THE ARBITRABILITY DOCTRINE AND TRIBULATIONS OF TRIBUNALISATION

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Abstract

Commercial arbitration frequently places the principle of party autonomy in conflict with a state's public policy considerations. The arbitrability doctrine is one such manifestation of this tendency. While many acknowledge the notion of arbitrability as a dying breed, India has remained immune to this apparent process of decay. However, while arbitrability continues to be a robust limitation to party autonomy in India, it is undergoing a gradual evolution. Under the garb of arbitrability, Indian courts now also assess if the establishment of special tribunals, either expressly or impliedly, ousts an otherwise private dispute from the purview of arbitration. The authors question this extension of the arbitrability doctrine in India and argue in favour of disassociating it from the process of tribunalisation of justice.

I. Introduction

Commercial arbitration—be it domestic or international—stands as a popular exception to the usual route of adjudicating disputes before the national courts of a state. It is an alternative method of dispute resolution premised on the autonomy of the disputing parties, who agree to resolve their disputes before an arbitral tribunal constituted solely for this purpose. But while party autonomy provides the basis for a tribunal's jurisdiction, the limitations attached to this principle emanate from the state. After all, the disputing parties possess the autonomy to refer only those disputes to arbitration that are capable of being resolved through arbitration in the first place.

Across several jurisdictions, arbitral statutes and judicial decisions stipulate certain categories of disputes that are not capable of settlement by arbitration, thereby relieving them from the state's obligation to recognise and enforce arbitration agreements. Thus, to determine whether a dispute is capable of being settled by arbitration is a fundamental exercise.

The rationale behind the aforementioned limitation stems from the fact that though arbitration is a private method of dispute resolution, it bears potential to impose consequences upon the public at large. Accordingly, one rightly questions whether all kinds of disputes ought to be arbitrated at all; especially when most arbitral proceedings and the resultant awards are confidential in nature. It then falls upon each state to decide which category of disputes may or may not be resolved by arbitration, in accordance with its own political, social and economic policy.[1] This limitation is called objective arbitrability.[2] While this understanding of the arbitrability doctrine is uncontested, the expression "*arbitrability*" is also sometimes given a broader meaning, particularly in the United

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1 REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 111 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015).

2 Henceforth, the expression "arbitrability" shall be construed as a reference only to objective arbitrability.

States, to encompass issues relating to the existence and validity of parties' consent to arbitration.[3] That is not what the authors refer to herein.

Conventionally, the notion of arbitrability entails an enquiry into which types of disputes are capable of settlement by arbitration, and which are not.[4] It imposes a duty upon national courts as well as arbitral tribunals to inquire this question, by reference to the applicable law.[5] However, the notion of arbitrability is undergoing a gradual evolution in India. Under the garb of the arbitrability doctrine, Indian courts now also assess whether the establishment of any special tribunals having subject-matter jurisdiction over the dispute under the applicable law, expressly or impliedly, ousts such dispute from the purview of arbitration. The authors refer to the process of establishing these special tribunals as "*tribunalisation*" or "*tribunalisation of justice.*"

It is this extension of the arbitrability doctrine in India that constitutes the focus of this article. Part II examines the general rule of arbitrability in India and identifies the various exceptions to this rule as identified by the Indian courts. Thereafter, Part III scrutinizes the impact of the proliferation of special tribunals on the arbitrability discourse in India and assesses if the same is justified or not. Part IV suggests a suitable approach to be adopted in India. Finally, Part V of the article provides some concluding comments.

II. The Arbitrability Doctrine in India

The relationship of Indian arbitration law with the concept of arbitrability is characterized by a long stint of distrustful flirtation, with scattered glimpses of stability and coherence. Section 20(4) of the Indian Arbitration Act, 1940 (equivalent to Section 8 of the Arbitration and Conciliation Act 1996 ["**Arbitration Act**"]) required one to show "*sufficient cause*" for any matter to not be referred to arbitration. Under this provision, Indian courts assumed substantial discretion in referring matters to arbitration.[6] This served as a window for courts to view arbitration with ample suspicion, and refuse referring a matter to arbitration on a ground as generic as "*coming to the conclusion that in arbitration complete justice cannot be obtained between the parties*."[7]

While one would expect this scepticism towards arbitration to be remedied to some extent by the revamped Arbitration Act, such a remedy, at least in an acceptably unequivocal form, came much after its enactment. For long, Indian courts struggled to come to terms with how the Arbitration Act changed the regime so far as arbitrability was concerned. As the Madras High Court noted in *H.G. Oomor Sait* v. *O Aslam Sait* (subsequently cited by the Supreme Court[8] and high courts),[9] "*the*

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3 *See* First Options of Chicago, Inc. v. Kaplan 514 U.S. 938, 942–943 (1995).

4 Karim Abou Youssef, *The Death of Inarbitrability*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 47 (Loukas Mistelis & Stavros Brekoulakis eds., 2009).

5 *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(2), June 10, 1958, 330 U.N.T.S. 38; United Nations Comm'n on Int'l Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, arts. 34(2)(b)(i), 36(1)(b)(i), G.A. Res 40/72 (Dec. 11, 1985), as amended by G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

6 *See* Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, (1962) 3 SCR 702 (India) [*hereinafter* "Madhav Prabhakar"].

7 Majeti Subbahiah & Co. v. Tetley & Whitley, 1923 SCC OnLine Mad 92 (India).

8 N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72, ¶ 25 (India) [*hereinafter* "N. Radhakrishnan"].

9 *See, e.g.,* Baburaj v. Faizal, 2014 SCC OnLine Ker 28591, ¶ 7 (India).

present Act had done [nothing] to remove the […] inadequacies and deficiencies which are inherent in an arbitration proceeding."[10] An indication of the said inadequacies comes in the following notable finding:

> "*[W]here […] the decision would depend upon consideration of minute details of evidence, it is always desirable to let the civil court to go into the issue rather than to leave it to the Arbitrator before whom the nature of the proceedings are summary and rules of evidence are not applicable.*"[11]

In addition to reflecting the Indian courts' continued cynicism towards arbitrators' capabilities to determine certain disputes, this finding represents an evident misunderstanding of how arbitral procedure works in general. Contemporaneous with these decisions also came other decisions where the courts either sidestepped the issue of arbitrability when it arose,[12] or laid out a fairly misdirected understanding of the concept.[13]

Thus, it comes as no surprise that scholars often hailed Section 2(3) of the Arbitration Act as the "*touchstone*" of the Indian approach to arbitrability[14] or the "*only guide*" in respect thereof, while simultaneously acknowledging that the provision itself was not indicative of either how arbitrability is to be conceived or what kinds of disputes are considered inarbitrable.[15] In fact, as recently as late-2020, a three-judge bench of the Supreme Court of India referred to the text of Sections 2(3) and 34(2)(b)(i) of the Arbitration Act to immediately conclude that the Act "*clearly recognizes and accepts that certain disputes or subjects are not capable of being resolved by arbitration.*"[16]

Indian courts' unwavering reliance on Section 2(3) as the legal foundation of the arbitrability doctrine in India is intriguing. After all, the provision only stipulates that "*[t]his Part [of the Arbitration Act] shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.*" While a detailed discussion on this provision is reserved for Part IV, for now, it suffices to mention that apart from its general priority in favour of other prohibiting statutes, the provision is certainly not the reservoir of how Indian law understands arbitrability.

Ultimately, the provisions of the Arbitration Act "*do not enumerate or categorize non-arbitrable matters*" nor do they lay out the principles for determining the arbitrability (or not) of a dispute. These principles are ultimately for the courts to formulate.[17]

A. *Booz Allen* – Establishing the General Rule and Exceptions

In order to obtain a discernible insight into this understanding of arbitrability, one had to wait until the Supreme Court of India's ruling in *Booz Allen and Hamilton Inc.* v. *SBI Home Finance Ltd.* ["**Booz**

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10 H.G. Oomor Sait v. O. Aslam Sait, 2001 SCC OnLine Mad 465, ¶ 29 (India).
11 *Id.* ¶ 39(B).
12 Vipin Kumar Gadhok v. Ravinder Nath Khanna, (2007) 10 SCC 623, ¶¶ 9, 12 (India).
13 Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd., (1999) 5 SCC 688, ¶¶ 4, 5 (India) [*hereinafter* "Haryana Telecom"].
14 Jack Wright Nelson, *International Commercial Arbitration in Asia: Hong Kong, Australia and India Compared*, 10(2) ASIAN INT'L ARB. J. 105, 118 (2014).
15 Vinay Reddy & V. Nagaraj, *Arbitrability: The Indian Perspective*, 19(2) J. INT'L ARB. 117, 120 (2002).
16 Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1, ¶ 33 (India) [*hereinafter* "Vidya Drolia II"].
17 *Id.*

Allen"], even though there were prior instances wherein the Supreme Court had touched upon findings in the nature of what the apex court laid down herein.[18]

In *Booz Allen*, the Supreme Court of India held that "*[a]rbitral 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*."[19] On such premise, the Court went on to prescribe what has since become the foundational rule of arbitrability in India:

> "*Generally and traditionally, all disputes relating to rights in personam were amenable to arbitration; [while] all disputes relating to the rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration.*"[20]

On the face of it, this seemingly straightforward finding of the Court reflects a subject-matter-centric understanding of the arbitrability doctrine. However, while the apex court did articulate the above test of arbitrability in terms of the subject matter of the dispute, its allegiance to this idea was not exclusive. Finding that the above proposition was not a "*rigid or inflexible rule,*"[21] the Court recognized that certain disputes, although *in personam* in nature, may nonetheless be regarded inarbitrable, since they may either be explicitly reserved for public fora by the legislature "*as a matter of public policy*," or stand excluded from the purview of private fora "*by necessary implication*."[22] In laying down this exception to the general rule, the Court appeared to pay homage to the essence of Section 2(3) of the Arbitration Act, while adding additional layers of public policy considerations and exclusion by necessary implication. Notably, it steered clear from defining the scope and extent of the public policy exceptions of arbitrability, or how public policy interacts with arbitrability.

There is no doubt that *Booz Allen* has grown to be the seminal authority in respect of the general rule of arbitrability in India, i.e., the delineation between disputes relating to rights *in personam,* which are generally considered arbitrable, and those relating to rights *in rem,* which are categorized as inarbitrable. The apex court effectively provided for two doorways to the elusive box of inarbitrability. The first came in the form of its general rule, which assigned all disputes in respect of *in rem* rights into the realm of inarbitrability. The second came in the form of the exception to this general rule, whereby the Court found that certain *in personam* disputes, which would ordinarily be arbitrable, may still find place in the box of inarbitrability due to considerations of public policy.

The second category of exception is explored in Part II.C of this article. However, as far as the first kind of inarbitrable disputes, i.e., those pertaining to rights *in rem,* is concerned, the Supreme Court itself listed the following "*well recognized examples*":

(i) Disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
(ii) Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
(iii) Guardianship matters;

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18 Haryana Telecom, (1999) 5 SCC 688 (India); Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan (1999) 5 SCC 651, ¶ 37 (India).
19 Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532, ¶ 35 (India) [*hereinafter* "Booz Allen"].
20 *Id.* ¶ 38.
21 *Id.*
22 *Id.* ¶ 35.

(iv) Insolvency and winding up matters;
(v) Testamentary matters (grant of probate, letters of administration and succession certificate); and
(vi) Eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.[23]

B. Deciphering Further Exceptions to the General Rule

Given the state's inherent discretion in determining the kinds of disputes that are amenable to arbitration, based on the malleable notions of public rights, policies, and the social and economic fabric of the state, the above list could not have been intended to be inflexible. Indeed, the Supreme Court of India recently acknowledged that "*exclusion from arbitrability is predominantly a matter of case law*."[24] This is confirmed by the fact that subsequent to the *Booz Allen* judgment, in 2016, the Supreme Court itself had "*added a seventh category of cases to the six non-arbitrable categories set out in Booz Allen,*"[25] namely, disputes relating to trusts, trustees and beneficiaries arising out of a trust deed and the Indian Trust Act, 1882 ["**Trust Act**"].[26] Notwithstanding the propriety of the Supreme Court's rationale in coming to this conclusion, which is discussed in Part III.A of this article, it is notable that this decision takes the tide of arbitrability of trust disputes in the opposite direction to the one shown by the single judge of the Delhi High Court. The single judge's order, the precedential value of which has been called in question by the apex court since,[27] noted that "*[a]ny dispute between the beneficiaries [of a trust] can be referred to the arbitration […] if there is an independent [a]rbitration [a]greement between the beneficiaries for referring the dispute to the arbitration.*"[28]

A similar fluctuation in the Indian judiciary's stance on arbitrability is also reflected in respect of intellectual property disputes, oscillating between a rigid and a more relaxed understanding of the arbitrability doctrine.[29] Disputes relating to "*patent, trademarks and copyright*" were traditionally considered inarbitrable.[30] However, Indian courts have recently begun to add certain nuances to the discourse surrounding the arbitrability of intellectual property disputes.

Refusing to acknowledge an "*absolute principle that all disputes in trade mark and copyright infringement and passing off are […] inarbitrable,*"[31] the Bombay High Court in *Eros International Media Ltd.* v. *Telemax Links India Pvt. Ltd.* ["**Eros Int'l**"] found that in an infringement or a passing off claim, the rights and remedies in question "*can only ever be an action in personam […] What is in rem is the Plaintiff's or registrant's entitlement to bring that action. That entitlement is a result of having obtained or acquired copyright (either by authorship or assignment) or having statutory or common law rights in a mark.*"[32] On this basis, the

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23 *Id.* ¶ 36.
24 Vidya Drolia II, (2021) 2 SCC 1, ¶ 33 (India).
25 A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386, ¶ 35 (India) [*hereinafter* "Ayyasamy"].
26 *See* Vimal Kishore Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 (India) [*hereinafter* "Vimal Kishore Shah"].
27 *See* State of West Bengal v. Associated Contractors, (2015) 1 SCC 32 (India).
28 Chhaya Shriram v. Deepak C. Shriram, 2008 SCC OnLine Del 233, ¶ 8 (India).
29 *See generally* Utkarsh Srivastava, *Putting the jig saw pieces together: an analysis of the arbitrability of intellectual property right disputes in India*, 33(4) ARB. INT'L. 631 (2017).
30 Ayyasamy, (2016) 10 SCC 386, ¶ 14 (India).
31 Eros International Media Ltd. v. Telemax Links India Pvt. Ltd., 2016 SCC OnLine Bom 2179, ¶ 14 (India) [*hereinafter* "Eros Int'l"].
32 *Id.* ¶ 17.

Court found an action in respect of infringement of a copyright to be arbitrable. In *Lifestyle Equities CV* v. *QDSeatoman Designs Pvt. Ltd.*,[33] the Madras High Court took a similar position, holding that "*while a patent right may be arbitrable, the very validity of the underlying patent is not arbitrable.*"[34]

The decisions of the Bombay High Court and Madras High Court were consistent with certain prior decisions that had reached a similar conclusion, without clearly articulating the underlying legal justification. For instance, the Delhi High Court, in *Ministry of Sound International Ltd.* v. *Indus Renaissance Partners Entertainment Pvt. Ltd.*,[35] had rejected a contention that an arbitration clause "*relating to breach of obligation of confidentiality or infringement of intellectual property right*" was inarbitrable.[36] Similarly, the Supreme Court of India, in a matter arising out of a petition under Section 9 of the Arbitration Act, had also shown no hesitation in upholding an interim order rendered in support of arbitration proceedings in respect of a breach of a deed of assignment of a trademark.[37] Although the question of arbitrability did not directly come up in this case, it evidently treated the matter as a purely contractual one, despite the involvement of intellectual property rights. More recently, the Delhi High Court endorsed the arbitrability of a dispute pertaining to the cancellation of a trademark on the ground that "*[t]he right that [wa]s asserted […] [wa]s not a right that emanates from the Trademark Act but a right that emanates [from a contract].*"[38]

On the other hand, shortly after the judgment in *Eros Int'l*, the Bombay High Court in *IPRS Ltd.* v. *Entertainment Network (India) Ltd.*,[39] arrived at a decision seemingly to the contrary; this time also in the context of copyright law. The Court observed that the arbitrator had "*rendered a finding on the legal character and validity of the ownership of the respondent in the copyright, and thus the said award would be in the nature of an adjudication on an action in rem.*"[40] Accordingly, relying on the general rule of arbitrability laid down in *Booz Allen*, and the exceptions thereto, the Court concluded that being equivalent an action in *rem*, the copyright dispute "*could not have been adjudicated upon by the learned arbitrator at all and could be decided only by a Civil Court.*"[41]

This is not to suggest that any civil dispute between the disputing parties will be automatically rendered inarbitrable merely because it appears to implicate an interest *in rem*. For it to be rendered inarbitrable, the resolution of the dispute must necessarily result in a judgment *in rem*. Indeed, this was the precise controversy raised before the Supreme Court of India in *Deccan Paper Mills Co. Ltd.* v. *Regency Mahavir Properties*.[42] There, it was contended that a suit for cancellation of a written instrument in terms of Section 31 of the Specific Relief Act, 1963 ["**SRA**"], with "*the proceeding under section 31 being a proceeding in rem, would fall within one of the exceptions made out in [Booz Allen],*" and

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33 Lifestyle Equities CV v. QDSeatoman Designs Pvt. Ltd., 2017 SCC OnLine Mad 7055 (India).
34 *Id.* ¶ 5(t).
35 Ministry of Sound International Ltd. v. Indus Renaissance Partners Entertainment Pvt. Ltd., 2009 SCC OnLine Del 11 (India).
36 *Id.* ¶ 4(b).
37 Suresh Dhanuka v. Sunita Mohapatra, (2012) 1 SCC 578, ¶¶ 44, 48 (India).
38 Golden Tobie Private Ltd. v. Golden Tobacco Ltd., 2021 SCC OnLine Del 3029, ¶ 16 (India).
39 The Indian Performing Right Society Ltd. v. Entertainment Network (India) Ltd., (2016) SCC Online Bom 5893 (India).
40 *Id.* ¶ 140.
41 *Id.* ¶ 152.
42 Deccan Paper Mills Co. Ltd. v. Regency Mahavir Properties, 2020 SCC OnLine SC 655 (India) [*hereinafter* "Deccan Paper Mills"].

therefore, be inarbitrable.[43] However, rejecting this argument, and overruling the judgment of the High Court of Telangana in *Aliens Developers Private Ltd.* v. *M. Janardhan Reddy*,[44] the Supreme Court of India reached a contrary conclusion by reference to several provisions of the SRA.

At the outset, with respect to the relief for rescission of a contract under Section 27 of the SRA, the Court explained that a judgment relating to a rescission of contract cannot be a judgment *in rem*, since the rescission inherently applies only *inter partes.*[45] Extending the same consideration to a determination of voidance, the Court held that "*when a written instrument is adjudged void or voidable, the Court may then order it to be delivered up to the plaintiff and cancelled – in exactly the same way as a suit for rescission of a contract [and as such] it is clear that the action under section 31(1) is strictly an action inter parties or by persons who obtained derivative title from the parties, and is thus in personam.*"[46] Further, the Court overruled the reasoning laid down in *Aliens Developers* by stating that:

> "*According to the judgment in Aliens Developers […], the moment a registered instrument is cancelled, the effect being to remove it from a public register, the adjudicatory effect of the Court would make it a judgment in rem. Further, only a competent court is empowered to send the cancellation decree to the officer concerned, to effect such cancellation and "note on the copy of the instrument contained in his books the fact of its cancellation". Both reasons are incorrect. An action that is started under section 31(1) [of SRA] cannot be said to be in personam when an unregistered instrument is cancelled and in rem when a registered instrument is cancelled. The suit that is filed for cancellation cannot be in personam only for unregistered instruments by virtue of the fact that the decree for cancellation does not involve its being sent to the registration office […].*"[47]

In fact, the Court cited Section 4 of the SRA, which states that "*[s]pecific relief can be granted only for the purpose of enforcing individual civil rights,*"[48] to derive a broader proposition of law, i.e., it would be anomalous if all provisions of the SRA, by extension of Section 4, were considered to refer to *in personam* actions, but Section 31 alone was not.[49] Thus, the Court concluded that "*[a]ll these anomalies only highlight the impossibility of holding that an action instituted under section 31 of the [SRA] is an action in rem.*"[50]

C. The Public Policy Exception

The above subject matter merely exemplifies an interaction with arbitrability on the premise of the nature of rights, i.e., whether they are *in rem* or *in personam.* However, in addition to this, there have traditionally existed subject matters that are considered inherently unfit for arbitration in India based on public policy implications. This caters to the second doorway to inarbitrability that *Booz Allen* had prescribed, and typically includes matters of bribery/corruption, criminal complaints, matrimonial disputes, etc.[51] A subset of this category is the disputes involving allegations of fraud. Although the issue concerning fraud is not one simpliciter of arbitrability as it involves various layered aspects transgressing issues of contractual validity, fundamentally fraud has been

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43 *Id.* ¶ 2.
44 Aliens Developers Private Ltd. v. M. Janardhan Reddy, 2015 SCC OnLine Hyd 370 (India).
45 Deccan Paper Mills, 2020 SCC OnLine SC 655, ¶ 15 (India).
46 *Id.* ¶ 21.
47 *Id.* ¶ 22.
48 Specific Relief Act, No. 47 of 1963, § 4 (India).
49 Deccan Paper Mills, 2020 SCC OnLine SC 655, ¶ 30 (India).
50 *Id.* ¶ 33.
51 Ayyasamy, (2016) 10 SCC 386, ¶ 14 (India).

considered unfit for arbitration on the ground that a party charged with fraud should be given the option to vindicate its character in open court, and the subject matter should be publicly inquired.[52]

While Indian jurisprudence regarding arbitrability of fraud under the Arbitration Act went through a phase of uncertainty, with decisions of the apex court going in various directions, the Supreme Court of India has now reached an equilibrium in dealing with allegations of fraud. The seminal verdict in *N. Radhakrishnan* v. *Maestro Engineers* ["**N. Radhakrishnan**"] saw the apex court taking shelter under precedents from the Indian Arbitration Act, 1940 to find that "*since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation cannot be properly gone into by the Arbitrator.*"[53] The said judgment was subsequently interpreted by high courts in India to filter out serious allegations of fraud as inarbitrable, but let "*mere allegations*" of fraud or allegations that cannot be proved *prima facie*,[54] pass through as amenable to arbitration.[55]

Notably, the aforementioned line of jurisprudence has been held to be inapplicable to Section 45 petitions in respect of international arbitrations seated abroad.[56] That apart, the apex court had also doubted the credibility of this line of jurisprudence on one occasion, in the context of domestic arbitrations, alleging that the *N. Radhakrishnan* judgment was *per incuriam* for not considering Section 16 of the Arbitration Act and certain binding decisions of the apex court.[57] However, the unrest created as a result of this was recently undone by the Supreme Court in *A. Ayyasamy* v. *A. Paramasivam*, where it confirmed *N. Radhakrishnan* as good law and held as follows:

> "*[M]ere allegation of fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration and should be decided by the civil court. [In order to be inarbitrable] the allegations of fraud should be such that not only these allegations are serious that in normal course these may even constitute criminal offence, they are also complex in nature and the decision on these issues demands extensive evidence for which civil court should appear to be more appropriate forum than the Arbitral Tribunal.*"[58]

In this regard, the 246th Report of the Law Commission of India ["**246th Report**"] considered it "*important to set this entire controversy to a rest and make issues of fraud expressly arbitrable [by proposing] amendments to section 16 [of the Arbitration Act].*"[59] It suggested the inclusion of a sub-section (7), which would state that the "*arbitral tribunal shall have the power to make an award or give a ruling notwithstanding that the dispute before it involves a serious question of law, complicated questions of fact or allegations of fraud, corruption etc.*" However, this amendment was not adopted in either the 2015 or the 2019

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52 Madhav Prabhakar, (1962) 3 SCR 702, ¶ 13 (India).
53 N. Radhakrishnan, (2010) 1 SCC 72, ¶ 21 (India).
54 Bharat Kantilal Bussa v. Sanjana Cryogenic Storage Ltd., 2013 SCC OnLine Bom 376, ¶ 21 (India).
55 Ivory Properties & Hotels v. Nusli Neville Wadia, 2011 SCC OnLine Bom 22, ¶ 16 (India); C.S. Ravishankar v. Dr. C.K. Ravishankar, 2011 SCC OnLine Kar 4128, ¶¶ 7, 8 (India).
56 World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd., (2014) 11 SCC 639, ¶¶ 36, 39 (India).
57 Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677, ¶ 20 (India).
58 Ayyasamy, (2016) 10 SCC 386, ¶ 18 (India).
59 Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act, 1996 (2014), at 28, ¶ 52.

revamp of the Arbitration Act. In any event, the above finding of the apex court in *Ayyasamy* was rendered after considering the 246th Report.

D. *Vidya Drolia* – Attempting to Tie Up Loose Ends

As recently as in December 2020, a three-judge bench of the Supreme Court of India in *Vidya Drolia* v. *Durga Trading Corporation*[60] ["**Vidya Drolia**"] revisited the scope and ambit of the arbitrability doctrine in India. In this case, the Supreme Court of India's mandate was to resolve a conflict between two contradictory judgments rendered by co-ordinate benches of the Supreme Court on the arbitrability of landlord-tenant disputes governed by the provisions of the Transfer of Property Act, 1882.[61] On one hand, in 2017, a two-judge bench of the Supreme Court of India in *Himangni Enterprises* v. *Kamaljeet Singh Ahluwalia* ["**Himangni Enterprises**"] had held that even in the absence of a special law, the rights of the parties would be governed by the Transfer of Property Act and would thus be triable before civil courts and not arbitrable.[62] On the other hand, in 2019, a subsequent two-judge bench of the Supreme Court, in *Vidya Drolia* v. *Durga Trading Corporation*, disagreed with this view, on the ground that the Transfer of Property Act was silent on arbitrability and thus did not negate it.[63] Thus, the Court found that "*the judgment in Himangni Enterprises […] will require a relook by a Bench of three Hon'ble Judges of this Court.*"[64]

In addition to resolving this conflict, the Supreme Court's three-judge bench in *Vidya Drolia* took the opportunity to develop the legal position established in *Booz Allen*. In a nutshell, the Court clarified the operation of the arbitrability doctrine in India through the following principles.

First, the Supreme Court reaffirmed the distinction between *in personam* and *in rem* rights. It cited the judgment in *Booz Allen* with approval to note that while disputes regarding the former are amenable to arbitration, those regarding the latter category of rights are inarbitrable and can be adjudicated exclusively by courts and public tribunals.[65]

Second, notwithstanding the above, the Court added further nuance to the above distinction. It alluded to a situation where a dispute involves both rights *in rem* and rights *in personam*, which in turn, makes it difficult to ascertain the arbitrability of the dispute. Accordingly, as per the Court, the "*[u]se expressions "rights in rem" and "rights in personam" may not be correct for determining non-arbitrability because of the inter-play between rights in rem and rights in personam. Many a times, a right in rem results in an enforceable right in personam.*"[66] Instead, the Court emphasised on determining whether a dispute results in a judgment that operates *in rem* or *in personam.*

In this regard, the Court explained what is meant by the two kinds of judgments:

> "*A judgment in rem determines the status of a person or thing as distinct from the particular interest in it of a party to the litigation; and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided. Such a judgment "settles the destiny of the res itself" and*

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60 Vidya Drolia II, (2021) 2 SCC 1 (India).
61 *Id.* ¶ 1.
62 Himangni Enterprises v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706, ¶ 24 (India).
63 Vidya Drolia v. Durga Trading Corpn., (2019) 20 SCC 406, ¶ 24 (India).
64 *Id.* ¶ 26.
65 Vidya Drolia II, (2021) 2 SCC 1, ¶ 37 (India).
66 *Id.* ¶ 48.

> *binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence. By contrast, a judgment in personam, "although it may concern a res, merely determines the rights of the litigants inter se to the res".*"[67]

Third, in a significant development, the Supreme Court affirmed that "*[d]isputes relating to subordinate rights in personam arising from rights in rem are considered to be arbitrable.*"[68] By making a reference to the *Booz Allen* judgment, the Court held that "*the subordinate rights in personam derived from rights in rem can be ruled upon by the arbitrators, which is apposite.*"[69] To illustrate this finding, it noted that "*a claim for infringement of copyright against a particular person is arbitrable, though in some manner the arbitrator would examine the right to copyright, a right in rem.*"[70] This way, the Court appeared to tacitly endorse the approach propounded by the Bombay High Court in *Eros Int'l.*

Critically, the Supreme Court also applied this principle to resolve the conundrum surrounding the arbitrability of landlord-tenant disputes under the Transfer of Property Act, 1882. It concluded that "*[l]andlord-tenant disputes governed by the Transfer of Property Act are arbitrable as they are not actions in rem but pertain to subordinate rights in personam that arise from rights in rem.*"[71]

Fourth, consistent with and building upon the *Booz Allen* judgment, the Court laid down a four-fold test for determining the various circumstances in which the subject matter of a dispute is not arbitrable under the Indian law:

> "*(1) when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.*
>
> *(2) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;*
>
> *(3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and*
>
> *(4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).*"[72]

The Supreme Court clarified that "*[t]hese tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable.*"[73]

It is the fourth exception, which states that the subject-matter of the dispute may be rendered in arbitral "*expressly or by necessary implication,*" that is relevant for determining the relationship between the arbitrability doctrine and the process of tribunalisation.

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67 *Id.*
68 *Id.* ¶ 37.
69 *Id.* ¶ 48.
70 *Id.*
71 *Id.* ¶ 79.
72 *Id.* ¶¶ 76.1–76.4.
73 *Id.* ¶ 76.5.

Based on the above elucidation, it follows that for determining the subject matters considered to be arbitrable, Indian jurisprudence has long reflected a characteristic fluidity. And the recent judgment in *Vidya Drolia* only bolsters this claim. Nonetheless, while initial scepticism towards arbitration has made way for a more reasoned analysis of arbitrability, a clearer and more confident line of jurisprudence would help in determining the precise scope of arbitrable disputes. Even the recent improvements, as the subsequent parts discuss, are not without their own flaws; particularly when dealing with issues relating to the jurisdiction of special tribunals.

III. The Impact of Tribunalisation on Arbitrability

Despite ample progress, the discourse surrounding arbitrability in India remains inter-mingled with issues of statutory interpretation, in particular the conflict between a special law and a general law. The context in which this discussion occurs is the proliferation of special tribunals created by the state, comprising legal and expert members, to adjudicate a category of disputes that earlier fell within the jurisdiction of civil courts.[74] These include the establishment of a Telecom Disputes Settlement and Appellate Tribunal ["**TDSAT**"] under the Telecom Regulatory Authority of India Act of 1997 ["**TRAI Act**"], Appellate Tribunal for Electricity ["**APTEL**"] for matters relating to the Electricity Act of 2003, several Debts Recovery Tribunals ["**DRT**"] for the enforcement of provisions of the Recovery of Debts Due to Banks and Financial Institutions Act of 1993 ["**DRT Act**"], the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests Act of 2002, the Commissions under the Consumer Protection Acts of 1986 and 2019, amongst others. This poses the question—whether *in personam* civil disputes within the jurisdiction of special tribunals, and not the general jurisdiction of civil courts, are arbitrable? The answer to this question is more convoluted than it may appear to a casual observer. Indian courts have sought to answer this question through the prism of statutory interpretation, by relying on Section 2(3) of the Arbitration Act. The authors prefer to address these two components individually.

A. Arbitrability and Statutory Interpretation

An arbitration agreement is deemed to have a positive as well as a negative effect. While the positive effect of an arbitration agreement requires the contracting parties to resort to arbitration, its negative effect entails a commitment to not submit any dispute falling within the scope of the arbitration agreement to national courts. From this perspective, an arbitration agreement ousts the jurisdictional of the national courts to the extent permissible under the applicable law. However, does an arbitration agreement also have the effect of ousting the jurisdiction of a special tribunal, established under a special enactment?

Indian courts have framed the above question as that of statutory interpretation. In case of any perceived conflict between a general law and a special law in India, ordinarily, it is the general law that must yield to the special law.[75] In this regard, a same statute can be treated as special vis-à-vis one legislation, but be regarded as general vis-à-vis another legislation.[76] Further, where there is a

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74 *See* Law Commission of India, Report No. 272 – Assessment of Statutory Frameworks of Tribunals in India (2017) [*hereinafter* "Report No. 272"].

75 Chairman, Thiruvalluvar Transport Corporation v. Consumer Protection Council, (1995) 2 SCC 479, ¶ 6 (India).

76 *See* Allahabad Bank v. Canara Bank, (2000) 4 SCC 406, ¶ 39 (India).

conflict between two special statutes, the one enacted later will prevail over the former if it contains a provision giving it overriding effect.[77]

On the basis of these principles, Indian courts tend to answer this question by assessing whether the legislative enactment establishing a special tribunal enjoys an overriding effect over the Arbitration Act. For instance, in *India Trade Promotions Org.* v. *International Amusement Ltd.*,[78] the Delhi High Court questioned if the Public Premises (Eviction of Unauthorised Occupants) Act of 1971, which granted an Estate Officer the exclusive jurisdiction to adjudicate tenancy disputes emanating from the Act, is a special law that will override the Arbitration Act. It ultimately answered in the affirmative, as has been the general tendency in Indian jurisprudence. This has, in turn, added another limb to the arbitrability doctrine in India.

The decisions in support of the above assertion are multiple. In *Aircel Digilink India Ltd.* v. *Union of India*, the TDSAT observed that the Arbitration Act "*is a general Act and it will apply to all the arbitration agreements but [TRAI Act] is a special Act and applies to the telecom sector [and] to broadcasting and cable services.*"[79] Thus, it found arbitration to be barred in respect of the matters within the exclusive jurisdiction of the TDSAT under the TRAI Act.[80] But this judgement was succeeded by a Delhi High Court verdict under Section 34 of the Arbitration Act, wherein the Court refused to set aside an arbitral award rendered in respect of a telecom dispute on the ground that the arbitral tribunal could exercise jurisdiction if it were approached prior in time to or in exclusion to the TDSAT.[81]

On similar lines, a three-judge Bench of the Bombay High Court in *Central Warehousing Corp.* v. *Fortpoint Automotive Pvt. Ltd.* noted that Section 41(1) of the Presidency Small Cause Courts Act of 1882, which constituted special courts for adjudication of tenancy disputes specified therein, is a special law, and an arbitration agreement in such cases would be invalid.[82] Notably, the Supreme Court of India affirmed this line of reasoning in *Gujarat Urja Vikash Nigam* v. *Essar Power Ltd.* and concluded that Section 86(1)(f) of the Electricity Act of 2003 "*is a special provision, and hence, will override the general provision in Section 11 of the [Arbitration Act for appointment of arbitrators] for arbitration of disputes between the licensee and generating companies.*"[83]

In fact, recently, the apex court took the above rationale a step further in respect of disputes arising under the Trust Act in the judgment of *Vimal Kishore Shah* v. *Jayesh Dinesh Shah*. While deriving comfort from its familiarity with "*principle of interpretation that where a specific remedy is given, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute,*"[84] the Court took it upon itself to examine the scheme of the entire Trust Act. In this regard, it noted

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77 Damji Valji Shah v. LIC of India, (1965) 3 SCR 665, ¶ 19 (India).

78 India Trade Promotions Org. v. International Amusement Ltd., 2007 SCC OnLine Del 981, ¶¶ 38, 41 (India). This case was further upheld by the Supreme Court of India. *See* International Amusement Ltd. v. India Trade Promotion Organisation, (2015) 12 SCC 677 (India).

79 Aircel Digilink India Ltd. v. Union of India, 2005 SCC OnLine TDSAT 105, ¶ 20 (India).

80 *See also* Reliance Infratel Ltd. v. Etisalat DB Telecom Pvt. Ltd., 2012 SCC OnLine TDSAT 293, ¶¶ 281, 283 (India); Viom Network Ltd. v. S Tel Pvt. Ltd., 2013 SCC OnLine Del 4511, ¶ 34 (India).

81 Bharti Cellular Ltd. v. Dept. of Telecommunications, 2012 SCC OnLine Del 4846, ¶ 60–62 (India) [*hereinafter* "Bharti Cellular"].

82 Central Warehousing Corp. v. Fortpoint Automotive Pvt. Ltd., 2009 SCC OnLine Bom 2023, ¶ 40 (India) [*hereinafter* "Central Warehousing"].

83 Gujarat Urja Vikash Nigam v. Essar Power Ltd., (2008) 4 SCC 755, ¶ 28 (India).

84 Vimal Kishore Shah, (2016) 8 SCC 788, ¶ 51 (India).

that the scheme of the Trust Act reflects that "*the legislature has dealt with and taken care of each subject comprehensively and adequately,*"[85] and in the face of such an exhaustive legislation dealing with trusts, trustees and beneficiaries, including by providing them appropriate remedies to approach the concerned civil courts, the Court found that disputes regarding the affairs of a trust could not be considered arbitrable.

In its opinion, "*when the Trust Act exhaustively deals with the Trust, Trustees and beneficiaries and provides for adequate and sufficient remedies to all aggrieved persons by giving them a right to approach the Civil Court of principal original jurisdiction […], any such dispute pertaining to affairs of the Trust […] in relation to their right, duties, obligations, removal etc. cannot be decided by the arbitrator.*"[86]

Notwithstanding the judicial approval received in the cases above, to re-characterize an issue of arbitrability as a question of statutory conflict is misguided, and thus, an unnecessary distortion of the arbitrability doctrine. The reasons for this are two-fold:

First, the Indian courts' reliance on principles of statutory interpretation is premised on an assumption that the provisions of the Arbitration Act conflict with provisions contained in a legislative enactment establishing a special tribunal. However, such an assumption has no basis in law. The Indian arbitration machinery, like the arbitration machinery in most states, is an edifice constructed upon the core principle of party autonomy. That said, the existence of party autonomy is taken for granted, and there is little discussion as to its origins.[87] It is important to acknowledge that notwithstanding its importance, the principle of party autonomy exists not because of its centrality to arbitration, but because a state's legal framework allows it to sustain. After all, it is the primary responsibility of a state to provide its nationals with a functional judicial mechanism for settlement of disputes,[88] and any departure from it through the exercise of party autonomy is subject to the state's will.[89] Therefore, the parties' freedom to experiment with envisaged dispute resolution processes[90] must be sourced to a permissive legal system.

In India, the validity and enforceability of an arbitration agreement emanates in the first place from Section 28 of the Indian Contract Act, 1872, which provides that every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract *by the usual legal proceedings in the ordinary tribunals* is void to that extent.[91] Ordinarily, this would be sufficient to invalidate any arbitration agreement. However, Indian law nonetheless recognizes an arbitration agreement because of the statutory exceptions to the said provision. These exceptions state that the provision shall neither render illegal an agreement to refer disputes to arbitration,[92] nor affect any provision of any law in force for the time being as to references to arbitration.[93] Thus, Indian law expressly recognizes arbitration as an exception to "*usual legal proceedings in the*

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85 *Id.* ¶ 45.
86 *Id.* ¶ 50.
87 H. M. Watt, *Party Autonomy in international contracts: from the makings of a myth to the requirements of global governance*, 6(3) EUR. REV. CONT. L. 1, 4 (2010).
88 *See generally* JEAN JACQUES ROUSSSEAU, THE SOCIAL CONTRACT (2006).
89 *See generally* PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS (1999).
90 Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 534 (2005).
91 Indian Contract Act, No. 09 of 1872, § 28(a) (India).
92 *Id.* § 28 Exception 1.
93 *Id.* § 28 Exception 2.

ordinary tribunals." The deliberate use of the word "*tribunals*" herein, as opposed to courts, suggests that this includes proceedings before both national courts as well as special tribunals.

This understanding is affirmed when one notices that both Sections 8[94] and 45[95] of the Arbitration Act, which are analogous to Article II (3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, obligate every "*judicial authority,*" and not just the courts, to refer a matter that is the subject of an arbitration agreement, to arbitration. As per the Law Commission of India's report on the Arbitration and Conciliation (Amendment) Bill, 2001, the expression "*judicial authority*" should be understood to include "*a District Court or a Court subordinate to the District Court or the High Court on the original side [and] may also refer to a quasi-judicial authority*."[96] Along these lines, the apex court has also confirmed, albeit in the context of the Indian Arbitration Act, 1940, that not only a civil court, but also a consumer tribunal, would constitute such a "*judicial authority*".[97] It is for this precise reason that the Arbitration and Conciliation (Amendment) Bill, 2001 sought to introduce Section 2(1)(fa) to clarify that a "*judicial authority*" included "*any quasi-judicial statutory authority*."[98] While the said proposal did not find place in the Arbitration and Conciliation (Amendment) Act, 2015 ["**2015 Amendment**"], it nonetheless confirms that a "*judicial authority*" includes both courts as well as special tribunals. Consequently, the provisions of the Arbitration Act are in conflict with any statute conferring exclusive jurisdiction upon a special tribunal to the same extent that they are in conflict with the Code of Civil Procedure, 1908 from where civil courts derive their jurisdiction. In other words, they are not.

Second, in any event, the Indian courts have faltered in framing a question of arbitrability as one of statutory conflict. This aspect was rightly recognized by a three-judge-bench of the Delhi High Court in *HDFC Bank Ltd.* v. *Satpal Singh Bakshi* ["**HDFC Bank**"], when reflecting upon the arbitrability of recovery disputes falling within the jurisdiction of DRT. The Court noted that the answer to this issue does not depend upon principles of statutory interpretation, which operate to oust the jurisdiction of civil courts vis-à-vis special tribunals. Instead, the Court identified the real question that even when a special tribunal is created, can the parties still agree that instead of such tribunal, their disputes shall be decided by an arbitral tribunal?[99] It continued that if this question is answered in the affirmative, the edifice of the submissions made based on the principles of statutory interpretation "*would collapse like house of cards as all those submissions would be relegated to the pale of insignificance.*"[100]

On such basis, the Delhi High Court clarified that the DRT, though created under a special enactment, is only a forum established to decide specific types of cases that were earlier decided by the civil courts.[101] Citing the test of arbitrability as laid down by the Supreme Court in *Booz Allen*, it affirmed that a claim of money by the bank or financial institution against the borrower, which falls within the jurisdiction of such a tribunal, does not involve any right *in rem*. In fact, "*a*

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94 Arbitration and Conciliation Act, No. 26 of 1996, § 8(1) (India) [*hereinafter* "Arbitration Act"].
95 *Id.* § 45.
96 Law Commission of India, Report No. 176 – The Arbitration and Conciliation (Amendment) Bill, 2001 (2001), at 20.
97 *See* Fair Air Engineers Pvt. Ltd. v. M.K. Modi, (1996) 6 SCC 385, ¶ 16 (India).
98 Arbitration and Conciliation (Amendment) Bill, 2001, § 4(a)(ii) (India).
99 HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815, ¶¶ 6,7 (India) [*hereinafter* "HDFC Bank"].
100 *Id.* ¶ 7.
101 *Id.* ¶ 11.

judgment/ decision of the [DRT] deciding a particular claim can never be a right in rem, and is a right in personam as it decides the individual case/claim before it with no elements of any public interest."[102] Accordingly, it found the array of *in personam* disputes, otherwise within the jurisdiction of the DRT, to be arbitrable. This leads to a conclusion that notwithstanding the contrary judicial opinions, the notion of arbitrability is focused on an assessment of the subject-matter of the dispute. And the mere creation of a special tribunal, which certainly ousts the jurisdiction of a civil court, does not *by itself* transform it into a question of statutory interpretation.

Unfortunately, the three-judge bench of the Supreme Court in *Vidya Drolia* disagreed with the Delhi High Court's conclusion as to the arbitrability of disputes within the jurisdiction of a DRT, confirming that they are inarbitrable.[103] As discussed in the subsequent pages, the Supreme Court's disagreement in this regard is without cogent reason, and vulnerable to legitimate criticism. However, even otherwise, it is apparent that the Court's decision to overrule the judgment in *HDFC Bank* was motivated by its understanding of the nature of rights created by the DRT Act. It did not cast any doubt on the Delhi High Court's preliminary finding that the issue of arbitrability cannot be viewed purely as a question of statutory conflict, with a view to ascertain whether a legislative enactment establishing a special tribunal constitutes a "*special law*" relative to the Arbitration Act. To this extent, despite its conclusion being overruled, the approach of the Delhi High Court in *HDFC Bank* continues to retain relevance.

B. Exploring Section 2(3) of the Arbitration Act

Dissociating the notion of arbitrability from the administrative prerogative of tribunalisation of justice[104] allows one to address issues of arbitrability in an appropriate framework. However, by no stretch of imagination does this imply that every *subject-matter* falling within the jurisdiction of a special tribunal is arbitrable *per se*. Instead, answering this question requires an inquiry as to whether there may be another reason that renders such categories of dispute inarbitrable.

In this regard, Section 2(3) of the Arbitration Act, quoted above, provides that Part I of the Act "*shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.*"[105] The provision implies that if any other law in India excepts disputes from being referred to arbitration, such disputes cannot be so referred under the Arbitration Act "*irrespective of any provisions contained herein.*"[106]

For instance, Section 6(1) of the West Bengal Premises Tenancy Act, 1997 affirms the jurisdiction of a civil judge over tenancy disputes emanating from the said Act "*notwithstanding anything to the contrary contained in any other law for the time being in force or in any contract.*"[107] In *Ranjit Kumar Bose* v. *Anannya Chowdhary* the Supreme Court of India construed this as "*one such law which clearly bars arbitration in a dispute relating to recovery of possession of premises by the landlord from the tenant.*"[108] However, barring such clear prohibition, the question arises as to whether the creation of a special tribunal

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102 *Id.* ¶ 13.
103 Vidya Drolia II, (2021) 2 SCC 1, ¶ 58.
104 *Id.* ¶ 10.
105 Arbitration Act, § 2(3).
106 P. C. MARKANDA, LAW RELATING TO ARBITRATION AND CONCILIATION 63 (2009).
107 West Bengal Premises Tenancy Act, No. 37 of 1997, § 6(1) (India).
108 Ranjit Kumar Bose v. Anannya Chowdhary, (2014) 11 SCC 446, ¶ 12 (India) [*hereinafter* "Ranjit Kumar Bose"].

by itself demonstrates a legislative intent to exclude disputes falling within the tribunal's jurisdiction from the purview of arbitration through necessary implication.

i. Comparison with Article 1(5), UNCITRAL Model Law

Section 2(3) of the Arbitration Act corresponds to Article 1(5) of UNCITRAL Model Law on International Commercial Arbitration 1985 ["**Model Law**"]. While the latter includes a reference to other laws by virtue of which certain disputes "*may be submitted to arbitration only according to provisions other than those of [the Model Law],*" thereby excluding the applicability of the Model Law to these disputes, the Indian variant does not include such a reference. It only mentions laws by virtue of which "*certain disputes may not be submitted to arbitration.*" This difference may not have the most significant practical implications, but is indicative of an attitude on part of the drafters of the Model Law to "*clarify that the model law is not a self-contained and self-sufficient legal system,*" but is open to the existence of "*all other national provisions of law dealing with arbitration.*"[109] On the other hand, Section 2(3), in its deference only to laws that exclude certain disputes from being submitted arbitration, does not exude similar openness to other forms of arbitration outside its own contours.

That apart, the Model Law's *travaux préparatoires* evidences a fairly limited discussion in respect of the adoption of this provision. To see how Article 1(5) of the Model Law was intended to operate, one may take inspiration from the jurisprudence of other Model Law countries. Certain countries such as New Zealand and Singapore have specifically stepped away from adopting Article 1(5) of the Model Law by stating that "*[t]he fact that any written law confers jurisdiction in respect of any matter on any court of law […] shall not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.*"[110] However, other countries, such as Germany, have adopted a variant of it, in which certain categories of disputes are specifically listed as inarbitrable.[111]

More pertinent are the judicial decisions from countries where Article 1(5) of the Model Law has been adopted either verbatim, or with slight modifications, as is the case in India. For instance, courts in Canada[112] and Hong Kong[113] have held that the existence of legislation prescribing certain matters to be dealt with in or by a specific court action or by a certain prescribed procedure would not render the Model Law inapplicable pursuant to Article 1(5), since they do not consider the aforesaid prescriptions to operate in exclusion of arbitration. In fact, even in the face of statutorily prescribed liquidation proceedings for proof of debt, a judge in the Hong Kong High Court ordered arbitration to proceed based on a comparison of the potential costs of the two kinds of adjudication on the grounds that "*it would benefit both the Applicant and the general body of unsecured creditors to give leave to proceed with the reduced arbitration.*"[114] Similarly, the Supreme Court of Canada has been reluctant to read a statutory grant of jurisdiction in copyright matters to a particular Court

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109 HOWARD M. HOLTZMANN & JOSEPH NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 39 (1989).

110 International Arbitration Act, Cap 143A, 2002 Rev. Ed., § 11(2) (Sing.); Arbitration Act 1996, § 10(2) (N.Z.).

111 ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 1030(2) (Ger.).

112 *See* BWV Investments Ltd. v. Saskferco Products Inc., (1994) Can. LII 4557 (SK CA) (Can.).

113 *See* Union Charm Development Ltd. v. B+B Construction Co. Ltd., (2001) H.K.C.F.I. 779 (H.K.) [*hereinafter* "Union Charm"].

114 *Id.* ¶ 29.

as being in exclusion to arbitration, holding that "*[i]f Parliament had intended to exclude arbitration in copyright matters, it would have clearly done so.*"[115]

Thus, from the above comparative assessment, one can infer a general practice across Model Law jurisdictions, emanating either from judicial decisions or specific prescriptions in the arbitration laws, requiring a clear or explicit exclusion of arbitration in a comparator statutory provision. Courts have not assumed an exclusion of arbitration based on statutory schemes that provide for jurisdiction to particular courts or for a specifically prescribed procedure of dispute settlement.

ii. Judicial Practice in India

Compared to the international practice, Indian courts have adopted a different approach in respect of Section 2(3) of the Arbitration Act. It is not in doubt that explicit stipulations in another law by virtue of which certain disputes may not be submitted to arbitration will render disputes falling under such other law inarbitrable. Examples of such explicit stipulations exist in the form of *non-obstante* clauses, which prescribe, for instance, that the provisions of a particular statute shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force,[116] or notwithstanding anything to the contrary contained in any contract.[117]

However, apart from such seemingly explicit stipulations, courts have also considered Section 2(3) to give primacy to other laws, which by "*necessary implication*" do not permit disputes to be submitted to arbitration. This epithet of "*necessary implication*" was most clearly endorsed by the Bombay High Court, in the following manner:

> "*[Section 2(3)] amplifies the scope of the Act of 1996 […] if any law which is for the time being in force were to provide – either expressly or by necessary implication – that the specified disputes may not be submitted to arbitration, in that case […], that law has been saved by virtue of Section 2(3) of the Act of 1996.*"[118]

The proposition of excluding of arbitration by way of a necessary implication has received the approval of the Supreme Court, both under the Indian Arbitration Act, 1940[119] and in *Booz Allen*,[120] albeit not with a direct reference to Section 2(3) of the Arbitration Act. This judicial practice has opened doors to consider not only express provisions in statutes that appear to forestall the application of the Arbitration Act, but also the object of these other laws in question,[121] or elements in common law.[122] Consequently, courts have indicated an openness to examine the gamut of "*the existing law on the date when the [Arbitration Act] was enforced*" to decide whether a certain dispute is arbitrable.[123]

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115 Desputeaux v. Éditions Chouette, (2003) 1 S.C.R. 178, ¶ 46 (Can.).
116 Big Shoppers Supermarket Pvt. Ltd. v. KM Trading Agencies Pvt. Ltd., 2008 SCC OnLine Raj 1231 (India).
117 Ranjit Kumar Bose, (2014) 11 SCC 446, ¶ 12 (India).
118 Central Warehousing, 2009 SCC OnLine Bom 2023, ¶ 9 (India).
119 Natraj Studios (P) Ltd. v. Navrang Studios, (1981) 1 SCC 523 (India) [*hereinafter* "Natraj Studios"].
120 Booz Allen, (2011) 5 SCC 532, ¶ 35 (India).
121 Carona Ltd. v. Sumangal Holdings, 2007 SCC OnLine Bom 405, ¶¶ 11, 12 (India) [*hereinafter* "Carona"].
122 India Trade Promotions Org. v. International Amusement Ltd., 2007 SCC OnLine Del 981, ¶ 37 (India). This case was further upheld by the Supreme Court of India. *See* International Amusement Ltd. v. India Trade Promotions Org, (2015) 12 SCC 677 (India).
123 *Id.*

Apart from representing a glaring increase in the screening process that subject-matters need to go through before qualifying as arbitrable, this approach is inherently problematic on two levels.

First, as far as examination of common law and objectives behind legislations is concerned, so long as these facets bear a linkage to the public policy of the country, they operate as separate and independent exceptions to arbitrability. Thus, they do not fall within the ambit of Section 2(3) of the Arbitration Act. That notwithstanding, courts have extended this license of "*necessary implication*" to include enactments, which, although do not contain any *non-obstante* clause generally prioritizing that statute, are still considered to exclude reference of specified disputes to arbitration, as a larger scheme or a body of law. This is primarily on the ground that the particular "*law invests exclusive jurisdiction*"[124] in a "*special forum,*"[125] the creation of which is read as exclusion of arbitration by necessary implication under Section 2(3). While these decisions were rendered in the context of rent control legislations, which for reasons discussed below may warrant exceptional protection, the same proposition in support of an implied exclusion of the Arbitration Act has been advanced to exclude other kinds of disputes from the realm of arbitrability as well. On many occasions, this argument is advanced in conjunction with the use of principles of statutory interpretation discussed above. A case in point for this is the Supreme Court's recent decision in respect of disputes under the Trust Act, where, in addition to erroneously invoking principles of statutory interpretation, the Court also found that:

> "*[T]hough the Trust Act does not provide any express bar in relation to applicability of other Acts for deciding the disputes arising under the Trust Act yet […] there exists an implied exclusion of applicability of the Arbitration Act for deciding the disputes relating to Trust, trustees and beneficiaries through private arbitration. In other words, when the Trust Act exhaustively deals with the Trust, Trustees and beneficiaries and provides for adequate and sufficient remedies to all aggrieved persons by giving them a right to approach the Civil Court of principal original jurisdiction for redressal of their disputes arising out of Trust Deed and the Trust Act then, in our opinion, any such dispute pertaining to affairs of the Trust […] cannot be decided by the arbitrator by taking recourse to the provisions of the [Arbitration] Act.*"[126]

Using the existence of "*special remedies*" to denounce the arbitrability of a dispute is, in effect, an extension of the process of tribunalisation that has ended up influencing the interpretation of Section 2(3) of the Arbitration Act. As evident from the discussion concerning Article 1(5) of the Model Law, this was certainly not the intention of the drafters of the Model Law. While it is one thing to stipulate that an arbitration legislation is open to the existence of other forms of dispute resolution under other laws, it is quite another to assume that wherever a statute grants special jurisdiction to a particular tribunal or even a civil court, the same serves to exclude the possibility of arbitration by necessary implication. While the former proposition pertains to the cohabitation of arbitration with other legal regimes, the latter appears to fly in the face of the negative effect of an arbitration agreement. To put it differently, when the parties have been afforded the autonomy by the state to conclude arbitration agreements, the same cannot be readily curtailed by statutes only because they grant jurisdiction to tribunals that have "*all trappings of the Court.*"[127] Doing so

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124 Central Warehousing, 2009 SCC OnLine Bom 2023, ¶ 31 (India).
125 Carona, 2007 SCC OnLine Bom 405, ¶¶ 11, 12 (India).
126 Vimal Kishore Shah, (2016) 8 SCC 788, ¶ 50 (India).
127 HDFC Bank, 2012 SCC OnLine Del 4815, ¶ 12 (India).

under the garb of exclusion of arbitration by "*necessary implication*" extends Section 2(3) of the Arbitration Act beyond its intended objectives.

The *second* problematic implication of curtailing arbitrability by necessary implication arises in subject matters that have had a curious jurisprudential presence in India. A prime example of this is consumer disputes, which were initially considered unequivocally inarbitrable under the Arbitration and Conciliation Act, 1940 but have been subjected to a nuanced approach by the apex court under the Arbitration Act. The Supreme Court has found that in the absence of any provision in the Consumer Protection Act, 1986 ["**Consumer Act**"] "*authorising the Commission to refer a pending proceeding before it, on receipt of a complaint from a consumer, for being settled through a consensual adjudication, the conclusion is irresistible that the Commissions under the Consumer Protection Act do not have the jurisdiction to refer the dispute for a consensual adjudication.*"[128] Thus, the Court traced an exclusion of arbitrability as a necessary implication of the fact that the text of the Consumer Act does not contain a specific provision.

This finding was unwaveringly upheld by the apex court in subsequent decisions[129] as recent as in 2016, in an obiter,[130] under the chaperon of Section 3 of the Consumer Act, which states that "*[t]he provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.*" This provision, read in light of the above findings of the apex court, has resulted in a peculiar legal situation in respect of disputes under the Consumer Act, whereby:

> "*The remedy of arbitration is not the only remedy available to a [consumer]. Rather, it is an optional remedy. He can either seek reference to an arbitrator or file a complaint under the Consumer Act. If the grower opts for the remedy of arbitration, then it may be possible to say that he cannot, subsequently, file complaint under the Consumer Act. However, if he chooses to file a complaint in the first instance before the competent Consumer Forum, then he cannot be denied relief by invoking Section 8 of the [Arbitration Act].*"[131]

Consequently, whether or not consumer disputes are considered arbitrable is a question that has a different answer depending on which fora is approached first. In India, consumer disputes are arbitrable if a consumer first refers it to arbitration. However, if the consumer first approaches the Commission with a consumer complaint relating to its same dispute, a "*scrutiny of the different provisions of the Act and bearing in mind the powers conferred on the Commissions*" has resulted in the finding that disputes under the Consumer Protection Act cannot be referred to arbitration.[132] As recently as 2017, the National Consumer Dispute Redressal Commission affirmed that with respect to arbitrability, the 2015 Amendment has left the "*status quo ante unaltered.*"[133] This position was confirmed by the Supreme Court of India in 2018, with the following caveat:

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128 Skypak Couriers Ltd. v. Tata Chemicals, (2000) 5 SCC 294, ¶ 2 (India) [*hereinafter* "Skypak Couriers"].

129 Rosedale Developers Pvt. Ltd. v. Aghore Bhattacharya, (2018) 11 SCC 337 (India); National Seeds Corp. Ltd. v. M. Madhusudan Reddy, (2012) 2 SCC 506 (India) [*hereinafter* "National Seeds"].

130 Ayyasamy, (2016) 10 SCC 386, ¶ 37 (India).

131 National Seeds, (2012) 2 SCC 506, ¶ 66 (India). *But see* Yashwant Rama Jadhav v. Shaukat Hussain Shaikh, 2017 SCC OnLine NCDRC 578, ¶ 6 (India) ("The jurisdiction of the consumer forum is not ousted on account of a civil suit having been instituted by the respondents, even if the subject matter of the said suits is the same agreement which is the foundation of the consumer complaint.").

132 Skypak Couriers, (2000) 5 SCC 294 (India); *See also* DLF Ltd. v. Mridul Estate, 2013 SCC OnLine NCDRC 486, ¶ 30 (India).

133 Aftab Singh v. Emaar MGF Land Ltd., 2017 SCC OnLine NCDRC 1614, ¶ 52 (India) [*hereinafter* "Aftab Singh"].

> "*[I]n the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration.*"[134]

Curiously, a similar legal situation appears to have been fashioned in the context of telecom disputes. In an obiter in a Section 34 petition, the Delhi High Court has observed:

> "*Section 15 states that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the TDSAT is empowered to determine. The words 'entertain any suit or proceeding' indicate the prospective nature of that provision. None of the above provisions support the contention […] that pending arbitral proceedings could not go on after the establishment of the TDSAT and that in the present case, the learned Arbitrator lacked inherent jurisdiction to adjudicate the disputes.*"[135]

The above approach is glaringly problematic. Assuming the exclusion of arbitration merely due to the absence of a specific provision empowering special tribunals to refer the parties to arbitration makes the implied exclusion argument under Section 2(3) of the Arbitration Act incoherent. It ignores the fact that Section 8 of the Arbitration Act extends to all "*judicial authorities*" and not just courts, and also opens the gates for "*special remedies*" available to tribunals to be brought into the arbitrability discourse. Even in such circumstance, this latter spin-off of tribunalisation is only considered selectively, i.e., where a consumer Commission is approached prior in time. Therefore, despite the existence of Section 3 in the Consumer Act, which states that the said Act is not in derogation of any other law in force, courts have concluded that a reference to arbitration cannot be made.

Accordingly, the exclusion of arbitration based on necessary implications—a phenomenon in existence in Indian jurisprudence prior to the enactment of Section 2(3)[136]—has tainted the interpretation of the provision. Not only has it allowed the subversion of arbitration to the process of tribunalisation, but it has also created a peculiar line of jurisprudence that is susceptible to arriving at varying answers to the same question.

IV. The Way Forward

Until now, the authors attempted to manufacture a lens through which the idiosyncrasies of Indian judicial practice in respect of the impact of tribunalisation on arbitrability become apparent. The objective is to demonstrate how the Indian jurisprudence in respect of Section 2(3) of the Arbitration Act has run counter to the evolution of case law in other Model Law jurisdictions. While this inconsistency with accepted international jurisprudence holds equally true in the broader context of the courts' dealings with specialised tribunals, this should not cause all hope of arbitral sophistication to be lost. After all, most sophisticated arbitral jurisdictions have been through the same growth cycle—transition from declaring arbitration agreements as deprivers of more "*advantageous court remedy afforded by*" a legal regime, such as the Securities Act 1933 in the U.S.,[137] to

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134 Emaar MGF Land Ltd. v. Aftab Singh, (2019) 12 SCC 751, ¶ 63 (India).
135 Bharti Cellular, 2012 SCC OnLine Del 4846, ¶ 60 (India).
136 Natraj Studios, (1981) 1 SCC 523, ¶ 26 (India).
137 Wilko v. Swan, 346 U.S. 427 (1953) (U.S.).

now embracing arbitration. Such has been the curve of transformation that today, some scholars recognize that "*[t]he federal contract right to arbitrate will displace state law, no matter how clearly stated, that requires judicial resolution rather than arbitration in a particular dispute.*"[138]

Inspiration must be drawn from jurisdictions, such as Hong Kong,[139] U.S.,[140] and New Zealand,[141] which have made conspicuous progress in respect of arbitrability, to mirror their journey from initial scepticism towards arbitration to now being comfortable with treating the arbitrability question as one of "*sound judicial case management rather than as a matter of construction,*" subject only to public policy exceptions.[142]

In India, a glimpse of promise was shown by the Delhi High Court's now-overruled judgment in *HDFC Bank,* which the authors believe correctly laid down the stepping stones for devising a better way forward. Therein, the Court found no reason to distinguish between an ordinary civil court and a tribunal that has all the trappings of a court, and thus, did not view the mere existence of alternate tribunals as a bar to arbitrability. A similar approach was also adopted by the Bombay High Court when it observed that the provisions of the Copyright Act, 1957 and the Trade Marks Act, 1999 do not confer any exclusivity. The Court held that "*it is not possible from such sections, common to many statutes, to infer the ouster of an entire [Arbitration] statute. These sections do not themselves define arbitrability or non-arbitrability. For that, we must have regard to the nature of the claim that is made.*"[143]

Nonetheless, going a step further, in seeking to answer the question "*as to what would be the yardstick to determine some kind of disputes to be decided by the tribunals are non-arbitrable*,"[144] the Delhi High Court had suggested a possible way out of this tribunalisation crisis. It opined that "*cases where a particular enactment creates special rights and obligations and gives special powers to the Tribunals which are not with the civil Courts, those disputes would be non-arbitrable.*"[145] Thus, it laid down a cumulative test requiring the creation of a special tribunal vested with powers, and the existence of special rights and obligations in an enactment, which would give rise to a conclusion of non-arbitrability. To exemplify, the Court pointed to matters under the state-enacted Rent Control legislations, which grant statutory protection to tenants that overrode the contract entered into between the parties. According to the Court, "*[i]t is the rights created under the Act which prevail and those rights are not enforceable through civil Courts, but only through the Tribunals, which is given special jurisdiction*" to adjudicate upon those rights.[146] Another example cited by the Court was that of the Industrial Disputes Act 1947. On the other hand, tribunals such as DRTs, which are only a replacement forum for civil courts, could not create an implicit bar to the arbitrability of disputes.[147]

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138 Richard E Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 173 (1988-89).
139 Union Charm, (2001) H.K.C.F.I. 779 (H.K.).
140 The Saturday Evening Post Company v. Rumbleseat Press Inc, 816 F.2d. 1191 (7th Cir. 1987) (U.S.).
141 IBM Australia Ltd v. National Distribution Services Pty Ltd Handley JA, (1991) 22 N.S.W.L.R. 466 (N.Z.).
142 Justice Andrew Rogers, *Arbitrability*, 1 ASIA PAC. L. REV. 1, 12–13 (1992).
143 Eros Int'l, 2016 SCC OnLine Bom 2179, ¶ 16 (India).
144 HDFC Bank, 2012 SCC OnLine Del 4815, ¶ 14 (India).
145 *Id.*
146 *Id.*
147 *Id.* ¶¶ 13, 14.

The progress made by the Delhi High Court was undone by the Supreme Court in *Vidya Drolia* for reasons that are at best, unclear, and at worst, unmeritorious. The Supreme Court provided two reasons for overturning the judgment in *HDFC Bank*; both of which remain unconvincing.

First, the Court reasoned that:

> "*The decision in HDFC Bank Ltd. holds that only actions in rem are non-arbitrable, which as elucidated above is the correct legal position. However, non-arbitrability may arise in case the implicit prohibition in the statute, conferring and creating special rights to be adjudicated by the courts/public fora, which right including enforcement of order/provisions cannot be enforced and applied in case of arbitration.*"[148]

This is an incomplete and erroneous reading of the Delhi High Court's judgment. In *HDFC Bank*, the Delhi High Court did not limit its analysis to merely acknowledge the inarbitrability of actions *in rem*. Rather, much like the Supreme Court, it also observed that the creation of "*special rights and obligations*" and conferral on "*special powers to the Tribunals*" would indicate that the dispute within the jurisdiction of such special tribunal is inarbitrable.[149] To this extent, both Courts share an identical understanding of the arbitrability doctrine. However, where the Delhi High Court's analysis differs from that of the Supreme Court is its interpretation of the rights created by the DRT Act. In *HDFC Bank*, the Delhi High Court rightly questioned whether the DRTs constitute anything more than a replacement for ordinary civil court, and concluded as under:

> "*When arbitration as alternate to the civil Courts is recognized, which is common case of the parties before us, creation of Debts Recovery Tribunal under the RDB Act as a forum for deciding claims of banks and financial institutions would make any difference? We are of the firm view that answer has to be in the negative. What is so special under the RDB Act? It is nothing but creating a tribunal to decide certain specific types of cases which were earlier decided by the civil Courts and is popularly known as 'tribunalization of justice'. It is a matter of record that there are so many such tribunals created.*"[150]

Astonishingly, the Supreme Court in *Vidya Drolia* does not event attempt a similar analysis. It neither explains its reasons for disagreeing with the Delhi High Court's assessment of the DRT Act, nor does it indicate the nature of the special rights purportedly created by the DRT Act. To put it differently, although the Supreme Court remarks that the DRT "*legislation has overwritten the contractual right to arbitration,*"[151] it fails to identify the content of this legislative writing.

This is a critical omission, which is contradicted by the Supreme Court's own reasoning in the same judgment. In *Vidya Drolia* itself, the Court accepts that *"[i]mplied non-arbitrability requires prohibition against waiver of jurisdiction, which happens when a statute gives special rights or obligations and creates or stipulates an exclusive forum for adjudication and enforcement.*"[152] As such, for a subject-matter to become inarbitrable by necessary implication, both the requirements, namely (i) the creation of special rights or obligations and (ii) the creation of an exclusive forum for adjudication and enforcement of such rights or obligations, must be satisfied. If the statute does not create special rights or

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148 Vidya Drolia II, (2021) 2 SCC 1, ¶ 58 (India).
149 HDFC Bank, 2012 SCC OnLine Del 4815, ¶ 14 (India).
150 *Id.* ¶ 11.
151 Vidya Drolia II, (2021) 2 SCC 1, ¶ 58 (India).
152 *Id.* ¶ 68.

obligations, as was held by the Delhi High Court in *HDFC Bank* in relation to the DRT Act, the mere act of creating an exclusive forum for adjudication of a specific category of disputes will not render such disputes inarbitrable.

In view of the above, the Court's conclusion, and its failure to engage with the reasoning in *HDFC Bank* regarding the nature of the DRT Act, effectively equates the requirement of creation of a special tribunal with that of creation of special rights.

Second, instead of engaging with the Delhi High Court's analysis, the Court merely remarks that to "*hold that the claims of banks and financial institutions covered under the DRT Act are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act.*"[153] However, this is an incorrect statement, that the Court also fails to corroborate. If the banks and financial institutions covered under the DRT Act are keen to avail the recovery modes provided in the DRT Act, i.e., by means of adjudication before the DRTs, they are at liberty to not include any arbitration agreement in their agreements. This is a reasonable expectation in lending arrangements where unlike borrowers, lending banks and financial institutions often retain greater negotiating power to dictate the terms of the bargain. Therefore, recognising the *in personam* disputes falling within the jurisdiction of DRTs as arbitrable does not by itself deprive banks and financial institutions of their access to the modes of recovery under the DRT Act. Rather, it is the critical act of consciously entering into an arbitration agreement, coupled with the negative effect of an arbitration agreement, which leads to this conclusion in a specific case.

Viewed from another perspective, the Supreme Court's reasoning that suggests that even when banks and financial institutions remain dissatisfied with the modes of recovery under the DRT Act, such as absence of tribunal members or judicial delays, they remain wedded to the jurisdiction of the DRT. They must make peace with their grim reality that in 2016, about 78,118 cases were pending before DRTs in India.[154] Thus, the Court's conclusion is equally anomalous to the rising discontent with the functioning of statutory tribunals in India and the consequent attempts to dissolve many statutory tribunals.[155] This suggests that at least in relation to disputes before the DRTs, the Supreme Court's construction of the arbitrability doctrine is detached from reality.

Consequently, the Supreme Court's conclusion that "*there is a prohibition against waiver of jurisdiction of the DRT by necessary implication*"[156] is supported neither by law, nor by pragmatic considerations relevant to the functioning of statutory tribunals. Nevertheless, a quest for jurisprudential progress must be accompanied by cautious optimism. Despite the Supreme Court overruling the judgment in *HDFC Bank*, Indian law on the arbitrability doctrine has taken modest steps in the right direction. There is a visible attempt by Indian courts, including the Supreme Court in *Vidya Drolia*, to shift the focus of the discourse from mere creation of special tribunals to the more fundamental question relating to creation of special rights and their enforcement. While this approach leaves ample room for misinterpretation and ambiguity, it also assists in identifying a better way forward.

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153 *Id.*, ¶ 58.
154 Report No. 272, *supra* note 74, at 33.
155 *See* Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, No. 2 of 2021 (India).
156 Vidya Drolia II, (2021) 2 SCC 1, ¶ 58 (India).

The journey to identify this better way forward again begins with a consideration of the Delhi High Court's judgment in *HDFC Bank*. While speaking about statutory rights and obligations that override contracts,[157] the Delhi High Court essentially referred to the notion of mandatory or non-derogable laws, whose application cannot be excluded by means of any contractual agreement.[158] The question as to whether an arbitrator can adjudicate disputes in respect of mandatory laws has plagued the arbitral community through the march of time and jurisprudence.[159] This is primarily because of the apprehension that parties, in furtherance of their freedom of contract, could subject their contract as well as an arbitral tribunal to an external applicable legal system, which does not contain the mandatory law in question. Thus, to the extent that the Delhi High Court is wary of mandatory laws, containing special rights and obligations, being subjected to arbitration, its fears are well-founded and echoed around the world.

Nonetheless, keeping in mind a crucial difference between the jurisdiction of a tribunal on the one hand, and the applicable substantive law before it on the other, may go a long way in refining the outlook towards disputes canvassing the territory of mandatory laws. In this regard, inspiration may be drawn from the USA Supreme Court's decision in *Mitsubishi* v. *Soler Chrysler-Plymouth,* where the Court was faced with the dilemma of referring parties to arbitration in respect of a dispute that triggered the application of the mandatory antitrust laws of the USA. The solution ultimately adopted by the Court was that if the parties to the arbitration agreement agree that the arbitral tribunal has to "*decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim*", i.e., USA's antitrust law in that case.[160] Thus, the Court did not strip the tribunal of its jurisdiction merely because the tribunal, in order to make a proper determination of the case, would have had to apply a (foreign) mandatory law. Instead, the Court appeared to mandate the tribunal to apply the law in question, in light of the parties' agreement.[161] If that were not done by the tribunal, the Court declared its authority "*to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed*" at the award enforcement stage.[162]

A similar approach may be advisable for arbitrations in India, domestic and international alike, whereby courts could seek an agreement from the parties to have the tribunal apply the mandatory law in question, despite it containing special rights and obligations. In the event that such an agreement comes through, the arbitrability of a dispute that requires the application of mandatory laws need not be called in question at the stage of referring the parties to arbitration. This is particularly so since the Court ultimately retains the power to oversee the application of mandatory provisions. The authors' suggestion resonates with the observations made by the Supreme Court of India in *Vidya Drolia*, while clarifying the relationship between arbitrability and mandatory laws:

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157 *See, e.g.,* Delhi Rent Control Act, No. 59 of 1958, §§ 5(1), 14(1), 14A(1), 14A(2) (India). These provisions contain numerous *non-obstante* clauses that override contrary contractual stipulations.

158 *See* Harshad Pathak & Pratyush Panjwani, *Mandatory Rules and the Dwindling Restraint of Arbitrability*, 5 NLUD STUDENT L. REV. 82 (2018).

159 *See* Pierre, Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARB. INT'L. 274 (1986) [*hereinafter* "Pierre Mayer"]; Alexander K.A. Greenawalt, *Does International Arbitration need a Mandatory Rules method?*, 18 AM. REV. INT'L ARB. 103 (2007).

160 Mitsubishi v. Soler Chrysler-Plymouth*,* 473 U.S. 614 (1985), ¶ 38, fn. 19 [*hereinafter* "Mitsubishi"].

161 *See* Pierre Mayer, *supra* note 159.

162 Mitsubishi, 473 U.S. 614 (1985).

> "*Application of mandatory law to the merits of the case do not imply that the right to arbitrate is taken away. Mandatory law may require a particular substantive rule to be applied, but this would not preclude arbitration. […] An arbitrator, like the court, is equally bound by the public policy behind the statute while examining the claim on merits. […] There is a general presumption in favour of arbitrability, which is not excluded simply because the dispute is permeated by applicability of mandatory law. Violation of public policy by the arbitrator could well result in setting aside the award on the ground of failure to follow the fundamental policy of law in India, but not on the ground that the subject matter of the dispute was non-arbitrable.*"[163]

Accordingly, courts can encourage the parties to specifically agree to bind their tribunal to apply the mandatory laws regardless of the contractually agreed legal regime. If courts are amenable to such an amicable resolution, the Indian approach will steer closer to the internationally accepted outlook that focuses on employing practical case management techniques, rather than stubbornly foreclosing the doors to arbitration.

V. Conclusion

A significant part of how the notion of arbitrability is understood in each jurisdiction has a lot to do with the state's proclivity for arbitration. Simply put, in its conventional form, arbitrability is nothing more than a "*gateway*"[164] issue that filters disputes that are inherently unsuitable for arbitration. However, while many other jurisdictions have adopted a definitive understanding of arbitrability, be it narrow or broad, through legislative clarity, Indian arbitration jurisprudence in this regard has been rather inconsistent. It appears to reflect a tussle between the legislative and judicial organ of the state. This assertion was recently exemplified by the National Consumer Dispute Redressal Commission, when it observed that "*disputes are not characterized as arbitrable and non-arbitrable at the whim and fancy of the Legislature,*" before insisting that the "*[l]egislature and Judiciary have built this jurisprudence with consensus and harmony.*"[165]

The authors do not question the contribution of either the Indian legislature or the judiciary in developing the jurisprudence surrounding arbitrability in India. In fact, they support it since it is consistent with India's common-law tradition. However, what the authors certainly challenge is the assertion that such development occurred "*with consensus and harmony.*" In fact, the above analysis clearly demonstrates to the contrary. Consequently, in this article, the authors attempt to undo some of the convolutions that have crept into the understanding of arbitrability in India, to move towards a more simplistic and consistent conceptualization of it.

What emerges from the above discussion is that despite witnessing gradual progress, the Indian understanding of the arbitrability doctrine remains marred fundamental inconsistencies, especially in relation to the process of tribunalisation. Over time, Indian courts have adjudged many categories of *in personam* disputes inarbitrable by "*necessary implication*" merely because they do not fall within the jurisdiction of a civil court, but rather a special tribunal. While the Delhi High Court had attempted to introduce an element of nuance in this discourse, the Supreme Court of India's judgment in *Vidya Drolia* was a misstep. Even otherwise, Indian courts have added some alien elements, such as principles of law for resolving statutory conflict, to the discourse surrounding

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163 Vidya Drolia II, (2021) 2 SCC 1, ¶ 68 (India).
164 George Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE L.J. 1, 10–13 (2012).
165 Aftab Singh, 2017 SCC OnLine NCDRC 1614, ¶ 29 (India).

the doctrine of arbitrability. They remain equally oblivious to the fact that they have an unrestricted power to review issues of arbitrability at the stage of annulment or enforcement of an arbitral award, which ought to allow them to adopt a more mature approach in dealing with the impact of tribunalisation. Yet, they often overlook that opening the gateway of arbitrability to allow categories of *in personam* disputes to arbitration will not leave the parties completely remediless.

Fortunately, there is ample opportunity for Indian courts, and particularly the Supreme Court, to take constructive steps in this regard. An increased emphasis on simply ensuring the application of mandatory laws in India, as opposed to tightening the screws of arbitrability, may allow one to disentangle some of the unintended knots that have been created. This article is, ultimately, one such attempt in that direction.