Mandatory Arbitration in India

Salient Features

- A meticulous attempt at analysing the ambit of mandatory arbitration.
- A motion set under the umbrella of three exhaustively discussed prospects by a way of three different chapters.
- An overview into the rule of hidden arbitration clauses in the unilateral standard terms of contract.
- Comparative analysis on the scope of mandatory Arbitration in India, UK and US
- A through analysis of the position of Indian law on the scope of arbitration in cases of the agreements tainted with fraudulent transactions.
- An understanding of courts' approach in interfering with the arbitration proceedings tainted with fraud.
- An overture to the possibilities of Bilateral Arbitration Treaty (BAT)
- Practicality of BATs in a real world context.

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FOREWORD

It is a privilege to be invited to write a Foreword to this excellent work on Mandatory Arbitration. As we know, Arbitration means settlement of dispute by the decision of a person or persons chosen and accepted as Judges other than Court of competent jurisdiction. This practice is not new and its origin can be traced back to ancient civilizations. With the change of time, its ambit enlarged and the requirements increased. Need to enact laws dealing with settlement of domestic disputes as well as international commercial disputes arose. To cater this need and to standardize law relating to arbitration, the Arbitration and Conciliation Act has been enacted. The United Nation Commission on International Trade Law has adopted model Law on Commercial Arbitration. In spite of this, in certain areas dearth of proper material is felt, one of them being Mandatory Arbitration.

This book is a distinctive attempt to address the newfound void that has been discovered in the relatively short but elaborative jurisprudence of the arbitration law. Rather than terming the chapters covered in the book as shortcomings in the arbitration law, it would be more appropriate to call it an endeavour to augment the ambit of the said law. With a steep well in the category of an aware customer in B2C business, the accountability of business entities towards their customers has escalated. In that scenario, the existing laws may fall short of the ability to tackle the trivial issues of a B2C business in a timely manner. This is where the scope of mandatory arbitration attains its significance. Also, as the economic offences are occurring in an increasing fashion across the nation, the means to address the legality of fraud have called for a dispute resolution process that is swift and judicious. Having arbitration as a means of dispute resolution to tackle this demand is a contemplative thought. In light of the aforesaid and more persisting lacunas, the proposal of Bilateral Arbitration Treaty (BAT) by Professor Gary B. Born deserves a solemn consideration. The idea of having a dedicated and binding multilateral arbitration treaty that functions in consonance with existing protocols can be a determinant in the arena of domestic and international arbitration law. Lastly, the motions put forward by the authors are not only well timed but also warranted proposals. Until a later time, this book calls for a rigorous round of brainstorming in arbitration law.

The usefulness of the book will be proved with the passage of time but I do not have slightest doubt in my mind that any person concerned with the law on arbitration will not find himself well-equipped unless he has this book in his hand. l am also convinced that in the years to come there will be many more editions of this book at regular intervals. I firmly believe that in the present-day world, the function of a lawyer is not confined to practicing law in judicial courts alone but he has to expand his abilities to cover diverse aspects in the legal field and that precisely has been done by the authors of this book. I congratulate them for the excellent work they have done and wish them Good Luck for the future.

2nd July, 2018
Ahmedabad

Akshay H. Mehta
Former Judge, High Court of Gujarat

A Scope of Mandatory Arbitration in India

Author Introduction:

Samrat Thakker is an advocate practicing in various courts and tribunals across Bombay & Delhi. He is dedicated to institutionalize arbitration in India. He has acquired a degree in Business Administration and LLB with an Honours in International Commercial Law from National Law University, Odisha (NLUO). He further did his Masters in the field Law (LLM) from The Queen Mary, University of London. He specialized in International Arbitration & Commercial Laws. Thereafter, he went on to do a management programme from SP Jain, School of Global Management in pursuit of integrating Law and Management. As a law student, he has written extensive research papers and has also been a founder of a legal newspaper in his college. After joining the bar, Samrat has handled several cases in the field of law which include Arbitration law, Criminal law, Commercial laws, Family law and Intellectual Property law. However, he has dedicated majority of his time in exploring the scope of the application of arbitration law online & possibility of settlement out of court to provide speedy justice. He eventually aims to set up a one of kind, institutional Arbitration Center in India to bring India at par with the alternate judicial systems available internationally.

Scope of Mandatory Arbitration in India

Preamble

Pre-dispute mandatory arbitration clauses are ubiquitous in case of B2C or consumer contracts. Typically, the seller or service provider presents a standard term of contract to the prospective consumer on a "take it or leave it" basis, making it non-negotiable. Often an arbitration provision is embedded in the contract mandating the consumer to resolve any disputes by arbitration and thereby unknowingly waive the right to adjudicate in the courts. The arbitration proceedings so held on terms of the seller lack procedural protection and selection of an unbiased arbitrator for a fair outcome. Additionally, the mandatory arbitration provisions contain high cost, barring of evidence, disclosure and other consumer unfriendly clauses to attain unfair advantages for the business. The arbitration provision automatically puts a bar on class actions, as a result making it more difficult for the consumers to get their claims in place. This research scrutinizes the implementation of mandatory arbitration provisions upon consumer contracts in India by comparing it with the current positions of law in U.S, U.K and E.U. The pro-arbitration approach adopted by U.S allowing pre-dispute mandatory arbitration clauses in consumer contracts is converse to the defensive approach adopted by E.U and U.K by curbing the use of mandatory arbitration in B2C or consumer contracts. This has lead to a development of an international debate on inherent voluntary consent along with the legal position to be adopted, especially by E-commerce businesses and multinational companies operating around the world. Finally this paper proposes that mandatory arbitration provisions in consumer contracts are inherently unfair and differ from other arbitration contracts entered into by parties of equal bargaining power with a voluntary consent. Although an outwright ban on mandatory arbitration provisions in consumer contracts shall be equally unnecessary thereby concluding a mid-way of regulating the consumer arbitration contracts by bringing it under the purview of public justice.

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A1. An Introduction

The rise of Mandatory binding arbitration across the last two decades has dramatically changed the adjudication system. The necessity, arrived by the backlog of cases and inefficient working of the Judiciary has lead to a rapid development of Alternative Dispute Resolution (herein after referred to as ADR), especially arbitration due to its binding nature of award. The Arbitration and Conciliation Act, 1996[1] adopted on the bases of UNCITRAL Model Law[2] was a pro-arbitration step adopted by India in order to overcome the defects of earlier Act[3] which awarded multiple opportunities to litigants to approach the court for intervention on innumerable grounds.

The new act was a step towards minimum intervention and supervision of the courts and to enforce every arbitral award whether domestic or commercial in the same manner as if it were a decree of the court.[4] In the words of Supreme Court:

> *"To attract the international community and support the growing volume of India's trade, business and relations with the rest of the world after the new economic policy, the legislature was persuaded to adopt the UNCITRAL Model Law and thereby the Act of 1996 which provides for minimum court intervention as against the act of 1940."*[5]

However the broad interpretation of the Act[6] and pro- arbitration approach adopted by the Supreme Court pursuant to the Act has lead the businesses to expand the use of arbitration agreements into various contracts with controversial circumstances especially in relation to consumer contracts.

[1] Arbitration and Conciliation Act 1996 (Arbitration Act)

[2] UNCITRAL Model Law on International Commercial Arbitration 1985

[3] Arbitration and Conciliation Act 1940

[4] UNCITRAL Arbitration Rules, General Assembly Resolution 31/98 (1976)

[5] *Konkan Railway Corporation v Mehul Construction Co* [2000] 7 SCC 201

[6] Arbitration Act (n1)

The lawmakers effectively trying to embrace Arbitration as a cure to the traditional, slow and suffering system went a step further towards pro- arbitration by inserting Section 89 of the Civil Procedure Code[7] which puts a mandate on civil courts to endeavor settlement of disputes wherever possible by use of ADR in form of arbitration, mediation and conciliation.[8] This was done in furtherance of Article 39(A) of the Constitution of India which empowers the state to pass any legislation in order to secure the working of legal system and promote justice with equal opportunity to all.[9] The Judge shall formulate the terms of settlement and send the dispute to arbitration. Once the civil dispute is referred to arbitration the case will go outside the stream of the court permanently and shall not return to the court.[10] The judges were given the power to actively manage cases and send them to arbitration if both the parties consent or if the court views a possible settlement outcome which may be agreeable to parties. This legal position was confirmed by the apex court in the *Afcons Infrastructure Limited v. Cherian Varkey Construction Ltd*[11] which states "if there is no pre-existing arbitration agreement, the parties may agree upon arbitration or if the Judge advises, the parties may consent to arbitration, thereupon such award shall be final and binding." Since the validation of the act of 1996, the courts has in most cases where any reference to arbitration has been incorporated, the court has allowed such disputes to arbitration.[12] The courts have made it clear that, if there is an arbitration clause, no party shall file an action before the court unless an award has been obtained by submitting to arbitration.[13]

The pro-arbitration approach used by the courts has been misused by commercial businesses in B2C contracts.[14] In the present context, the companies have found techniques upon involuntary imposition of arbitration by force/compulsion via unilateral or non - negotiable standard terms of contract. Companies are increasingly using form contracts, envelope stuffers, digging bills, one-click websites to require their consumers, targets, students and patients to, with or without consent, submit to arbitration thereby taking away the right of adjudication. Most of the times, such clauses are stuffed in the bill itself in such a way that they run unnoticeable. Such forced mandatory arbitration clauses have become a distinctive feature in credit cards, real estate contracts, application for bank loans, renting cars, lease of cars, commercial transactions, e-commerce websites and especially in the service sector and employment contracts.[15]

[7] Code of Civil Procedure 1908

[8] Law Commission of India, *238th Amendment of Section 89 of The Civil Procedure Code* (2011)

[9] Constitution of India 1950 Art. 39A

[10] Law Commission of India, *238th Amendment (n 8)*

[11] *Afcons Infrastructure Limited v Cherian Varkey Construction Ltd* [2010] 8 SCC 24

[12] *MR Engineers v Som Datt Builders* [2009] 7 SCC 696

[13] *Scott v Avery* [1856] 10 ER 1121

[14] *Transport Mutual Ins Assoc (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 3 APPLR

[15] Michael S. Barr, 'Mandatory Arbitration in Consumer Finance and Investor Contracts' (2015) 4 NYUJL & Bus 11, 793

Knowingly or unknowingly if we have bought a car, a credit card, travelled by private airlines, or made an e-commerce transaction, chances are we may have unknowingly given away our constitutional right to adjudicate without actually intending to do so. Till the consumers have the required qualified satisfactory product or no dispute arises, such waivers go unnoticed. On the other hand, when a dispute arises, the consumer even becomes aware of his own act of waiver from adjudication and thereby submitting to arbitration. Hence taking reference to the words in the *Halsey* Judgement:

> *"Coercion INTO referred to as front-end consent or entry-level consent, which is required for participation in the arbitration process, which is taken away by forced mandatory arbitration. Coercion WITHIN- back-end or outcome consent that is required for abiding by the agreement made in arbitration which is voluntary and shall rightfully take away the right of adjudication as a willful consent. The courts in mandatory arbitration cannot have a coercive effect in the outcome of the arbitration process. Thus the consent lacks the required voluntary nature."*[16]

Similar is the situation in other jurisdictions having a pro-arbitration approach. In the United States, when Congress enacted the Federal Arbitration Act[17] to honor arbitration agreements between assenting parties, it passed the act in response to judicial hostility towards arbitration agreements.[18] The FAA basically prohibits courts from reviewing or overturning arbitration awards, except in very limited circumstances.[19] Most Texas courts that have considered the validity of arbitration provisions have held them valid and enforceable. For example, in *Universal Computer Systems, Inc. v. Dealer Solutions, LLC,*[20] the court enforced an arbitration provision, notwithstanding claims of procedural and substantive unconscionability and misrepresentation, as well as "contractual glitches."[21] *Universal Computer* demonstrates the extent to which courts support contractual pre-dispute arbitration agreements. This position lead to an abnormal use of mandatory arbitration clauses in consumer contracts thereby forcing/ coercing the parties to submit to arbitration under adhesion contracts formed by the companies which are non-negotiable one way contracts. The Congress lately saw the abuse of mandatory arbitration by the companies against consumers. This is confirmed by the Dodd-Frank Act, which aims to protect consumers from abusive financial practices.[22]

[16] *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR

[17] Federal Arbitration Act 1925 (FAA)

[18] *Volt Info Scis, Inc v Bid of Trustees of Leland Stanford Junior Univ* [1989] 489 US

[19] *First Options of Chicago, Inc v Kaplan* [1995] 514 US

[20] *Universal Computer Systems, Inc v Dealer Solutions, LLC* [2005] 183 SW3d 741

[21] ibid

[22] Dodd-Frank Wall Street Reform and Consumer Protection Act 2010

B

Arbitrability of Fraud in India

Author Introduction:

Sahil Salvi is an advocate practicing on the Original and the Appellate sides of the High Court of Bombay at the Mumbai bench. Having graduated in 2014 from Symbiosis Law School, Pune, he went on to do judicial clerkship with Hon'ble Justice Kurian Joseph at the Supreme Court of India and thereafter gained a masters degree from the School of Law, Queen Mary University of London in Commercial and Corporate Laws. Having pursued his own legal practice thereafter he has worked on several reported and un-reported judgments pertaining to Arbitration law, Constitutional law, Education law, Service law, Criminal law, Company law, Land laws and Developmental regulations amongst several others.

Arbitrability of Fraud in India

Preamble

"Almost every international commercial controversy poses a critical preliminary question – 'Where, and by whom, will this dispute be decided?' The answer to this question often decisively affects a dispute's eventual outcome."[1] Though this question has been considered and debated over in every part of the world by jurists, academicians, members of both bar and bench alike, the controversy still remains unsolved in India. The Indian Judiciary's approach is the gatekeeper approach whereas the legislation prescribes the filtration-at-award procedure. This tussle between the Legislature and the Judiciary has caused a wide range of uncertainties in the commercial arbitration process in India. This loggerheads position between the Judiciary and the Legislature in India needs to be analyzed in the light of the global perspective. This article is an analysis of the global position on the arbitrability of fraud and its implications on the Indian Judiciary and the Parliament. The article focuses on the interpretation that the Indian courts have provided and critiques the ambiguities in the observations. The article also provides for an alternative approach that the courts and legislators can undertake to resolve the deadlock and effectively address the issues at hand.

[1] Gary B Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014) 70.

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B1. An Introduction

"Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals, which are public fora, 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 jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication."[2] The boundaries of Contract law are the cornerstones on which the process of arbitration is rested. Arbitration is a process of resolution of disputes by an independent and impartial third person who is appointed by the parties to the dispute to determine the rights of these parties.

> *"Luke's gospel tells of a man who sought to have Jesus decide an inheritance dispute. "Rabbi," he said, "bid my brother divide the inheritance with me." Jesus dismissed the request for adjudication with a question of his own: "Who made me a judge or an arbitrator over you?"*[3]

These words from the Bible could be the precedent to the concept to arbitrability. The words of Jesus though meant to be read from a theological perspective, do give rise to the issue that goes to the core of arbitrability of any dispute. The right to get a dispute resolved stems out of submission of one's sovereignty. This submission of rights of adjudication by an individual towards the society gave rise to the concept of courts and other national forums. Initially, the courts had the sovereignty in the sphere of adjudication of disputes within their jurisdiction. The submission of resolution of disputes between two individuals by a private third party gave way to the concept of arbitration. Arbitration is therefore viewed as an encroachment on the sovereignty of the courts. And the courts showed an attitude of distrust towards the arbitration process. There were several disputes in which the courts could exclusively decide and were considered to be not arbitrable. This gave rise to the concept of arbitrability.

[2] *Booz Allen & Hamiltion Inc. v. SBI Home Finance Ltd. & Ors.* [2011] (2011) 5 S.C.C. 532.

[3] The Holy Bible, Luke12:13.

Bilateral Arbitration Treaties: A Doctrinal Analysis

Author Introduction:

Dhruv Toliya is a detail oriented and dynamic practising lawyer who is currently based out of Gujarat (India). Dhruv Toliya pursued his Bachelor of Laws from the National Law University, Jodhpur (NLUJ) and further went on to pursue Master of Laws (LLM) from The School of Law at the Queen Mary University London. As a student of the law, he gained internship experiences spanning across various disciplines of law with several renowned lawyers, reputed national law firms and international law firms in the UK and the USA. After joining the bar, Dhruv began practising as an advocate with a renowned criminal lawyer and a designated Senior Advocate Mr. S. V. Raju. In his short stint as a litigating lawyer, Dhruv has handled cases related to various fields of law such as Criminal Law, Constitutional Law, Company Law, Intellectual Property Law and Arbitration Law. He regularly appears before the Trial Courts, High Courts and Tribunals. In his pastime, Dhruv likes to read books about law, politics and biographies.

Bilateral Arbitration Treaties: A Doctrinal Analysis

Preamble

First and foremost, I would like to inform you that this is an attempt to address a part of the vacuum that the arbitration law is confronted with. Parties are opting for alternative dispute resolution processes over court room litigation faster than ever before. Arbitration as a mode of dispute resolution has increasingly gained relevance with a stark increase in cross border investments and dynamic government policies. It is our firm belief that with its propitiousness, arbitration is bound to transform the way entities look at its inter-party reinforcements spanning across all scales of businesses. In recent times, participation of cognizant parties in cross border investment have made a call for a policy that is stringent yet adaptable. Bilateral Investment Treaty (BAT) is a well-timed proposal by Professor Gary Born to foster arbitration by a way of an international treaty. Bilateral Arbitration Treaty is proposed as a treaty that would exist in harmony with other multilateral treaties. Primarily, BAT binds the parties to the treaty to choose arbitration as a default mechanism of dispute resolution while the parties having an option to choose an alternative dispute resolution process. The courts would not only decline to hear the matter due to a subsisting treaty but also enforce the arbitral awards laid down in the arbitral proceedings under the BATs. The point of inquiry remains that how feasible an idea is to have arbitration as an all-inclusive obligatory process of dispute resolution? Are we ready to lay off the 'Alternate' from the 'Alternative Dispute Resolution' (ADR) when it comes to arbitration?

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C1. An Introduction

During the beginning of the twentieth century, international commercial arbitration developed the pace as a sought after means of alternative dispute resolution. It was the growing necessity of the merchants and traders to opt for a means of alternative dispute resolution that was both, neutral and comparatively hassle-free. The global economic recolonisation created a need of a feasible means of dispute resolution. From then to now, the process of arbitration has moved from 'ex post consent' to 'ex ante consent' for good by the adoption of the New York Convention. The laying down of the New York Convention and its subsequent adoption on a big scale solved various problems that acted as an obstructed to the evolution of international arbitration. Arbitration came to the rescue as a comparatively neutral forum to resolve the disputes for the investors keeping in mind the partiality of the national courts, inefficiency and corruption in vulnerable economies post World War II.

Subsequently, this gave rise to the establishment of BITs i.e., Bilateral Investment Treaties. Bilateral Investment Treaty is an agreement between two countries, under which the terms and conditions of foreign direct investments are laid down with a foremost intention of promoting and protecting FDI's.[1] Rather than creating a more ideal environment to conduct businesses, Bilateral Investment Treaties are fundamentally inclined towards removing the legal barrier towards a fluent flow of investment. The purpose of investment treaties is closely tied to the removal of obstacles that may stand in the way of allowing and channelling more foreign investments into the host states.[2] Unless expressly mentioned in the treaty, the rules of a BIT work in a reciprocal manner between both the nations. Bilateral Investment Treaty (BIT) is one of the major instruments in facilitating the foreign direct investments (FDI's). This treaty also includes an arbitration clause which is a default and implied consent of the parties to the Bilateral Arbitration Treaty. Investment Treaty Arbitration has gone on to become one of the most successful types of Arbitration. The very success of Investment Treaty Arbitration stands as an example of the efficiency of pre-dispute consent based dispute resolution process in international commercial arbitration.

[1] Patrick Juillard, 'Bilateral Investment Treaties in Context of Investment Law', *Investment Compact Regional Roundtable on Bilateral Investment Treaties for the Protection and Promotion of Foreign Investment in South East Europe* (2001) <http://www.oecd.org/investment/internationalinvestmentagreements/1894794.pdf> accessed 12 March 2016.

[2] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2008).