined the entire Trusts Act and held that since the Act specifically conferred jurisdiction on the civil courts, it was evident that the intent of the legislature was to confer jurisdiction *only* on the civil courts.¹⁰⁷

The Court erroneously applied the dictum of *Dhulabhai v. State of M.P.*¹⁰⁸ and *Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke*¹⁰⁹ [“**Premier**”] and held that while there is no express bar under the Trusts Act, the jurisdiction of the arbitral tribunal is impliedly barred as the statute provides recourse to the civil court. The Court cherry-picked the words in *Premier* to the effect that if a statute provides for a right and the remedy for enforcement of such right, the remedy is an exclusive one.¹¹⁰ It did not consider the latter part of the sentence that “*the scope and purpose of a statute and in particular for whose benefit it is intended has got to be considered*”.¹¹¹

Thus, while the Court sought to examine arbitrability based on the test of *Booz Allen*, in fact, it did not apply either of the tests outlined in *Booz Allen* i.e. a rights-based analysis of *in rem* and *in personam* or the relief claimed. The controversy between trustees was neither an action *in rem* nor one having an effect *in rem*. Furthermore, the remedy sought was not one which could not have been granted by the arbitrator. In fact, following the principle that an arbitrator can do all that a civil court can do, the Court should have upheld the arbitrability of the dispute under the Trusts Act, especially as the standard of *Booz Allen* was not met. It is interesting to note that a public policy argument was not even raised in the case and, hence, the decision in *Premier* was not even applicable to the present case since in *Premier* the issue related to the bar of civil courts hearing a labour dispute. Also, the Court undertook no analysis of why the civil court was supposedly more competent to decide the issue and whether the domain of trust disputes was exclusively reserved for a court. Thus, in *Vimal Kishor*, the parties were not seeking to contract out of the statute, but were merely selecting a forum for better and more efficient resolution of their

¹⁰⁴ *Id.* ¶ 46.

¹⁰⁵ *Bijoy Ballav Kundu v. Tapeti Ranjan Kundu*, AIR 1965 Cal 628.

¹⁰⁶ *Vimal Kishor Shah*, *supra* note 103, ¶ 42.

¹⁰⁷ *Id.* ¶ 54.

¹⁰⁸ *Dhulabhai v. State of M.P.*, AIR 1969 SC 78 [The court in this case considered the bar to filing civil suits when there is an express or implied bar created by a special statute. The court simply borrowed the same reasoning to apply to arbitrability].

¹⁰⁹ *Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke* (1976) 1 SCC 496 [*hereinafter* “*Premier Automobiles*”].

¹¹⁰ *Vimal Kishor Shah*, *supra* note 103, ¶ 51 [“The principle of interpretation that where a specific remedy is given, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar, and which runs through the law was adopted by this Court in *Premier Automobiles*”].

¹¹¹ *Premier Automobiles*, *supra* note 109, ¶ 12.

dispute.¹¹²

Similarly, the Company Law Board Appellate Tribunal in a case of oppression and mismanagement held that the claim is inarbitrable.¹¹³ The court referred to the jurisprudence laid down in *Booz Allen* and took the view that since the Company Law Board had the power to resort to non-corporate management, the right to substitute the management, as a whole or in part, and the right to provide for regulation of the affair of the company, and as such a relief cannot be granted by an arbitral tribunal, the claim is inarbitrable.¹¹⁴ However, the dispute in the present matter related to a family dispute with respect to control over a company. The court did not consider the actual remedy sought by the petitioners¹¹⁵, but instead took the view that since Chapter VI of the erstwhile Companies Act, 1956 dealt with winding up and the same is an action *in rem*, and since claims of oppression and mismanagement fall within Chapter VI, the same would be inarbitrable. The reasoning of the court was based on an erroneous application of *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya*¹¹⁶ [**“Sukanya Holdings”**] that the court cannot separate the reliefs *in rem* and *in personam* and hence, all matters under Chapter VI would be considered inarbitrable. The court has already distinguished *Sukanya Holdings* and accepted the view argued by one of the parties that the bifurcation of the cause of action and parties is permissible in law, especially in light of the legislative intent that arbitration should be preferred over other remedies.¹¹⁷ Thus, in this case, at a bare minimum, the re-structuring and removal/appointment of directors could have been decided by the arbitral tribunal.

An exception to the misapplication of *Booz Allen*, was a single judge bench decision of the Bombay High Court, *Eros Media Ltd. v. Telemax Links India Pvt. Ltd.*,¹¹⁸ where the court had to determine arbitrability of a copyright license. The Court listed the categories outlined by *Booz Allen* as non-arbitrable and then analysed the position prior to *Booz Allen* in *V.H. Patel and Co. and Ors. v. Hirubhai Himabhai and Ors.*¹¹⁹ In the said case, the Supreme Court had held that the arbitral tribunal has the right to dissolve a partnership, if the arbitration clause between the parties permitted it to do so. The respondents had placed reliance on *Premier* but the court, rightly, made the distinction between the taking away of a remedy completely and the mere option to select a forum for seeking that remedy.

The respondent further placed reliance on *Steel Authority of India Ltd. v. SKS Ispat & Power Ltd. and Ors.* [**“Steel Authority”**]¹²⁰ to argue that all disputes related to trademark and copyright are inarbitrable, as they are actions *in rem*. However, the Bombay High Court carefully distinguished

¹¹² *Eros International*, *supra* note 4, ¶ 14; Gregg A Paradise, *Arbitration of Patent Infringement Disputes: Encouraging the Use of Arbitration through Evidence Rules Reform*, 64(1) *FORDHAM L. REV.* 247, 261-265 (1995); Robert H. Mnookin, *Alternative Dispute Resolution*, HARVARD LAW SCHOOL (Mar. 04, 1998), available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/232.pdf.

¹¹³ *Rakesh Malhotra v. Rajinder Kumar Malhotra*, 2017 SCC Online SC 733.

¹¹⁴ *Id.* ¶ 83.

¹¹⁵ *Id.* [Various petitions were filed in order to prevent diversion of funds under Sections 397, 398, read with Section 402 of the Companies Act, 1956, seeking orders to set aside the re-structuring and removal and appointment of directors].

¹¹⁶ *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya*, (2003) 5 SCC 531.

¹¹⁷ *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 64, ¶ 55.5.

¹¹⁸ *Eros International*, *supra* note 4.

¹¹⁹ *V.H. Patel & Co. & Ors. v. Hirubhai Himabhai and Ors.*, (2000) 4 SCC 368.

¹²⁰ *Steel Authority of India Ltd. v. SKS Ispat and Power Ltd. & Ors.*, 2014 SCC OnlineBom 4875.

the said case on the facts to state that in *Steel Authority* the allegations of infringement and passing off did not arise out of the contract and therefore were beyond the arbitration clause itself.¹²¹

The Bombay High Court highlighted that arbitrability or non-arbitrability cannot be ascertained by reference to the text of the statute alone but must be determined with regard to the nature of the claim made by the parties.¹²² Therefore, in commercial disputes, where parties have voluntarily and consciously chosen to have their dispute resolved through arbitration, such disputes can never be inarbitrable as such actions are clearly *in personam* i.e. one party seeking a specific particularized relief against a particular defined party and not against the world at large.¹²³ The court held that the claim was arbitrable and also reiterated that if the proposition that all intellectual property rights [**“IPR”**] disputes are non-arbitrable is accepted, then each time an intellectual property is transferred between two parties, the arbitration clause between them would become void. The court held that such an *“apocalyptic legal thermonuclear devastation”* is not intended in the world of domestic and international business.¹²⁴

While the Bombay High Court correctly applied *Booz Allen*, in a case after the 2015 amendment to the Arbitration Act,¹²⁵ the Supreme Court while examining the question of fraud vitiating an arbitration agreement, made observations on arbitrability of disputes without making any further analysis and added more categories of inarbitrable disputes i.e. (i) patent, trademarks and copyrights; (ii) antitrust/competition laws; (iii) insolvency/winding up; (iv) bribery/corruption;(v)fraud; and (vi) criminal matters.¹²⁶ The premise for this was that these disputes were public in nature. However, the Court did not attempt to make any analysis on arbitrability, and by simply relying on its previous judgments, held that fraud falls in a category of inarbitrable disputes.

The latest casualty of the curse of *Booz Allen* is a decision of the Supreme Court which completely subverted the entire jurisprudence on arbitrability and held that lease agreements would not be arbitrable.¹²⁷ Oddly enough, the Court referred to the Delhi Rent Act, 1995 [**“Delhi Rent Act”**] and held that even though the premises was not governed by the Delhi Rent Act, it did not mean that the Arbitration Act would apply.¹²⁸ In the Court’s view, if the Delhi Rent Act did not apply, the Transfer of Property Act, 1882 [**“Transfer Act”**] would apply. The Court clearly treated arbitrability and the Arbitration Act to be a question of substantive law instead of the Arbitration Act governing the arbitration proceedings i.e. the procedure of the arbitral tribunal. The arbitral tribunal could have easily applied either of the two acts i.e. (i) the Delhi Rent Act or (ii) the Transfer Act. The disputes under the Delhi Rent Act would be inarbitrable because a special legislation would override the contractual agreement between the

¹²¹ Eros International, *supra* note 4, ¶14.

¹²² *Id.* ¶ 16.

¹²³ *Id.* ¶ 19.

¹²⁴ *Id.* ¶ 22.

¹²⁵ The Arbitration and Conciliation (Amendment) Act, No. 3 of 2016.

¹²⁶ A. Ayyasamy, *supra* note 10, ¶ 14 [Apart from trust disputes as held in Vimal Kishor Shah, *supra* note 103].

¹²⁷ Himangni Enterprises, *supra* note 32, ¶ 24.

¹²⁸ *Id.*

parties (as held in *Natraj*).¹²⁹ However, given that the premises were not governed by the Delhi Rent Act, the arbitral tribunal could have easily applied the Transfer Act. Therefore, the mere choice of forum to have the dispute resolved by arbitration would not take away the application of the Transfer Act to the merits of the disputes and only the procedure would have been governed by the Arbitration Act.

VI. The New Test of Arbitrability

With about 2,94,52,124 cases currently pending in the country,¹³⁰ arbitration can facilitate and help reduce this backlog to a large extent. However, if the courts continue to keep disputes close to their chests and continue to hold mistrust with respect to arbitration,¹³¹ the backlog is only bound to increase. It is about time that the judiciary accepts that arbitration does not deprive parties of any legal protection afforded by courts, but offers the same legal protection, if not a greater one. Also, the mistrust that only judges can apply public policy rules is misplaced. Arbitrators can apply the same substantive law, including public policy rules.¹³²

Accordingly, a new test for determining arbitrability of disputes in India is required. The test requires answering the following:

1. Whether the dispute relates to a claim involving economic value?
2. Whether the claim is one which falls within the domain of sovereign functions or state monopoly¹³³ i.e. inalienable functions of the State,¹³⁴ or is it *inter partes*?
3. Whether the relief claimed is one which has an *erga omnes* effect?
4. Whether there is a special legislation with a social objective covering such a dispute?

It is pertinent to examine the above test against various subject-matters before accepting its utility:

1. **Criminal offences:** Disputes relating to criminal offences would be inarbitrable as they would not be disputes having an economic value. Also, such disputes would fall squarely within the ambit of sovereign function and, hence, would be inarbitrable.
2. **Winding up:** Matters related to winding up will be those having an economic value. However, incorporation and winding up are exclusive sovereign functions and a

¹²⁹ *Natraj Studios*, *supra* note 62.

¹³⁰ NATIONAL JUDICIAL DATA GRID, available at http://njdg.ecourts.gov.in/njdg_public/main.php.

¹³¹ Justice Andrew Rogers, *Arbitrability*, 1 ASIA PACIFIC L. REV. 1 (1992).

¹³² Hodayoon Arfazadeh, *supra* note 6, at ¶ 18.

¹³³ *Union of India v. Competition Commission of India*, AIR 2012 Del 66.

¹³⁴ *Agricultural Produce Market Committee*, *supra* note 34, ¶ 32 [“Thus, various functions of the State, may be ramifications of ‘sovereignty’ but they all cannot be construed as primary inalienable functions. Broadly it is taxation, eminent domain and police power which covers its field. It may cover its legislative functions, administration of law, eminent domain, maintenance of law and order, internal and external security, grant of pardon. So, the dichotomy between sovereign and non-sovereign function could be found by finding which of the functions of the State could be undertaken by any private person or body. The one which could be undertaken cannot be sovereign function. In a given case even in subject on which the State has the monopoly may also be non-sovereign in nature”].

petition for winding up is not for money.¹³⁵ Hence, such matters would also fall outside the domain of arbitration.

3. **Oppression and mismanagement:** Claims related to oppression and mismanagement would be arbitrable as they are claims of economic value and have no connection to sovereign functions of the State. The question, therefore, in such disputes would be whether the relief claimed is one which has an *erga omnes* effect. In most claims, the relief sought is usually *inter partes* and therefore disputes of oppression and mismanagement would be arbitrable under the proposed test.¹³⁶

4. **Matrimonial disputes:** Disputes related to custody, judicial separation, restitution of conjugal rights, etc. would not be disputes having an economic value and, hence, would not be arbitrable. Furthermore, since they also deal with recognition of rights against the world at large and the granting of status by the State, they would also fall within the ambit of sovereign functions.

5. **Testamentary matters:** Matters related to probate, testamentary succession, etc. are such that have an economic value and are not functions of the sovereign. However, the relief sought in such matters would not be one which affects the parties involved alone. The effect of a probate is a declaration to the world at large that the will is valid, in force and the execution of the same is conclusive, unless revoked by law. Therefore, it has an *erga omnes* effect and does not affect only the parties involved in the controversy.¹³⁷ Also, there is a duty cast upon the court to preserve the original will in probate cases.¹³⁸ Thus, such claims would be inarbitrable.

6. **Antitrust/competition law:** The Competition Act, 2002 [“CA”] provides for different kinds of disputes, while some can be brought by third parties, or any person, consumer or association, certain remedies are limited to an “aggrieved party”.¹³⁹ In this context, if the aforementioned test is applied then the claims would satisfy the first test of having an economic value. At the second stage of enquiry, the court will have to make a distinction between statutory provisions enacted for regulation of the market such as unfair trade practice,¹⁴⁰ and statutory provisions enacted for a remedy to an aggrieved party i.e. *inter partes*.

The next test is whether the dispute, though being *inter partes*, is one where the relief claimed by the parties is one which will have an *erga omnes* effect. If the answer is yes, the dispute would become inarbitrable. In this context, it may be noted that claims arising under Section 19 of the CA, are usually those which involve a claim for damages or

¹³⁵ Haryana Telecom Ltd. v. Sterlite Industries Ltd., (1999) 5 SCC 688.

¹³⁶ Sidharth Gupta and Ors. v. Getit Infoservices (P) Ltd., 2016 SCC Online CLB 10, ¶ 28, the Company Law Board found no oppression under Sections 397, 398 of the Companies Act, 1956 and since the dispute related to terms and conditions in the shareholders agreement, the parties were directed to proceed with arbitration.

¹³⁷ Chiranjilal Shrilal Goenka v. Jasjit Singh, (1993) 2 SCC 507.

¹³⁸ *Id.*, ¶¶ 14-15; see also The Indian Succession Act, No. 39 of 1925, § 294.

¹³⁹ The Competition Act, No. 12 of 2003, § 53.

¹⁴⁰ *Id.* § 19.

injunction i.e. reliefs that are *inter partes*.¹⁴¹

The next stage of enquiry would be whether the CA was enacted with a social objective. The CA has been enacted to sustain and promote competition within Indian markets.¹⁴² Though it may be argued that the preamble uses the words ‘protect the interests of consumers’, it is necessary to make a distinction between consumers under CoPRA, RERA, labour laws, rent control legislations and the CA. Under the CoPRA, RERA and rent control legislations, the social objective is to address issues surrounding the bargaining power of innocent and uninformed consumers,¹⁴³ and hence, have a clear pro-consumer bias.¹⁴⁴ On the other hand, under the CA, the issue of protection is for protection of informed and aware commercial entities (which are therefore specifically excluded under the CoPRA)¹⁴⁵ and commerce in general. Therefore, while there are special rights and privileges under the CA, the same do not completely fall within the domain of public interest or the need for judicial protection as is the case under CoPRA or RERA and hence, would make *inter partes* disputes arbitrable.

7. **Intellectual Property Rights:** All IPR disputes which arise from a commercial relationship between the parties and have an *inter partes* effect, would become arbitrable as they would be claims of economic value, falling outside the domain of sovereign function, and there would be no applicable special legislation with a social objective. However, if IPR claims relate to the validity of a patent or trademark, etc., such claims would require adjudication over the sovereign right of a State with respect to conferment of the patent, etc. and, hence, would be inarbitrable. It is relevant at this stage to highlight that even though an arbitral tribunal may hold the patent or trademark of a party to be invalid, it would not have an *erga omnes* effect, unless such patent or trademark is refused or cancelled by the necessary government authority.¹⁴⁶ Therefore, the invalidity would only be binding in so far as the dispute between the parties is concerned. This position of law is accepted in the United States.¹⁴⁷

Thus, the new test proposed may serve the larger goal of public policy much better than the current tests used by courts.

VII. Conclusion

As India attempts to restructure its laws and re-brand its image as ‘pro-arbitration’, all such attempts will at best be half-baked, if the underlying jurisprudence continues to exist in the shadows of the inadequate test of *in rem* and *in personam* outlined in *Booz Allen*. Courts must refrain from applying substantive law to procedural issues and unless the contours of the public

¹⁴¹ Tanya Choudhary, *Arbitrability Of Competition Law Disputes In India – Where Are We Now And Where Do We Go From Here?*, 4(2) IND. J. ARB. L. 69, 78-79 (2016).

¹⁴² The Competition Act, No. 12 of 2003, pmb.

¹⁴³ AJAR RAB, *supra* note 35.

¹⁴⁴ Lucknow Development Authority v. M K Gupta, AIR 1994 SC 787; Director, Employees’ State Insurance Corporation v. High Land Coffee Works of P.F.X. Saldanha and Sons, (1991) 3 SCC 617; CIT v. Taj Mahal Hotel, Secunderabad, (1971) 3 SCC 550; State of Bombay v. Hospital Mazdoor Sabha, AIR 1960 SC 610.

¹⁴⁵ The Consumer Protection Act, No. 68 of 1986, § 2(d).

¹⁴⁶ Dário Moura Vicente, *supra* note 95.

¹⁴⁷ ZHENG SOPHIA TANG, *supra* note 59, at 100.

policy exception are clearly identifiable and defined, *Booz Allen* will continue to be misinterpreted and misapplied, compounding the problem of judicial intervention in arbitration proceedings.

The new test proposed for determining arbitrability does not drastically violate existing notions of public policy but instead aligns the test of arbitrability with international jurisprudence such as that of Germany, France, United States etc. which have made most matters such as IPR disputes, antitrust disputes etc. arbitrable. Also, this test adopts the widely accepted standard of disputes pertaining to economic value as being capable of settlement by arbitration. Thus, adopting the new test to determine arbitrability would pay due respect to consent and autonomy of the parties to have their dispute resolved through arbitration and at the same time preserve the domain of the courts to address issues fundamental to Indian law or in conflict with the basic notions of morality and justice i.e. disputes concerning the public policy exception.¹⁴⁸

¹⁴⁸ Arbitration Act, *supra* note 9, §§ 34(2)(b) and 48(2).