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DIVERGENT GLOBAL STANDARDS ON THE ARBITRATBILITY OF COMMERCIAL DISPUTES: CHALLENGES AND IMPLICATIONS

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INTRODUCTION

The modern world of 21st century has moulded itself into the aspects of globalisation. Cross-border trade and international trade connections have increased due to globalisation. Many contracts are being made between international parties or with businesses located in different countries. When any conflict arises out of such contracts, for resolving the same demands a mechanism that is highly reliable, neutral, efficient and can be enforced internationally. So now arbitration comes into picture in such cases. Arbitration has evolved in ways that parties to an international commercial transaction often resort to this mechanism in order to resolve their disputes peacefully, amicably and without any judicial intervention.

WIPO describes arbitration as:

"Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court."[1]

The main factor that attracts businesses to resort to arbitration for dispute resolution is that the enforcement mechanism given under the New York Convention[2] of 1958 which recognises arbitral awards worldwide and allows for its enforcement in more than 160 countries. Because of this reason arbitration is being considered suitable for many international businesses. Other factors, or more appropriately advantages, which attract parties to resolve disputes through arbitration is the speedy and flexible process, party autonomy is deciding procedures, privacy and confidentiality, cost effective and also parties can choose the arbitrator themselves.

However, two major dilemma arises here, firstly arbitration is restricted: restricted to disputes. Not all the disputes can be resolved through arbitration. Whether a dispute or a subject matter is capable of being resolved through arbitration is being decided by the concept of 'arbitrability'[3]. Secondly, every country follows its own standard of deciding what subject matter is arbitrable and what is not, which poses difficulty during disputes of international

[1] WIPO 'What is Arbitration' (World Intellectual Property Organisation)

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention)

[3] Loukas A. Mistelis Arbitrability: International and Comparative Perspectives (Kluwer Law International, 2009) 3

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agreements. Some countries follow the liberal approach and allow an expanded range of disputes that could be resolved through arbitration; however, some other countries reject certain types of disputes as being arbitrable on the grounds of public policy or interest of the sovereign, following a restrictive approach. Here the concept of 'public policy' also becomes difficult to be defined.[4]

For example, disputes relating to competition law, intellectual property, fraud, bankruptcy, etc are arbitrable disputes in some countries but certain other countries have put a bar on arbitrating such disputes contending it to be opposed of public policy and can reserve them to be resolved through court process.

A landmark case of *Mitsubishi Motors Corporation*[5] can be taken into consideration to see how arbitrability has been interpreted by the U.S. Supreme Court. The court allowed anti-trust disputes to be arbitrable, widening the scope of arbitrability of disputes, which marked a switch towards a more liberal approach and pro-arbitration (less court interference).

Contrary to the case mentioned above, the judgement in *Hamilton Inc. case*[6] the Supreme Court of Inida has clarified the difference in various disputes stating that disputes having right in rem are usually not arbitrable but disputes having right in personam are arbitrable. India's approach towards arbitration as a dispute resolution mechanism has been on a friendlier side however, the arbitrability of many disputes still depends on the interpretation of the courts.

From the two cases we can clearly see that variations occur in determining the arbitrability of disputes and the legal system of a particular country influences what disputes are eligible to be arbitrable. So where one country allows a particular dispute to be arbitrable, the same dispute might not be considered as arbitrable by another country. This divergence sums up to creating ambiguity and uncertainty in the commercial agreements entered by parties in the international level and may hinder the enforceability of awards.

Hence, it becomes necessary to discuss about these divergent standards on arbitrability of disputes and to foster better international commercial relations worldwide.

RESEARCH PROBLEM

Arbitration is a very effective dispute resolving mechanism, especially for commercial dispute resolution. However, there is no uniform standard on a global scale that determines what disputes are arbitrable. Various countries apply their own standards of arbitrability of disputes

[4] Ibid 2.
[5] Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614, 1985
[6] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. (2011) 5 SCC 532

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based on what they interpret public policy constitutes of. So disputes arbitrable in one country might not be arbitrable in another country.

This diverse standard may hinder the enforcement mechanism under the New York Convention. Ultimately, uncertainty in arbitral awards, increased court intervention and poor international business relations follow.

Hence, the core issue is that whether such divergent standards will undermine efficacy of internation arbitration and is harmonisation necessary for the greater good?

RESEARCH OBJECTIVES

1. To study the concept of arbitrability and examine how different countries interpret it.
2. To compare the liberal and restrictive approaches towards determining arbitrability of a dispute.
3. To scrutinise the challenges evolving from divergent global standards of arbitrable disputes.
4. To inspect whether harmonisation of the varied standards is possible or desirable.

RESEARCH QUESTIONS

1. Why do countries differ in determining the arbitrability of disputes?
2. How do the leading jurisdictions like USA, India, France and Singapore interpret and apply the concept of arbitrability?
3. What are the major challenges that arise due to the divergent standards of arbitrability?

RESEARCH METHODOLOGY

This research will completely adopt a doctrinal research methodology. It will be based on primary and secondary sources of data. Primary sources will include international conventions and precedents, and the secondary sources will include scholarly writings, published journals and articles, etc. This research will examine the topic in an analytical, comparative and critical manner.

SCOPE AND LIMITATIONS

The scope of this paper will only be limited to the commercial disputes in the international level with domestic laws in connection with international relations and not with any kind of criminal disputes. Also, it will focus mostly on the objective arbitrability as the main concern

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of international commercial disputes is that what disputes may be treated arbitrable.

The research paper will be restricted to the study of the concept of arbitrability in major jurisdictions like USA, India, France and Singapore. due to time constraints.

CHAPTER 1

SUBSTRUCTURE OF ARBITRABILITY

Arbitrability is one of the core concepts in arbitration law. This concept determines whether a subject matter is eligible to be arbitrated or is left upon the traditional courts to be decided. So, in short it determines the scope of arbitration[7]. Here the fundamental question of 'Is a particular type if issue competent enough to be settled by an arbitral tribunal under the law it is subjected to?'

Arbitration is a private and confidential dispute resolution mechanism that is treated as an alternative to the long court procedures and parties to the arbitration decide on a mutual basis and appoint a neutral third party, the arbitrator and so also decide the process. However, what matter will fall under the ambit of arbitrable disputes is left upon the court to decide, taking into consideration public policy and sovereign interests.[8]

The two main facets of the concept of arbitrability are the subjective arbitrability and objective arbitrability. Subjective arbitrability determines the party's legal capacity to sign an arbitration agreement. This may involve minors, statutory bodies, the state or the sovereign. Whereas objective arbitrability refers to the capability of the subject matter of the dispute to be resolved through arbitration.[9] Many jurisdictions exclude the disputes that involve subject matters like that of family law, matrimonial disputes, criminal law, insolvency, etc. and hence these are adjudicated by litigation process in traditional courts. Distinguishing between both the terms is important as one determines the capacity of the parties to enter into an arbitration agreement (subjective) and determines the eligibility of a dispute to be treated as being arbitrable in an arbitral tribunal (objective).[10]

So, we can say that arbitration is a matter of public and legal policy and not just restricted to the procedural issues involved in it. Where every country lays its own standards on determining

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[7] George A. Bermann, 'Arbitrability Trouble' (2012) AM.REV. INT'L ARB 367; Hiroshi Oda *Russian Arbitration Law and Practice* (Online edn, Oxford Law Pro, 2020)

[8] Hiroshi Oda *Russian Arbitration Law and Practice* (Online edn, Oxford Law Pro, 2020)

[9] Toni Deskoski & Vangel Dokovski, 'Notes on Arbitrability - Focus on Objective Arbitrability' (2018) 9 Iustinianus Primus L Rev

[10] Mohammed Zaheeruddin, 'The Arbitrability of the Subject Matter of Disputes in Arbitration'(2020) 23 (6) Journal of Legal, Ethical and Regulatory Issues < https://www.abacademies.org/articles/the-arbitrability-of-the-subject-matter-of-disputes-in-arbitration-10050.html > accessed 17 February 2026

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what issues shall be arbitrable and what shall be adjudicated by the courts, statutory interpretation comes to play. So, the state may put bars on certain issues even if commercial, if it considers such issues to be opposed of public policy and determining the greater good of the public where confidentiality cannot be exercised.

1.1. EVOLUTION AND DEVELOPMENT OF ARBITRABILITY

Earlier, when arbitration was recognised as a mechanism of dispute resolution, its scope was limited to mainly private and contractual issues. Disputes involving subject matters like crimes, insolvency, public rights violation etc were not regarded under the scope of arbitration. It was seen that civil law countries mostly put restrictions on what matters shall be decided through arbitration.

As globalisation made its path towards connecting people worldwide through international trade and commerce, there also increased the importance to resolve transnational issues. As a result, gradual increase in arbitration mechanism. However, till date no sole definition of what counts as 'arbitrable' is provided. The UNCITRAL Model Law and the New York Convention has given power to each state to decide on the subject matters of arbitrability. And hence, different countries make their own standards of arbitrability. But the New York Convention can refuse enforcement of an award if the subject matter of the award is found to be non-arbitrable under the law where the award is required to be enforced.

In USA, major turn in the law of arbitration occurred after the judgement in Mitsubishi Motors case and similarly India marked a shift in its arbitration laws after the verdict in Hamilton Incorporation case. In certain European countries, where insolvency disputes and intellectual property disputes were decided to be non-arbitrable, placing its reasons on public policy and third-party rights[11].with time, the European courts resorted mostly to arbitration for commercial disputes and restrictions were relaxed to a greater extent reflecting the effective resolution through arbitration for protecting legal rights while also respecting the public interest. In certain other areas of the world, the development of the arbitration law was shaped by the local customs of the country along with statutory norms, for example India, where rights in rem and rights in personam were separated for the purpose of arbitrability.

It becomes necessary for the parties to the international commercial arbitration to understand arbitrability because this will let the party make sure that their dispute is eligible of being arbitrated at the seat of arbitration and enforcement can be sought in any country. No prior

[11] Marc Blessing 'Arbitrability of Intellectual Property Disputes' (2014) 12 (2) Arbitration International, 191

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knowledge may put the parties in a situation where the award might not be enforceable under the New York Convention because the subject matter of the dispute does not qualify to be arbitrable.

As international trade is growing, clarity and stability in the standards of arbitrability becomes important. Hence arbitrability plays an important role in maintaining the efficacy and authenticity of international arbitration.

1.2. INTERNATIONAL LEGAL FRAMEWORK

In the context of international arbitration, the crucial question arises about what matters are arbitrable i.e., whether the dispute that has arisen is capable of being resolved through arbitration or only a national court can try it. The international instruments made for promoting arbitration and enforcement of arbitral awards like the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 and the UNCITRAL Model Law on International Commercial Arbitration, does not provide a clear and single definition of arbitrability and they leave this to the domestic laws to decide what would be considered as arbitrable in their country, which creates divergence in the interpretations of the term 'arbitrability' and restricts the uniformity in international arbitration.

The New York Convention, 1958

The New York Convention of 1958, a binding law, is one of the most important international instruments that governs the law of arbitration. Its primary aim is to ensure that the arbitral awards made in one nation are recognised and enforced in the other contracting nation with little or no judicial interference. The states are obliged to enforce the awards unless there are certain exceptions when enforcement can be refused or when the question of arbitrability arises[12].

Article II of the convention states that it is the duty of the state to recognise and enforce the agreements between parties made in writing, which the parties desire to submit the issues to arbitration, provided that the subject matter of arbitration is arbitrable[13].

Article V of the convention states that there are certain exceptions when an award can be refused by a state to be enforced. One major ground is given under Article V (2)(a) that gives

[12] John Abbott, 'Arbitrability in International Arbitration- Arbitration and Dispute Resolution- United Kingdom (Mondaq, 20 June 2024) < https://www.mondaq.com/uk/arbitration-dispute-resolution/1481258/arbitrability-in-international-arbitration > accesses 26 February 2026

[13] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) < https://www.newyorkconvention.org/english> accessed 26 February 2026

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the power to the state to refuse the enforcement of any award if the dispute is not considered as being arbitrable under the law of that enforcing state[14]. So, if a national court finds that the issue submitted for arbitration does not fall within the category of arbitrable disputes under the law of that nation, then the national courts can refuse to enforce such foreign awards.

These two provisions do not define 'arbitrability' instead it recognises the independence of each nation to come up with their own definition of what arbitrability means to them as per the laws of their nation and public policy, in an implied manner. So, the convention has left it for the determination by *lex fori* (the law of the enforcing state)[15]. As a result, there might occur situations where the two contracting parties might get varied outcomes about the arbitrability of the same dispute.

Article V(2)(a) is applicable only when the dispute is already arbitrated and the award has already been made to the parties and then a party has requested its recognition and enforcement in another nation. The national court of the nation where the award is requested to be enforced examine the capability of the subject matter to be eligible for settlement through arbitration under its national law. If it finds the dispute not capable of being arbitrable, it can refuse to enforce it. This means that even if an arbitration agreement and proceeding was valid where it was seated, its enforcement might me denied on the grounds that the arbitrability rules of the domestic laws does not recognise such disputes to be arbitrable[16]. So, Article V (2)(a) of the convention lays its focus mainly on the subject matter of arbitration for refusal of enforcement.

The UNCITRAL Model Law, 1958

The United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on International Commercial Arbitration in the year 1958 to help the nations streamline and harmonise their domestic arbitration laws as per the changing dynamics of the world. It provides an across-the-board framework for the arbitral procedures[17]. This convention is not a binding law as like the New York Convention and hence, it becomes binding when a state adopts it into its domestic laws.

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[14] Ibid.

[15] Sebastien Fries, Martin Molina, Annemarie Streuli, Denise Wohlwend, 'Grounds to Refuse Enforcement- Global Arbitration Review' (16 June 2015) < https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/4th-edition/article/grounds-refuse-enforcement > accessed 26 February 2026

[16] John Abbott, 'Arbitrability in International Arbitration- Arbitration and Dispute Resolution- United Kingdom (Mondaq, 20 June 2024) < https://www.mondaq.com/uk/arbitration-dispute-resolution/1481258/arbitrability-in-international-arbitration > accesses 26 February 2026

[17] UNCITRAL Model Lawon International Commercial Arbitration (1985) with Amendments as Adopted in 2006 (UNCITRAL, 2006) < https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration > accessed 27 February 2026

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The Model Law does not specifically provide a definition for arbitrability, but it impliedly speaks of the concept of setting aside of awards and also the enforcement of awards[18]. Article 34(2)(b)(i) grants the national courts the power to set aside an arbitral award on the ground that 'the subject matter of the dispute is not capable of settlement by arbitration under the law of this State'. Also, Article 36(1)(b)(i) allows for the denial to recognise and enforce a foreign award on the same ground[19]. So, the Model Law also sees arbitrability as a ground for denial of recognition and enforcement of awards if the subject matter of the dispute is non-arbitrable under the domestic law[20] and it also impliedly leaves the decision to make what laws arbitrable and what not up to the state.

The Non-Uniformity in its Definition

As we have discussed above, neither the New York Convention nor the UNCITRAL Model Law has defined what constitutes arbitrability or has provided a specified list of what can be referred to arbitration. Rather than doing so, they have laid their focus on the domestic standards of arbitrability exercised in individual nations, letting the countries the power to refuse recognition and enforcement of the foreign awards on the grounds of non-arbitrability of such disputes under the domestic law of the enforcing country[21]. This would have two key consequences:

- Different results due to different national laws: Countries have their own standards of recognising what is arbitrable and what is not. A dispute which is arbitrable in a nation where the arbitration took place might not be arbitrable in another state where the enforcement is requested, which leads to denial in enforcing the award.
- Scope of arbitrability varies nation to nation: Where many countries treat most of the commercial disputes as being arbitrable, some countries might exclude certain major categories[22] like anti-trust laws, insolvency issues, other statutory rights (generally rights in rem), etc.

This happens because the standards of arbitrability is decided by the public policy and statutory laws of a nation and the international frameworks take into account the sovereignty in this

[18] Redfern & Hunter, Law and Practice of International Commercial Arbitration(4th edn, Sweet and Maxwell, 2004)
[19] Mohammed Zaheeruddin, 'The Arbitrability of the Subject Matter of Disputes in Arbitration' (2023) 23 (6) Journal of Legal, Ethical and Regulatory Issues
[20] Ibid.
[21] John Abbott, 'Arbitrability in International Arbitration- Arbitration and Dispute Resolution- United Kingdom (Mondaq, 20 June 2024) < https://www.mondaq.com/uk/arbitration-dispute-resolution/1481258/arbitrability-in-international-arbitration > accesses 26 February 2026
[22] Ibid.

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regard. Hence, the result turns out to not having a single, clear and unambiguous definition of arbitrability.

Thus, the international instruments try to provide a harmonised enforcement structure, but they give liberty to the domestic laws, creating divergent standards of arbitrability of commercial disputes.

1.3. WHAT CONSTITUTES PUBLIC POLICY?

Public policy refers to the fundamental, legal, moral, social and economic principles of a country which is seen as basic values that is necessary for protecting its legal system and the public interest. In international arbitration, public policy acts as a safeguard to certain important legal principles of a country. Hence, it permits courts to deny the enforcement of an arbitral award or refuse to refer a matter to arbitration if such an award violates the fundamental legal principles of that nation, which is called the public policy of a nation. The national courts are devised with powers to exercise judicial control over arbitration and ensure fairness of arbitral proceedings and preserve the mandatory legal provisions of a country.

Finality of awards is one of the main advantages of arbitration. However, when courts deny enforcement on the grounds of public policy or non-arbitrability, it weakens the finality of the award. Hence, ultimately this divergent standard leads to increased litigation as the parties may the challenge the enforcement in various jurisdictions and the courts will again review it under public policy grounds.

On a global scale, public policy is interpreted very narrowly and includes:

- Principles of natural justice
- Morality
- Safeguarding national sovereignty
- Mandatory provisions of law
- Prevention of fraud and corruption

However, various nations interpret public policy differently. Hence, this difference in interpretation leads to difference in the standards of arbitrability in different nations.

In the US, courts interpret public policy in a narrower sense in arbitration matters. The US Supreme Court has clearly stated that public policy must have an ‘explicit’, ‘well-defined’ and ‘dominant’ quality[23], refusal of enforcement merely because the court dissents to the tribunal’s reasoning shall not be a ground. France recognises two types of public policies: first, domestic

[23] W. R. Grace & Co. v. Local Union 759 461 US 757 (1983)

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public policy and second, international public policy. France allows only violations of international public policy like principles of natural justice, due process of law, prohibition of corruption, etc as ground of refusal of enforcement. Singapore completely reflects the UNCITRAL Model Law that has a narrow interpretation of public policy[24] and the Singapore Court of Appeal has stated that public policy refers to the breach of basic notions of morality and justice like fraud, corruption, principles of natural justice, matters affecting national security etc.

On the other hand, India has a broader interpretation of public policy. In the case of *Renusagar Power Co. Ltd. v. General Electric Co.*[25], Supreme Court of India had interpreted public policy in narrower sense that included fundamental policies of Indian laws, Interests of India and justice or morality. This inclusion was very exhaustive. But in *Vijay Karia v. Prysmian Cavi E. Sistemi SRL*[26], the court stressed upon restricted interference and a narrow interpretation of the term ‘public policy’. Currently, India comparatively has narrow definition of public policy now and includes:

- Fundamental policies of Indian laws
- Basic morality and justice
- Fraud and corruption
- Violations of statutory safeguards
- Patent illegality (for domestic awards only)

Public policy is not a fixed concept, it is dynamic. Courts can expand its scope as per the needs in the following ways:

- Public policy inclusive of statutory violations
- Considering disputes related to economic regulation, insolvency, anti-trust laws or consumer protection as a subject of public policy.
- Instead of restricting the review to procedural fairness, public policy is applied to determine the merits of a case.

Certain other aspects related to public policy are given as under:

- Arbitration although is a private autonomous process, yet courts can exercise judicial control over arbitration and also possess supervisory authority. This is because it will ensure fairness of the process, protect constitutional principles and mandatory statutory provisions, etc.

[24] International Arbitration Act (Cap 143A, Singapore)
[25] Renusagar Power Co. Ltd. v. General Electric Co. (1985) 1 SCR 432
[26] Vijay Karia v. Prysmian Cavi E. Sistemi SRL (2020) 11 SCC 1

- States may sometimes refer certain important matters to arbitration, however, public policy stands to protect the sovereign interests. Matters involving criminal offences, family disputes, insolvency proceedings, disputes affecting national security, etc needs court's supervision as they impact public welfare, economic stability and hence public policy keeps a balance between party autonomy and state sovereignty.
- Although public policy assists many important functions, but it lacks uniformity. Different country interprets public policy differently which leads to divergence in the standards of arbitrability and weakens the predictability of the status of international arbitration.

CHAPTER 2

INTERNATIONAL COMPARISION OF LIBERAL AND RESTRICTIVE APPROACHES

In every country, the standards of arbitrability differs. Some jurisdictions may follow a liberal or pro-arbitration approach which gives wider party autonomy and also allows for the statutory and public law disputes to be referred to arbitration. But there are other jurisdictions that adopt a restrictive or cautious approach that limits the arbitrability of subject matters that involve public policy, sovereign concerns and third-party rights. Below is the comparison of the approaches adopted by United States, France, Singapore and India along with comparing the key areas like fraud, insolvency, intellectual property rights, etc.

2.1. UNITED STATES

When it comes to the United States in the matters of arbitration, it is recognised as one of the most liberal countries in the world. The pro-arbitration friendly approach of the US flows from the Federal Arbitration Act[27] (FAA) that provides that courts have the obligation to enforce the arbitration agreements and awards strictly[28]. The US courts try to interpret arbitration clauses widely to favour party autonomy.

There is this precedent setting case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[29]. In this case, Mitsubishi Motors have made an agreement for international distribution with Soler Chrysler-Plymouth. The agreement was containing an arbitration clause which said

[27] Federal Arbitration Act, 1925
[28] Federal Arbitration Act, 1925, 9 USC s. 1-16
[29] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 US 614 (1985)

that in case of dispute, the parties would resort to arbitration to be conducted in Japan. A dispute arose between them, and Soler (a Puerto Rican automobile distributor) filed counterclaims against Mitsubishi motors contending violations of the US anti-trust laws. The issue that arose before the court was whether the antitrust claims and statutory issues relating to competition laws can be referred to arbitration or not. The court clearly held that the statutory claims that include anti-trust issues can be referred to arbitration with a proviso that the arbitral tribunal applies the relevant law correctly. The court focused on the point that by resorting to arbitration, the parties do not waive off their substantive rights, rather they just chose a different platform for resolving their disputes. This judgement was remarkable as it widened the scope of arbitrability in the United States.

If we are to see the status of fraud, the US have allowed the arbitration of claims of fraud that arise from contractual relationships. US courts generally apply the separability doctrine to address the arbitration of fraud claims unless the arbitration clause is directly being challenged for constituting fraud[30].

For insolvency matters, the US law is a bit cautious. The major and principle proceedings of bankruptcy are usually recognised as non-arbitrable because they consist of the collective rights of creditors and also judicial supervision[31]. US treats bankruptcy issues as being affecting the third-party rights and also a hindrance to the public policy which makes it unfavourable for private dispute resolution.

The US arbitration laws are also favourable for the intellectual property disputes. Issues related to intellectual property (contractual matters) like royalty, licensing and technology transfer can be arbitrated. Also, issues related to patent rights are arbitrable[32].

In consumer dispute cases the US courts have actively enforced arbitration clauses, even if it is a standard form contract. In the case of AT & T Mobility LLC v. Concepcion[33] emphasised on the pro-arbitration approach adopted by the US and enforced the arbitration agreements related to consumer disputes.

The US, hence, reflects a very liberal approach towards deciding the standards of arbitrability permitting arbitration in matters of fraud, anti-trust laws, intellectual property and consumer protection disputes. It although has a limited jurisdiction for insolvency disputes, but the limits of arbitration is not completely nil.

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30 Prima Paint Corp. v. Flood and Conklin Mfg Co, 388 US 395 (1967)
31 Jay Lawrence Westbrook, 'Arbitration and Bankruptcy' (1992) 21 International Lawyer 1123
32 Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration' (2005) 73 Fordham Law Review 1521
33 AT&T Mobility LLC v. Concepcion 563 US 333 (2011)

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2.2. FRANCE

France is considered one of those states that broadly recognises the scope of arbitration. This country is one of the most arbitration friendly nations as the French courts try to minimise the judicial interference by holding the principle of competence-competence. It follows a liberal approach with certain restrictions in order to protect public policy.

While dealing with fraud cases, the French courts can refer the matter to be resolved by arbitration provided that the fraud arising out of contractual matters does not affect the public policy. Disputes can be referred to arbitration only when there is compliance with public policy and mandatory rules are applied simultaneously.

For the issues involving the subject matter of anti-trust laws, France allows for arbitration of such disputes however, the mandatory European and domestic rules shall be applied[34]. This shows a liberal approach of arbitrability of France similar to the United States.

However, France follows a restrictive approach when it comes to the disputes regarding insolvency matters. This is because, bankruptcy matters involve collective creditor rights and also judicial administration, for which arbitration is not considered a good resolution method[35].

France allows for the arbitration of intellectual property disputes arising out of contractual relations such as licensing, royalties, etc. But any issue that involves the recognition of the validity of patent or trademark is left to the state authority to decide[36] as these involve public registration systems.

While dealing with consumer disputes in France, the businesses cannot force the consumers to resort to arbitration if it affects their legal protection. For instance, if a company mentions an arbitration clause in the contract with the consumer before the dispute arises (like in the standard terms and conditions) it is subjected to the court's examination. If the terms of the arbitration clause seem unjust to the court or restricts the consumer's rights, then, it can be declared void under the European consumer protection statute[37]. Hence, France although is arbitration friendly but it protects consumers rights over arbitration agreements.

2.3. SINGAPORE

Singapore is recognised as a leading arbitration centre in the Asian continent. The International Arbitration Act adopted by Singapore is a reflection of the UNCITRAL Model Law on

[34] Labinal v. Mors (Paris Court of Appeal 1993)
[35] Nathalie Meyer-Fabre. 'Arbitration and Insolvency in France' (2014) International Insolvency Review
[36] Christophe Geiger, 'Arbitration of Intellectual Property Disputes' (2008) 24 Arbitration International 1
[37] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts

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International Commercia Arbitration and the courts follow a liberal yet a balanced approach[38]. For issues of fraud arising out of contractual relations, the Singaporean courts have stated that merely claiming that fraud has occurred does not directly make the dispute non-arbitrable. Where the fraud arising out of commercial contracts, does not involve any criminal offences. It can be referred to an arbitral tribunal[39]. Singapore does not put a blanket exception to arbitration when it comes to fraud.

The field of competition laws in Singapore also follow a pro-arbitration approach with certain restrictions. Anti-trust disputes are considered arbitrable by a tribunal as long as the tribunal consciously appertain the relevant legal provisions. However, the state bodies still remain with the power to enforce regulatory actions. Hence, arbitration and public body regulation function hand in hand.

For insolvency disputes, Singapore follows the basic international standards that says that the insolvency proceedings that affect multiple creditors like liquidation, are not to be referred for arbitration. The reason being that insolvency matters constitute collective creditor rights and judicial monitoring which cannot be alone driven by arbitration[40].

Singapore has stepped forward in the field of intellectual property disputes. Singapore allows for the arbitration of intellectual property matters that involve licensing, royalties, ownership and even recognition of the validity of all intellectual properties[41]. The arbitral award passed in this regard binds the actual parties to the dispute and does not automatically bind third parties as intellectual property rights involve public registration systems.

For consumer disputes, arbitration can be allowed however, they are subject to consumer protection laws. The arbitration clauses made in a contract are subject to judicial review to ensure that they are fair and does not overshadow the consumer rights.

2.4. INDIA

There have been remarkable changes in the law of arbitration in India. Earlier, India's standards of arbitrability has been restrictive but now the judgements given by the Indian judiciary marks a pro-arbitration approach.

In the famous case of *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd*.[42], the Supreme Court of India made a clear distinction between 'rights in rem' and 'rights in personam'. The

[38] International Arbitration Act (Cap 143A, Singapore)
[39] Tomolugen Holdings Ltd. V. Silica Investors Limited (2015) SGCA 57
[40] Larsen Oil and Gas Pte Ltd. v. Petroprod Ltd. (2011) SGCA 21
[41] Intellectual Property (Dispute Resolution) Act 2019 (Singapore)
[42] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. (2011) 5 SCC 532

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court said that rights in rem like insolvency disputes, enforcement of mortgages, intellectual property rights, liabilities in criminal offences, guardian ship matters, testamentary matters, etc. are non-arbitrable in India[43] but rights in personam like contractual rights, breach of trust, claim for damages are arbitrable. This judgement has created a formal structure of the arbitrability standards in India. The ratio given by the court was that arbitration is a private process conducted between the parties to an agreement. Rights in rem generally involve third parties or the public to the dispute and an arbitral award only binds the actual parties to it and not any third party. Hence, rights in personam only were allowed to be referred to arbitration.

Earlier, fraud disputes were treated very cautiously. The serious allegations made with regards to fraud was considered non-arbitrable. However, in the case of *Vidya Drolia v. Durga Trading Corporation*[44], the Supreme Court declared that ordinary issues with respect to fraud, arising out of contractual relations are arbitrable. But any major issues relating to fraud that affects the public interest are not subject to arbitration. This judgement was seen as a remarkable change in the arbitration laws of India towards a more pro-arbitration approach.

If we look into the insolvency disputes of India, the Indian judiciary has repeatedly declared that under the Insolvency and Bankruptcy Code the proceedings are non-arbitrable as it involves collective creditor rights which requires court's supervision[45].

For anti-trust matters, India is slightly tilted towards a restrictive approach. The contractual disputes between parties can be arbitrated. However, the state authority is given the power for regulatory enforcement.

India has limited arbitration of intellectual property to a certain extent. Arbitration of intellectual property disputes are arbitrable as long as it arises out of contractual relations such as licensing and royalties. But disputes involving grant or validity of patents and trademarks are considered highly non-arbitrable as they involve public rights[46].

For consumer disputes, if statutory remedies are available under the consumer protection legislation, the arbitration clauses cannot override it. Consumers can exercise their statutory right and can approach consumer forums for dispute resolution[47].

Hence, India reflects a very careful yet measured liberalising system, which balances party autonomy with public interest

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[43] Kingshuk Banerjee, 'Non-Arbitrable Disputes- The Law in India' (Khaitan & Co, 3 June 2021) <https://www.ibanet.org/nonarbdisputesindia#:~:text=A%20right%20in%20rem%2C%20the,been%20considered%20arbitrable.%5B11%5D> accessed 28 February 2026
[44] Vidya Drolia v. Durga Trading Corporation (2021) 2 SCC 1
[45] Indus Biotech Pvt. Ltd. v. Kotak India Venture Fund (2021) 6 SCC 436
[46] A. Ayyasamy v. A. Paramasivam (2016) 10 SCC 386
[47] Emaar MGF Land Ltd. v. Aftab Singh (2019) 12 SCC 751

This comparative study has helped to understand how different major jurisdictions, United States, Singapore, France and Inida has adopted the standards of arbitrability. Where United States, France and Singapore have adopted a wider and liberal approach in determining arbitrability, India stands two steps backward. India follows a restrictive approach. Although in Vidya Drolia case, the court's verdict seems to be progressive, but it still limits the matters which involve public rights, insolvency and statutory safeguards. Hence, a dispute arbitrable in one nation might not be arbitrable in another nation.

CHAPTER 3

PRACTICAL CHALLENGES AND NEED FOR HARMONISATION

3.1. CHALLENGES

Divergent standards of arbitrability across countries possess serious practical challenges in the field of international commercial arbitration. Arbitration aims to provide uniform predictable and fast dispute resolution mechanism for global trade but the differences in the domestic laws of each nation weakens this aim following are certain challenges that might occur in the near future due this divergence.

Legal uncertainty:

A core problem of the divergent standards is the lack of certainty. The New York Convention of 1958 and the UNCITRL Model Law both allows the state to refuse the enforcement of an award on the grounds of public policy. What constitutes public policy is left for the states to decide as per their domestic laws. Hence a matter arbitrable in one country might not be arbitrable in another country.

For instance, the United States follows a liberal approach and allows for antitrust disputes to be referred to arbitration[48]. However, many countries do not allow this. They might limit the process of arbitration to competition law matters or regulatory enforcement matters[49]. This created uncertainty in the awards made by the arbitral tribunal as parties cannot completely ensure that their arbitration agreement or the arbitral award will be recognised and enforced everywhere in the world.

Increased cost and delay:

Varied standards of arbitrability results in additional court proceedings that might be before or

[48] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc. 473 US 614 (1985)
[49] Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Kluwer, 1981)

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after the award is passed. A party can challenge the arbitrability of a dispute before the domestic courts i.e. before the arbitral proceedings has begun or a party can challenge the award passed (challenging the enforcement) in the arbitral proceedings before the national courts based on the violations of public policy i.e. after the arbitral proceedings has been completed and award has been passed.

As the New York Convention[50] and UNCITRAL Model Law[51] has allowed the national courts to refuse enforcement of awards if it goes against the nation's public policy, this provision ultimately opens the door for extended judicial review. Rather than getting efficacy in the tribunal parties may face multi-stage litigation across various territories.

Forum shopping:

Another challenge is the forum shopping, also called as bench hunting. Forum shopping is a strategic method where parties intentionally choose a country whose legal rules would favour more to their interests.

For instance, when parties agree to arbitrate a matter but later one party wants to opt out because he thinks that arbitration would not favour him, then he may choose a country that has a restrictive view of arbitrability so that the way for arbitrability would be blocked and he may initiate court proceedings. Inversely, a party who wants to enforce the award might choose a country where there is narrow interpretation of the term 'public policy'.

In India, in the case of ONGC Ltd. v. Saw Pipes Ltd[52]., the court gave a broader interpretation of public policy, and which allowed more judicial interference. This judgement was later criticised for encouraging challenges to public policy.

Risk for foreign investors:

Disputes are referred to arbitration mostly because people want a neutral forum in order to avoid any court biasness. However, if the domestic courts, exercising their power under the New York Convention or UNCITRAL Model Law declare the dispute to be non-arbitrable, then the investors would lose their advantage of arbitration[53]. Hence, this will create uncertainty for foreign investors.

Suppose we take the example of insolvency disputes. Insolvency and bankruptcy disputes are

[50] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, art. V(2)(a)
[51] UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 34(2)(b)(i)
[52] ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705
[53] Susan D. Frank, 'The Legitimacy Crisis in Investment Treaty Arbitration' (2005) 73 Fordham Law Review 1521

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generally considered non-arbitrable in many nations as they involve collective creditor rights. So even if the parties agree to arbitrate on such matters, the statutory norms will have an overriding effect on the arbitration agreement. Such uncertainty increases the risk and will ultimately discourage transnational investment.

Weak credibility on arbitration:

Arbitration as a dispute resolution mechanism is designed to function as an independent and internationally enforceable system. But greater judicial intervention on the grounds of non-arbitrability or public policy will weaken its credibility[54]. Countries like Singapore, France and the United States interpret public policy in a narrower sense, allowing a pro-arbitration approach, and protect the integrity of arbitration. However, broader interpretation, as like in India can make arbitration more like a litigation process which would reduce the essence of arbitration as an alternate dispute resolution mechanism.

Such divergent standards of arbitrability mirrors the tension between party autonomy and state sovereignty. International instruments on one hand promote uniform enforcement but national courts have the power to refuse enforcement on grounds of non-arbitrability and public policy. So, unless greater harmonisation is realised the differences will create uncertainty and weaken confidence on international commercial arbitration.

3.2.THE NEED FOR HARMONISATION

Many scholars and academicians contend that a uniform standard of arbitrability would enhance the credibility and enforceability of arbitral awards.[55] However, achieving complete unification seems very difficult because of the varied legal policies and societal norms across various jurisdictions. Hence, harmonisation of standards through international guidance is both feasible and desirable. The UNCITRAL Model Law provides for a more common framework for international arbitration, and it can be expected to provide more detailed guidance on arbitrability to minimise the divergence in domestic interpretations[56].

One feasible reform that is suggested by scholars is the narrow interpretation of public policy by domestic courts. Many countries have now recognised that public policy should not be a standard to measure the merits of an arbitral award rather should be used to prevent serious

[54] William W. Park, 'Arbitrability and Public Policy' (2009) 2 Contemporary Asia Arbitration Journal 1

[55] Julian D. M. Lew, 'Arbitration and the Harmonisation of International Commercial Law (1991) 2 Asian International Arbitration Journal 19

[56] Albert Jan van den Berg, 'International Arbitration and the Role of the Harmonisation Agenda' (2018) 34 Arbitration International 1

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violations of basic fundamental legal principles[57]. This view is in consonance with international practice, where the exception of public policy is regarded as a narrow safeguard rather than a broader grounds of refusal.

Providing clear legislative definitions of arbitrability and public policy would also help to an extent. Countries can explicitly list down what matters are arbitrable and what are not which will help the parties to decide which forum would be a more favourable platform. Another suggested reform could be judicial restraint. Courts can forbid themselves from interfering more and starting a re-litigation process but limiting their intervention in violations of fundamental norms and principles of the nation.

Hence, while complete unification of arbitrability law in not possible due to different cultural, social and political backgrounds of different nations greater consistency and international guidance is both desirable and achievable.

CONCLUSION

Different countries have varied standards of determining arbitrability and what constitutes public policy in international commercial arbitration based on their cultural, social and political background and also core constitutional values. The aim of arbitration is to provide a uniform and reliable method for solving transnational disputes, but the power of domestic courts to decide what is arbitrable and what is not, what arbitral award is enforceable and what is not creates uncertainty. Public policy which shall work to protect the fundamental principles of a nation, is often interpreted very differently across borders. Hence, this leads to inconsistency in the enforcement of arbitral awards under New York Convention. However, a narrow interpretation of public policy all across the world, judicial restraint on arbitration proceedings, clear legislative guidance in an international level and efforts for harmonisation of the arbitration laws across borders would help reduce the uncertainty and increase reliability and credibility on international arbitration.

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