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Mapping the jurisdictional limits of arbitration: Doctrinal challenges in arbitral and non-arbitral subject matters

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Abstract
The rise of arbitration as a preferred mode of dispute resolution has necessitated a nuanced understanding of its jurisdictional boundaries. Arbitration, although autonomous, operates within the constraints of statutory and public policy limitations. The essential question that persists is whether all disputes are inherently arbitrable or whether there exist doctrinal impediments that circumscribe the arbitral domain. This article systematically analyses the jurisdictional contours of arbitration by categorizing arbitral and non-arbitral subject matters, examining legislative intent, judicial pronouncements, and theoretical frameworks to outline the doctrinal challenges that continue to perplex both practitioners and scholars.

Keywords: Arbitral, non-arbitral, right in rem, right in personam, litigation, jurisdictional, public interest

Introduction
Arbitration has steadily gained prominence as a preferred mode of dispute resolution across the world, particularly in commercial matters. It offers parties a flexible, efficient, and private forum outside the traditional courtroom, promising procedural autonomy and finality of awards. The evolution of arbitration reflects the broader shift towards party-centric justice systems that priorities consensual dispute resolution mechanisms over adversarial litigation.
However, arbitration does not function in an unbounded legal vacuum. Despite its many advantages, arbitration is subject to inherent jurisdictional limits, both in theory and in practice. Certain disputes, by their very nature or by express statutory mandate, are considered non-arbitrable. These non-arbitrable matters are typically seen to involve public rights, impact third-party interests, or fall under the exclusive domain of statutory authorities and courts. Therefore, while arbitration is built on the foundation of party autonomy, this autonomy is not absolute.

Doctrine of arbitrability
The doctrine of arbitrability, particularly the division between what can and cannot be settled through arbitration, is a complex and evolving subject. The classification of arbitral and non-arbitral subject matters is not merely a procedural question but one that touches upon substantial aspects of public policy, legislative intent, and the allocation of judicial power. It is here that the tension between arbitration's contractual freedom and the regulatory boundaries set by the state becomes most apparent.

Arbitral tribunals are private mediums
Arbitral tribunals are private mediums chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public mediums constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the Arbitral tribunal jurisdiction is either explicitly or implicitly excluded.
Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public mediums as a matter of public policy.

Certain other categories of cases, though not expressly reserved for adjudication by a public medium (Courts and Tribunals), may be necessary implication stand excluded from the purview of private mediums.

Consequently, where the cause/dispute is arbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Arbitration and Conciliation Act, 1996, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes. The well recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the designated courts are granted jurisdiction to grant eviction or decide the disputes; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration, and succession certificate); (vi) marital disputes relating to divorce, judicial separation, restitution of conjugal rights, and child custody; and (vii) insolvency and winding up matters.

Based on the UNCITRAL Model Law, the Arbitration and Conciliation Act, 1996, in India, offers a comprehensive legislative framework but says nothing about a precise definition of the topics that can be arbitrated. Consequently, Indian courts have been frequently called upon to interpret the limits of arbitration's jurisdiction. Through judicial pronouncements, particularly in case laws such as *Booz Allen, Vimal Shah*, and *Vidya Drolia*, the Indian judiciary has attempted to develop a workable doctrine to distinguish between arbitrable and non-arbitrable matters. Yet, ambiguities persist, and doctrinal inconsistencies continue to generate legal uncertainty.

This challenge is not unique to India. Across jurisdictions, the question of what disputes are fit for arbitration has spurred intense debate among scholars, legislators, and courts. Some countries adopt a broad approach, allowing almost all civil disputes to be arbitrated, while others impose stricter statutory and public policy limits.

The need to map these jurisdictional boundaries is critical for several reasons. Firstly, it ensures the protection of public interests that may not be adequately safeguarded in private dispute resolution forums. Secondly, it prevents arbitral overreach into domains reserved for judicial or administrative authorities. Thirdly, a clear delineation enhances predictability and reinforces confidence in arbitration as a reliable process.

Conceptual Foundations

Arbitrability and its Dimensions, at its core, can be viewed through three analytical lenses:

- **Subject Matter Arbitrability:** Whether the dispute is capable of settlement by arbitration under the law.
- **Jurisdictional Arbitrability:** Whether the particular arbitral tribunal has the competence to hear the dispute.
- **Institutional Arbitrability:** Whether the dispute is suitable for arbitration under the chosen rules or framework.

This article focuses primarily on subject matter arbitrability and jurisdictional arbitrability.

The Legislative and Judicial Framework in India

The Arbitration and Conciliation Act, 1996, does not provide a comprehensive list of arbitrable or non-arbitrable disputes. Instead, the jurisprudence in India has evolved through judicial interpretation.

Key Judicial Developments

Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd (AIR 2011 SC 2507)

The Supreme Court broadly categorized disputes into *rights in personam* and *rights in rem*. It held that disputes involving rights in personam (private rights enforceable against specific individuals) are generally arbitrable, while rights in rem (public rights enforceable against the world) are not arbitrable, as they typically require adjudication by public fora.

Vimal Shah v. Barot Vijal (AIR 2016 SC 3889)

The Court held that disputes governed by the Indian Trusts Act are non-arbitrable due to their statutory and fiduciary nature. The involvement of public interest and judicial discretion made such matters unsuitable for private arbitration.

Vidya Drolia v. Durga Trading corporation (AIR Online 2020 SC 929)

In this landmark judgment, the Supreme Court provided a fourfold test for determining arbitrability:

- Whether the cause of action and subject matter relate to actions in rem?
- Whether the dispute impacts third-party rights?
- Whether the statute confers exclusive jurisdiction on courts?
- Whether the dispute is non-arbitrable by necessary implication?

This judgement also clarifies the arbitrability of disputes, particularly those involving tenancy and fraud, under the Arbitration and Conciliation Act, 1996 and it emphasized that tenancy disputes, not governed by special rent control laws, are generally arbitrable

Legislative Silence

One of the most significant challenges in determining the scope of arbitration in India stems from the absence of explicit statutory guidance on arbitrable and non-arbitrable subject matters. The Arbitration and Conciliation Act, 1996, while comprehensive in outlining procedural aspects of arbitration, remains silent on the substantive categorisation of disputes that are eligible or ineligible for arbitration. This legislative gap has left it to the judiciary to delineate the contours of arbitrability often through case-specific interpretations rather than uniform statutory criteria.

This silence is particularly problematic given the increasing reliance on arbitration as a preferred dispute resolution mechanism. In contrast to jurisdictions where statutes clearly demarcate non-arbitrable matters such as family law, criminal cases, or matters involving sovereign functions, India's arbitration law provides no such list. As a result, judicial decisions have effectively become the de facto law on the subject.

Moreover, the lack of express statutory direction increases the risk of forum shopping and procedural delay, as parties contest the arbitrability of disputes even after arbitration agreements have been executed. Courts are then burdened with determining whether to refer disputes to arbitration under Section 8 or Section 11 of the Act, or retain the jurisdiction based on implied exclusions.

Additionally, this ambiguity hinders India's ambition to become a center for international arbitration. For India to attract international arbitration and gain the confidence of investors, greater legislative clarity is essential. The need for reform is thus twofold: (1) to reduce the judiciary's discretionary role in defining arbitrability, and (2) to enhance the legal certainty and efficiency that arbitration seeks to provide.

In sum, the legislative silence on arbitrability has placed disproportionate reliance on judicial interpretation, leading to an uneven application of arbitration principles. Codifying arbitrability through statutory amendments would provide much-needed clarity, consistency, and confidence in India's arbitration regime. In the absence of a statutory demarcation in the 1996 Act has compelled courts to act as the gatekeepers, defining the boundaries of arbitration based on public policy and statutory construction.

Doctrinal Challenges in Defining Arbitrability

The *Rem–Personam* Dichotomy: A Blunt Tool?

Although it is helpful, the distinction between rights in personam and rights in rem is not a conclusive test. Certain rights in rem, such as insolvency proceedings, involve complex factual determinations that may partially overlap with contractual disputes. This creates grey areas where strict categorisation fails.

Public Policy as a Moving Target

Public policy serves as a limit to arbitrability but is an inherently elastic concept. What constitutes public policy in one era or jurisdiction may evolve, leading to doctrinal uncertainty. For example, while matrimonial disputes are currently non-arbitrable in India, some jurisdictions allow mediation and arbitration in family law under specific conditions.

Multiplicity of forums and fragmentation of jurisdiction

Arbitrable issues sometimes form part of a composite dispute, leading to bifurcation between arbitral and judicial forums. This fragmentation raises practical difficulties and undermines the efficiency arbitration seeks to achieve.

Statutory exclusions and non-delegable jurisdiction

Certain statutes, such as the Companies Act and the Insolvency and Bankruptcy Code, confer exclusive jurisdiction upon specialised tribunals. This creates a doctrinal barrier to arbitration. However, the extent to which parties can contractually carve out such disputes remains contentious.

Party Autonomy vs. Mandatory Jurisdiction

The principle of party autonomy is a cornerstone of arbitration, but it cannot override mandatory statutory provisions. This raises tension between the consensual nature of arbitration and the compulsory jurisdiction of courts in certain matters.

Comparative Perspective

Jurisdictions vary significantly in their approach to arbitrability:

- **United States:** Relatively broad arbitrability, especially in commercial matters, with courts inclined to refer disputes to arbitration unless explicitly excluded by statute.
- **France:** Expansive approach, where most disputes, including certain public law matters, can be arbitrated.
- **Germany:** More cautious, particularly in relation to matters involving status, family law, and insolvency.

In comparison, India's approach is conservative, closely tied to public policy and statutory interpretation.

The Way Forward: Evolving Standards and Doctrinal Coherence

For India to develop a more predictable and coherent arbitration regime, several steps are essential:

- **Statutory Clarification:** Amendments to the Arbitration and Conciliation Act to define arbitrable and non-arbitrable matters explicitly.
- **Judicial Restraint:** Courts should adopt a pro-arbitration stance and intervene only when the non-arbitrability is manifest and undisputed.
- **Public Policy Codification:** A more structured and narrow definition of public policy in the context of arbitration to reduce judicial subjectivity.
- **Harmon is action with Special Laws:** Clear legislative guidance on the interface between arbitration and statutory tribunals such as NCLT and DRT.

Conclusion

The question of what disputes can and cannot be resolved through arbitration strikes at the heart of arbitration's legitimacy and effectiveness as an alternative dispute resolution mechanism. While arbitration offers flexibility, confidentiality, and party autonomy, these advantages are inherently balanced against statutory mandates, public policy considerations, and the nature of the legal rights involved.

In India, the absence of a statutory framework that clearly delineates arbitrable from non-arbitrable subject matters has led to significant reliance on judicial interpretation. Landmark decisions such as *Booz Allen*, *Vimal Shah*, and *Vidya Drolia* have provided much-needed guidance, particularly through the development of the fourfold test in *Vidya Drolia*. Yet, ambiguities persist. The doctrinal tension between rights in rem and rights in personam, the elasticity of public policy, and the overlaps between arbitral and statutory forums continue to raise complex jurisdictional challenges.

The comparative analysis reveals that jurisdictions such as the United States and France have adopted a more liberal approach to arbitrability, enhancing predictability and investor confidence. India, by contrast, remains cautious, often deferring to statutory tribunals and public interest considerations. While such caution is warranted in certain areas, overreliance on judicial gatekeeping and legislative silence hampers the development of a robust and reliable arbitration ecosystem.

Moving forward, India must adopt a more coherent and proactive approach. This includes statutory amendments to explicitly list non-arbitrable matters, clarification of the role

of public policy, and harmonisation of arbitration law with sector-specific statutes like the Insolvency and Bankruptcy Code and the Companies Act. Only through such reforms can India promote legal certainty, reduce forum conflicts, and establish itself as a truly arbitration-friendly jurisdiction. Ultimately, mapping the jurisdictional limits of arbitration is not merely a technical exercise, it is foundational to upholding the rule of law, safeguarding public interest, and reinforcing confidence in arbitration as a credible and effective system of justice.

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