ARBITRABILITY OF CONSUMER DISPUTES: EXCAVATING THE HINTERLAND

Kashish Sinha[*] *& Manisha Gupta*[†]

Abstract

In international commercial arbitration, each country seeks to define a specific set of subject matters that it wants to keep out of the purview of arbitration. Such determination is primarily based on the public policy and the legislative mandate of each jurisdiction. In the context of arbitrability of consumer disputes, the Indian Supreme Court recently had the opportunity to demystify the uncertainties surrounding the same in Emaar MGF v. *Aftab Singh (2018). Contrary to the anticipation of all, the Court, following a regressive trend, turned down the opportunity presented to fine-tune the interplay between the remedies available under the arbitration law and the national consumer legislation. Without a doubt, there is a need for a consumer protection regime to balance out the bargaining power between the consumers and traders, but the same should not be carried out in a manner that damages the essential fabric of arbitration. By analysing the judgments preceding the abovementioned case, the paper seeks to argue on the lines that the reasoning that once reduced consumer arbitration to a nullity does not hold water anymore. This is followed by a comparative analysis of the Indian trend with the global scenario, to highlight the eminence of the need for change in India's stance and permit mandatory reference under Section 8 of the Arbitration and Conciliation Act, 1996 in case of a post-dispute arbitration agreement. The concluding part of the paper highlights the increasing need for an effective online dispute resolution mechanism, arguing that India should endeavour to provide such a mechanism if arbitration is not plausible.*

I. Introduction: Preface to the Consumer Dispute Arbitrability Conundrum

In India, the sight of consumers threatening to drag traders to court for the most trivial of issues is commonly observed. In the wake of such an attitude, Indian consumers live in a bubble that they have a higher bargaining power vis-à-vis the traders. However, contrary to such presumption, it is often the traders who have an upper hand in such cases. All this is made possible because of a sly trick of the hand, wherein the traders provide for a *mandatory arbitration* or *exclusive jurisdiction* clause in the standard form of contract. Since most consumers provide assent to the same without properly going through the terms, the miserable sight of consumers trying to resist the enforcement of such clauses is routinely seen.[1] The advent of e-commerce, wherein the consumers on an average spend a mere 30 seconds reading bulky terms and conditions, has worsened matters. Such practices have led the judiciary to take a closer look at the applicability of Section 8 of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"],

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[*] Kashish Sinha is a IV Year B.A., LL.B. (Hons.) student at the Dr. Ram Manohar Lohiya National Law University.

[†] Manisha Gupta is a V Year B.A., LL.B. (Hons.) student at the Dr. Ram Manohar Lohiya National Law University

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[1] National Seeds Corporation Ltd. v. M. Madhusudhan Reddy & Anr., (2012) 2 SCC 506 (India) [*hereinafter* "National Seeds Corporation"]; Aftab Singh v. Emaar M.G.F. Land Ltd., IA/247/2016, July 13, 2017 (National Consumer Dispute Redressal Commission, New Delhi) (India); M/S Emaar M.G.F. Land Ltd. v. Aftab Singh, F.A.O. 395/2017, Nov. 7, 2017 (Delhi High Court) (India).

which operates as a 'legislative command' on the courts to refer the matter to arbitration, where the matter is subject to an arbitration agreement.[2]

Although the Supreme Court in its 2009 ruling opined that, in the presence of a valid arbitration agreement, the Court is mandated to refer the matter for arbitration,[3] the binding force of the same has been diluted over the course of time. The primary cause of this is the advent of the *'arbitrability (*or *non-arbitrability) doctrine'*.[4] Consequently, disputing the arbitrability of the subject matter i.e. whether a matter is capable of settlement by arbitration, has become a trend. This has been the first line of defence to resist an application filed under Section 8, seeking mandatory reference to arbitration.[5] Similar objections have also been raised regarding the arbitrability of consumer matters, which this paper seeks to address.

The *first part* of this paper seeks to decode the arbitrability doctrine and the rationale behind it. Post a rudimentary understanding, the paper in its *second part* seeks to analyse if the Consumer Protection Act, 1986 ["**COPRA**"], which was intended to be a beneficial legislation, has fulfilled its object, or if there exists a need for arbitration in a consumer forum. Upon establishing the ever-increasing need for arbitration in consumer disputes, the *third part* of the paper tries to trace the trend followed by the Indian judiciary in referring consumers to arbitration and decode if it favours the same. The *fourth part* carries out a comparative analysis of the Indian trend on consumer arbitration with the global trend. On a concluding note, the *fifth part* of the paper seeks to check if the rationale for classifying consumer disputes as non-arbitrable still holds water.

II. The Alkaline Test of Arbitrability: What is Arbitrable and Why?

Although it is difficult to define the arbitrability of a dispute in precise terms, it is a precondition for the enforcement of an arbitration agreement.[6] Even though much has been enumerated with regard to this in the international fora, the Arbitration Act does not address the question of the scope of arbitration i.e. the subject matters that fall within the purview of adjudication by a private forum. On this point, the foundational UNCITRAL Model Law on International Commercial Arbitration ["**Model Law**"] also does not provide any guidance. Article 34(2)(b)(i) of the Model Law merely mentions inarbitrability of the dispute as a ground for setting aside an award. Since the Indian legislation is largely drawn as per the schematics of the Model Law, the

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2 The Arbitration and Conciliation Act, No. 26 of 1996, §8(1) (India); Magma Leasing & Finance Ltd. v. Potluri Madhavilata, (2009) 10 SCC 103, ¶ 18 (India) [*hereinafter* "Magma Leasing"]; Parul Kumar, *Is Fraud Arbitrable? Examining the Problematic Indian Discourse*, 33(4) ARB. INT'L 268, 272 (2017).

3 Magma Leasing, (2009) 10 SCC 103, ¶ 17 (India).

4 Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 (India) [*hereinafter* "Booz Allen"]; Agnish Aditya & Siddharth Nigotia, *Semantic and doctrinal restructuring of 'arbitrability': examining Brekoulakis' arguments in the Indian context*, 33(4) ARB. INT'L 609, 611, 618 (2017).

5 Kingfisher Airlines Limited v. Prithvi Malhotra, (2013) 136 FLR (HC) 733 (Nov. 20, 2011) (India) [*hereinafter* "Kingfisher Airlines"]; A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386 (India) [*hereinafter* "A. Ayyasamy"]; Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 (India) [*hereinafter* "Vimal Kishor"]; *see also* Binsy Susan & Himanshu Malhotra, *Arbitrability of Lease Deed Disputes in India – The Apex Court Answers,* KLUWER ARB. BLOG (Feb. 19, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/02/19/arbitrability-lease-deed-disputes-india-apex-court-answers/.

6 Stavros Brekoulakis, *On Arbitrability: Persisting Misconceptions and New Areas of Concern*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 1-16 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).

Model Law has been reproduced and finds mention in Section 34(2)(b)(i) of the Arbitration Act.[7] The presence of such a provision empowers the courts to set aside awards on the ground that the subject matter of the dispute is incapable of settlement through arbitration under law, or that it is opposed to public policy. Although such a provision exists, the statute does not provide for an exhaustive list of disputes that are not to be arbitrated upon. This appears to be a deliberate act on the part of the legislature, whereby it left the question open-ended with intent.[8] This inevitably indicates that disputes concerning subject matters that are not arbitrable, and the arbitrability of a subject matter, are open for challenge before the judiciary.

In the absence of a black letter law drawing the line, the Indian judiciary facilitates such challenges based on the '*arbitrability test*' propounded by the Apex Court in *Booz Allen and Hamilton Inc.* v. *SBI Home Finance Ltd.* ["**Booz Allen**"]. The Court in the aforesaid case held that disputes are non-arbitrable only when the subject-matter falls exclusively within the Court's domain, and outlined certain instances such as matrimonial disputes and guardianship matters which would be outside the purview of arbitration.[9] The rationale behind the same lies in the fact that certain categories of proceedings are reserved by the legislature exclusively for determination by the *public fora* i.e. the national courts, either expressly or impliedly.[10] Such reservations by the legislature form part of public policy and consequently, a private tribunal cannot be vested with the power to adjudicate the same.[11] The same is also based on the rationale that dispute resolution in private fora usually involves a right *in personam*, whereas a right *in rem* would not be arbitrable. This principle forms the bedrock for the determination of arbitrability of disputes. Therefore, if an arbitration agreement seeks to provide an avenue for resolution of a dispute by a private redressal mechanism, the same should not fall within the narrow contours of proceedings reserved for adjudication by the national courts.[12] In simpler terms, if the subject matter of a dispute qualifies to be a non-arbitrable subject, the courts will not be obligated to refer the parties to arbitration and such a ruling will be binding on the arbitral tribunals, an arbitral tribunal cannot be seen to oust the jurisdiction of a special court.[13] The primary reason for this is that for dispute resolution, several statutes create special fora such as labour courts, consumer courts, etc., which do not fall within the definition of 'Civil Court' as defined in Section 2(1)(e)

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7 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33 (Dec. 18, 2006) U.N. Doc. A/RES/61/33 [*hereinafter* "UNCITRAL Model Law"]; The Arbitration and Conciliation Act, No. 26 of 1996, § 34 (India):
"34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3). .....(2) An arbitral award may be set aside by the Court only if—
(b) the Court finds that—
(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force*"*.

8 P.C.MARKANDA ET AL., LAW RELATING TO ARBITRATION AND CONCILIATION 552 (8th ed. 2006).

9 Booz Allen, (2011) 5 SCC 532 (India).

10 *Id.* ¶ 20.

11 Tanya Choudhary, *Arbitrability of Competition Law Disputes in India — Where Are We Now and Where Do We Go from Here?*, 4(2) INDIAN J. ARB. L. 69, 73-74 (2013); Ajar Rab, *Redressal Mechanism under The Real Estate (Regulation and Development) Act 2016: Ouster of the Arbitral Tribunal*, 10(1) NAT'L U. JURID. SCI. L. REV. 1, 16 (2017).

12 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 769 (2d ed. 2014); Joseph Mante, *Arbitrability and Public Policy: An African Perspective,* 33(2) ARB. INT'L 275, 282 (2016).

13 S.B.P. & Co. v. Patel Engineering, (2005) 8 SCC 618, ¶¶ 24, 37 (India).

of the Arbitration Act.[14] Conferment of exclusive jurisdiction to such courts is a matter of public policy, thus taking adjudication of such disputes by a private forum out of the equation.[15]

III. Need for Arbitration in Consumer Disputes Pertaining to the E-Commerce Regime

The benefits-cum-marketing gimmicks of e-commerce, like one-day guaranteed delivery and 100% cash backs, have resulted in such an infiltration of the consumer market that they have completely changed the outlook of the Indian consumer towards e-commerce. Although it may sound unreal, today the same Indian consumer, who was once categorized as over-cautious and sceptical when it came to e-commerce, is the primary driving force behind the rise of mobile giants like Redmi and OnePlus, thanks to their flash sales online.

However, such a meteoric rise of the e-commerce giants in India has not been a fairy-tale. This phase, signifying their rise in the market, has been marred with instances where consumers have been duped by the giants with no effective remedy to resort to. In the recent past, the same has ranged from delivery of damaged or fake products, to the delivery of stones and dishwashing bars that have been packed in iPhone boxes. Although consumer courts exist as special forums for the redressal of such complaints, of late, these forums have proved to be ineffective. This is the consequence of the mechanism being over-loaded and corruption laden and has become a cause of concern for consumers.[16] Even though the statute provides for a range of three to six months as an ideal time period for the disposal of a complaint,[17] this is far from being the reality. At ground zero, in 2014, consumers were waiting for two-three years for an order.[18] Although the consumer protectionist legal regime provides for a balance of convenience tilted in favour of the consumer, the same has been unable to provide a cost-effective mechanism to the consumers for resolution of disputes.

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14 The Arbitration and Conciliation Act, No. 26 of 1996 (India), § (2)(1)(e):
"2. Definitions.—(1) In this Part, unless the context otherwise requires,—
….
(e) "Court" means—
(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;
(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court.".

15 Booz Allen, (2011) 5 SCC 532, ¶ 20 (India); National Seeds Corporation, (2012) 2 SCC 506, ¶ 66 (India).

16 Delhi State & District Consumer Courts Practitioner's Welfare Association (Regd.) v. Hon'ble Lt. Governor Govt. Of NCT Delhi and Ors., W.P. (C) 9458/2015, (Delhi High Court) (India); *see also,* Aneesha Mathur, *2 pleas on poor functioning of district consumer forums in Delhi HC*, THE INDIAN EXPRESS (Nov. 21, 2015), *available at* https://indianexpress.com/article/cities/delhi/2-pleas-on-poor-functioning-of-district-consumer-forums-in-delhi-hc/.

17 The Consumer Protection Act, No. 68 of 1968, § 13(3A) (India).

18 Times News Network, *3.7 lakh cases pending in consumer forums*, TIMES OF INDIA (Nov. 24, 2014), *available at* https://timesofindia.indiatimes.com/india/3-7-lakh-cases-pending-in-consumer-forums/articleshow/45253646.cms.

The current reflection of the state of affairs in India, pertaining to consumer dispute resolution, is the exact opposite of what was envisaged by the COPRA. In reality, the consumer fora that were once created for speedy and effective resolution of disputes have, in turn, come to match normal courts. What makes the situation all the more dismal is that as of 2017, despite only 14% of India's internet users shopping online, the consumer courts were unable to keep up with the case load. With an expected increase in online consumers from 60 million in 2016 to 475 million by 2026, this is a serious cause for concern as far as dispute resolution is concerned.[19] To counter this, the government has taken initiative, but this has been far from successful. One such initiative is the recently launched Online Consumer Mediation Centre that saw a slow start in the past year. One of the major reasons cited for this slow start was the non-cooperation of the e-commerce vendors, which arises because of the non-binding nature of mediation as a dispute settlement mechanism.[20]

In the wake of the meteoric rise in e-commerce, it is essential that India begins the process of institutionalisation of online dispute resolution in time.[21] The transition to online dispute resolution is necessary to avoid a situation wherein the consumers are left without any real remedy, which is worth its weight in gold, even if it is a leap of faith.[22] This is because if India starts to facilitate online arbitration that consumers can resort to by virtue of a binding arbitration agreement, the same, unlike the Online Consumer Mediation Centre, will not be toothless to force the vendors to come for dispute resolution.

It is interesting to note that the Indian courts have recognised the validity and enforceability of individual online arbitration agreements, even the ones concluded over e-mail,[23] thereby laying down the foundation for online arbitration. In simple terms, online arbitration is drawn out on similar schematics as traditional arbitration, the only difference lies in the manner the two are conducted. Unlike traditional arbitration which is costly, online arbitration proceedings happen online, saving time and cost. For instance, under online arbitration, evidence can be uploaded, and the parties can present their cases in a chatroom, saving the millions of dollars spent on hotel rooms.[24] Such a model provides for time and cost efficiency, the quintessential need in consumer disputes. Due to the advantages that it has to offer, there exists a pressing need for an

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19 Sushma U. N., *Morgan Stanley explains why India's e-commerce market is a hot investment opportunity*, QUARTZ INDIA (Sept. 29, 2017), *available at* https://qz.com/1089559/morgan-stanley-explains-why-indias-e-commerce-market-is-a-hot-investment-opportunity/.

20 Mugdha Variyar, *Econsumer mediation centre gets off to a slow start*, ECONOMIC TIMES (Jan. 01, 2018), *available at* https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/econsumer-mediation-centre-gets-off-to-a-slow-start/articleshow/62321215.cms; Sanjeeb Mukherjee, *For e-commerce purchases: Centre to open online consumer mediation centre*, BUSINESS STANDARD (Dec. 23, 2016), *available at* https://www.business-standard.com/article/current-affairs/for-e-commerce-purchases-centre-to-open-online-consumer-mediation-centre-116122300035_1.html.

21 Karolina Mania, *Online dispute resolution: The future of justice,* 1 INT'L COMP. JURIS. 76, 86 (2015).

22 Gabrielle Kaufmann-Kohler, *Online Dispute Resolution and its Significance for International Commercial Arbitration*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION 437, 444-445 (Gerald Aksen ed., 2009).

23 Trimex International FZE Ltd. v. Vedanta Aluminium Ltd., (2010) 3 SCC 1 (India); Shakti Bhog Foods Ltd. v. Kola Shipping Ltd., (2009) 2 SCC 134 (India).

24 Derric Yeoh, *Is Online Dispute Resolution The Future of Alternative Dispute Resolution*, KLUWER ARB. BLOG (Mar. 29, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/.

online dispute resolution mechanism that can facilitate consumer arbitration without requiring consumers to pen down every procedure for arbitration.

IV. The Existing Interplay between the Indian Consumer Protectionist Law and Arbitration

As discussed above, the determination as to the capability of the dispute to be resolved through arbitration hinges on two factors, *first*, the nature of the remedy sought in the dispute i.e. whether the remedy sought is *in rem* or *in personem* and *second*, whether the remedy sought can exclusively be granted by a special court or tribunal or by an arbitral tribunal i.e. a private forum.[25] These two factors are the primary determinants that influence considerations of arbitrability and the same has been reaffirmed in the recent holding of the Supreme Court in *A. Ayyasamy* v. *A. Paramasivam* ["**A. Ayyasamy**"].[26] In the evaluation of the arbitrability of consumer disputes, the first factor, namely, the nature of the remedy sought, does not seem to raise eyebrows. The ships of consumer arbitration sail seemingly unfettered on this front, as disputes primarily arise out of the agreement for sale between the consumer and service provider.[27] Accordingly, the arbitrator has to merely provide remedies against the parties to the dispute itself i.e. *in personam* and not against the world at large i.e. *in rem*.[28] However, evaluation of the second factor has been a different ball game altogether. The statutory creation of consumer forums as a separate mechanism dedicated for consumer dispute redressal, presents a major blockade for arbitration in consumer matters as the merchant is left at the misery of the consumer for a reference to arbitration.[29] Therefore, in this part, we analyse the rationale behind labelling consumer disputes as inarbitrable and see if the same still holds relevance.

A. How Did Consumer Disputes come to be Inarbitrable: the Troika of Three Supreme Court Rulings

i.Year 1996, where it all started: Fair Air Engineers Pvt. Ltd. and Anr. v. N.K. Modi

The trend of giving precedence to the 'welfare legislation' and allowing the consumer to resort to the consumer forum despite the existence of a valid arbitration agreement dates back to 1996.[30] In the pre-1996 period, the questions pertaining to the mandatory reference of consumers to arbitration were settled for the first time in *Fair Air Engineers Pvt. Ltd. and Anr.* v. *N.K. Modi*.[31] The Supreme Court, taking a pro-consumer stand, endorsed the idea of giving precedence to the beneficial consumer legislation over the mandatory provisions of the Arbitration Act, 1940. The rationale for the same was based on the very reason for the genesis of a separate dispute

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25 Booz Allen, (2011) 5 SCC 532, ¶ 19 (India); R.K. Productions Pvt. Ltd. v. M/s N.K. Theatres Pvt. Ltd., (2012) SCC OnLine Mad 5029, ¶ 18 (India).

26 Fali S. Nariman, *National Report for India (2015), in* ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 53, 54 (Jan Paulsson & Lise Bosman eds., 2017); A. Ayyasamy, (2016) 10 SCC 386, ¶ 38 (India).

27 Pilar P. Viscasillas, *The Good, the Bad, and the Ugly in Distribution Contracts: Limitation of Party Autonomy in Arbitration?*, 4 PENN. ST. J.L. & INT'L AFF. 213 (2015).

28 Booz Allen, (2011) 5 SCC 532, ¶¶ 19, 37, 38 (India); Eros International Media Limited v. Telemax Links India Pvt. Ltd. and Ors., Suit No. 331 of 2013, Apr. 12, 2016, (Bombay High Court), ¶ 9 (India); Steel Authority of India Ltd. v. S.K.S. Ispat and Power Ltd. and Ors., Suit No. 673 of 2014, Nov. 21, 2014, (Bombay High Court), ¶ 4 (India).

29 A. Ayyasamy, (2016) 10 SCC 386 (India); Natraj Studios (P.) Ltd. v. Navrang Studios and Anr., (1981) 1 SCC 523, ¶ 17 (India) [*hereinafter* "Natraj"].

30 O.P. MALHOTRA, THE LAW OF INDUSTRIAL DISPUTE 46 (E.M. Rao ed., 6th ed. 2006).

31 Fair Air Engineers Pvt. Ltd. v. N.K. Modi, (1996) 6 SCC 385, ¶¶ 15, 16 (India) [*hereinafter* "Fair Air Engineers"].

resolution forum for consumers i.e. to relieve consumers of cumbersome arbitration and civil court proceedings. As a consequence, although the courts were obliged to mandatorily refer the parties to arbitration in the presence of a valid arbitration agreement, this legislative mandate was diluted. In doing so, the court endowed the consumers with a choice to either proceed with arbitration or take the dispute before the consumer forum. The court facilitated the same on the grounds of a twofold reasoning, *first,* the legislature intentionally provided such remedy, based on the fact that the consumer legislation came at a later date in time i.e. it succeeded the Arbitration Act, 1940, and *second*, the remedy provided under the COPRA, is an additional remedy available to the consumers.[32] Under Indian law, the later law supersedes the earlier, on the ground that the legislators would have given due heed to all existing laws at the time of formulation of the later law and would have intended to give it an overriding effect in case of an overlap with a prior law.[33] Further, the fact that the COPRA is a special law (*lex specialis*) gives it precedence as the Arbitration Act merely deals with arbitration proceedings in general (*lex generalis*).[34]

Acceding to the fact that consumer fora qualify as 'judicial authority' under the Arbitration Act, 1940, the Court proceeded to analyse the extent of the embargo placed upon the intervention of the courts in this regard. For this, the Court relied upon the wording of Section 3 of the COPRA, which provides that the act should be in addition to and not in derogation of the provisions of any other law for the time being in force.[35] By a plain reading of the section, the Court observed that the remedies provided in the COPRA are additional remedies and the Arbitration Act, 1940 cannot operate to curtail the same.[36] To substantiate the same, the court looked into the implied intention of the legislators. The court noted that the Act was enacted to provide for better protection of the interests of consumers and for the aforesaid purpose, it established consumer councils and other authorities for the settlement of consumer disputes. In addition, the fact that the Arbitration Act, 1940 and the Indian Contract Act, 1872 both existed prior to the enactment of the consumer legislation was used to draw an inference that the Parliament intended to provide remedies in addition to those provided in the earlier acts.[37] Lately, this line of reasoning has repeatedly been relied on under the Arbitration Act and has been further reinforced by the Supreme Court.[38] In the 2013 judgment of the Supreme Court in *Skypak Couriers Ltd.* v. *Tata Chemicals Ltd.* ["**Skypak Couriers**"], the Court rejected the application under Section 8 for mandatory reference to arbitration on the same grounds and held:

> "*2. Even if there exists an arbitration clause in an agreement and a complaint is made by the consumer, in relation to a certain efficiency of service, then the existence of an arbitration*

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32 *Id.*

33 Ethiopian Airlines v. Ganesh Narain Saboo, (2011) 8 SCC 539, ¶ 65 (India); Maruti Udyog Limited v. Ram Lal and Ors., (2005) 2 SCC 638, ¶ 42 (India).

34 CTO Rajasthan v. M/S Binani Cement Ltd., (2014) 8 SCC 319, ¶ 27 (India).

35 Consumer Protection Act 1986, No. 68 of 1986, § 3 (India); Kritika Rastogi, *Indian Consumer: A Losing Identity*, MANUPATRA, *available at* www.manupatra.com/roundup/345/Articles/Indian%20Consumer.pdf.

36 National Seeds Corporation, (2012) 2 SCC 506, ¶ 66 (India); Rajesh Kumar Agrawal v. Tulsi Electronic, W.P. (227) No.399 of 2014, Dec. 9, 2016, (Chhattisgarh High Court), ¶ 15 (India).

37 Fair Air Engineers, (1996) 6 SCC 385, ¶ 14 (India).

38 National Seeds Corporation, (2012) 2 SCC 506 (India); Skypak Couriers Ltd. v. Tata Chemicals Ltd., AIR. 2000 SC 2008 (India) [*hereinafter* "Skypak Couriers"].

> *clause will not be a bar to the entertainment of the complaint by the Redressal Agency, constituted under the Consumer Protection Act, since the remedy provided under the Act is in addition to the provisions of any other law for the time being in force.*".[39]

ii.Deploying the beneficial rule of interpretation: Thirumugugan Cooperative Agricultural Credit Society v. M. Lalitha

Out of the vast variety of legislations that exist in a legal regime, few are enacted with the object of promoting general welfare and curbing a specific kind of wrong. In the Indian context, the COPRA qualifies to be one such beneficial legislation enacted to curb the abuse that consumers are subjected to in the dispute resolution process.[40] Regarding the contours of interpreting the same, the unanimous stand has been that it should be subjected to the broadest construction possible.[41] In light of this, the staunch deities of consumer legislations often see arbitration in consumer fora as an unacceptable proposition. This resistance is a result of an apprehension that by allowing mandatory reference to arbitration, the separate dispute resolution mechanism under the COPRA will lose its sanctity and may possibly become redundant. This reasoning saw recognition by the Court in 2003 in *Secy., Thirumurugan Cooperative Agricultural Credit Society* v. *M. Lalitha* ["**M. Lalitha**"],[42] wherein the existence of an arbitration clause did not operate to bar the adjudication of the complaint by a consumer forum and the court emphasised that the nature of consumer forums is such that they purposely provide additional remedy to the consumer. The above observation was based on entrenched ideals surrounding consumer jurisprudence. Therefore, an analysis as to the wording of the COPRA becomes imperative to understand the kind of rights it seeks to protect.[43]

The preamble of the COPRA envisages better protection of the interests of consumers. For the fulfilment of this object, the establishment of quasi-judicial tribunals at different levels was sought. This need was fuelled by the desire to accord consumers with a mechanism that is cheaper, easier, more expeditious and more effective in redressing consumers' disputes as compared to national courts. Purposive reading of the statute evidently hints that unlike other legislations that create dispute resolution mechanisms between level players, this legislation establishes a level-playing field between unequal players i.e. consumers and large corporations.[44] This line of thought found its fullest judicial recognition when the same was relied upon in *M. Lalitha.* The single judge bench in *M. Lalitha,* reiterating the same, held that the schematics of the COPRA reflect the intention of the drafters to relieve the consumers of being played unequally in cumbersome arbitration proceedings or civil actions before ordinary courts.[45] Consequently, this decision deprived Section 8 of the Arbitration Act of its fullest effect and recognized the supplanting effect of consumer legislation over the arbitration regime. This has been one of the

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39 Skypak Couriers, AIR 2000 SC 2008, ¶ 2 (India).

40 Spring Meadows Hospital v. Harjol Ahluwalia JT, (1998) 4 SCC 39, 620 (India); Dr. Suresh Patidar, *The Consumer Protection Act, 1986 of India – 25 Years of Enactment: A Critical Study*, 6(6) PACIFIC BUS. REV. IN'TL (2013).

41 State of Karnataka v. Vishwabharathi House Building Co-op. Society, (2003) 2 SCC 412 (India); Kishore Lal v. Chairman, Employees' State Insurance Corporation, (2007) 4 SCC 579 (India).

42 Secy., Thirumurugan Cooperative Agricultural Credit Society v. M. Lalitha, (2004) 1 SCC 305, ¶¶ 10, 11 (India) [*hereinafter* "M. Lalitha"].

43 *Id.*; Rosedale Developers Pvt. Ltd. v. Aghore Bhattacharya, (2015) 1 WBLR 385 (SC) (India).

44 Lucknow Development Authority v. M.K. Gupta, (1994) 1 SCC 243, ¶ 2 (India).

45 M. Lalitha, (2004) 1 SCC 305, ¶ 16 (India).

biggest factors because of which consumer disputes have been categorized as inarbitrable. This line of reasoning has found recognition by the Supreme Court in a decision as late as 2017, i.e. *National Insurance Co. Ltd.* v. *Hindustan Safety Glass Works Ltd.,* wherein the Court observed*:*

> "*In a dispute concerning a consumer, it is necessary for the courts to take a pragmatic view of the rights of the consumer principally since it is the consumer who is placed at a disadvantage vis-a-vis the supplier of services or goods. It is to overcome this disadvantage that a beneficent legislation in the form of the Consumer Protection Act, 1986 was enacted by Parliament.*".[46]

iii.<u>*Parties cannot opt out of the exclusive jurisdiction of the consumer forum: A. Ayyasamy v. A. Paramasivam and Ors.*</u>

The famous judgment of the Supreme Court in the *A. Ayyasamy* case laid down a definitive list of inarbitrable disputes, which includes 'consumer disputes'.[47] In the face of glaring dichotomy, the Court arrived at this conclusion by relying on the decisions in *National Seeds Corporation Ltd.* v. *M. Madhusudhan Reddy* ["**National Seeds Corporation**"] and *Skypak Couriers* in the years 2012 and 2013, respectively. Placing reliance on both the judgments,[48] it was expected that the Supreme Court would leave an avenue for the consumer to opt for arbitration, if they wished to. Instead, the Court arrived at a completely contrasting observation. In *A. Ayyasamy,* the Court opined that since the jurisdiction of the ordinary civil court is excluded by the conferment of exclusive jurisdiction on a consumer court, matters pertaining to consumer disputes become inarbitrable as a matter of public policy as well.[49] The Court noted that parties are prohibited from contracting out of the legislative mandate, when it is a matter governed by a welfare legislation.[50] Thus, the decision in the *A. Ayyasamy* case put the final nail in the coffin and made consumer dispute completely inarbitrable.

The attribute that made the 2012 ruling in the *National Seeds Corporation* case stand out in consumer arbitration jurisprudence, was that it provided the best possible way to balance the consumer's interest. It provided a stand that was the perfect blend of flexibility and rigidness to the consumer, on account of providing the consumer with a choice as to which forum it wants the dispute to be adjudicated in.[51] Even though the Court observed that Section 8 of the Arbitration Act could not operate to bar the consumer's choice of resorting to a specialized tribunal, they provided a check against the same: the safety valve put in place was such that, once the consumer makes such a choice, the same cannot be undone and there can be no subsequent reference to arbitration.[52] Such reasoning even found resonance in the matters deciding the arbitrability of other subject matters like labour disputes, which is governed by a similar

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46 National Insurance Co. Ltd. v. Hindustan Safety Glass Works Ltd., (2017) 5 SCC 776, ¶ 18 (India).

47 A. Ayyasamy, (2016) 10 SCC 386 (India); Booz Allen,(2011) 5 SCC 532, ¶¶ 19, 37, 38 (India).

48 National Seeds Corporation, (2012) 2 SCC 506 (India); Skypak Couriers, AIR 2000 SC 2008 (India); The Arbitration and Conciliation Act, No. 26 of 1996, § 5 (India).

49 A. Ayyasamy, (2016) 10 SCC 386 (India); MICHAEL J. ET AL., LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND (2d ed. 1989); FRANCIS RUSSEL, RUSSEL ON ARBITRATION, 28 (David St. John Sutton et al. eds., 23rd ed. 2014).

50 A. Ayyasamy, (2016) 10 SCC 386, ¶ 7 (India).

51 National Seeds Corporation, (2012) 2 SCC 506, ¶ 29 (India).

52 National Seeds Corporation, (2012) 2 SCC 506, ¶ 31 (India).

beneficial legislation.[53] This was also followed in the *National Seeds Corporation* case that elaborately dealt with the arbitrability of consumer disputes:

> "*The remedy of arbitration is not the only remedy available to a grower. Rather, it is an optional remedy. He can either seek reference to an arbitrator or file a complaint under the Consumer Protection 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 Protection 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 and Conciliation Act, 1996. Moreover, the plain language of Section 3 of the Consumer Protection Act makes it clear that the remedy available in that Act is in addition to and not in derogation of the provisions of any other law for the time being in force.*".[54]

When the Court took up the task of defining the term 'arbitrability' in *A. Ayyasamy*, it erred by expanding the effects of inarbitrability to consumer disputes. This was done due to a conjoint reading of all the decisions on arbitrability of a dispute that fell within the ambit of a beneficial legislation. In furtherance of the same, the Court relied upon the observation in *Vimal Kishor Shah & Ors.* v. *Jayesh Dinesh Shah* (this case analysed the conflict between a choice arbitration based on a trust deed and a welfare legislation i.e. the Indian Trust Act, 1882), wherein it was held that the nature of the remedy accorded by welfare legislations permanently ousts the jurisdiction of the arbitral tribunal.[55] This was reasoned on the ground that the arbitrator is not capable of granting the remedies that are provided for under the welfare legislation. The Division Bench in *A. Ayyasamy* placing reliance on the same held that if arbitral tribunals are conferred with jurisdiction on such matters it will be against public policy.[56] Such a rigid approach has the effect of undermining the sacrosanct principle of party autonomy and renders to nullity the perfect balance that was brought about in the *National Seeds Corporation* case i.e. arbitration at the disposal of the consumer. This marks the transition of consumer disputes from the set of partially arbitrable disputes to completely inarbitrable subject matters.

B. The Squandered Opportunity for Correction: *Aftab Singh v. Emaar MGF Land Ltd.*

The *modus operandi* of challenging the arbitrability of a subject matter and to resist a mandatory reference to arbitration under Section 8 of the Arbitration Act, was adopted yet again in the case of *Aftab Singh* v. *Emaar MGF Land Ltd.* ["**Aftab Singh**"].[57]Although the question pertaining to the arbitrability of consumer disputes has been lately settled, this case presented an opportunity for the Court to re-look at this aspect in light of the pressing need for an effective consumer

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53 Kingfisher Airlines, 2013 (7) BomCR 738 (Bombay High Court) (India); Rajesh Korat v. Management Innoviti, WP 34537/2015, Apr. 21, 2017, (Karnataka High Court) (India); Smaran Sitaram Shetty, *Arbitration of Labor Disputes in India: Towards a Public Policy Theory of Arbitrability*, KLUWER ARB. BLOG (Nov. 26, 2017), *available at* https://www.arbitrationblog.kluwerarbitration.com/2017/11/26/arbitration-labor-disputes-india-towards-public-policy-theory-arbitrability/.

54 National Seeds Corporation, (2012) 2 SCC 506, ¶ 29 (India).

55 Vimal Kishore, (2016) 8 SCC 788, ¶ 54 (India).

56 Natraj, (1981) 1 SCC 523, ¶ 9 (India); Mohit Mahla, *Trust Disputes Non-Arbitrable in India*, KLUWER ARB. BLOG (Mar. 27, 2017), *available at* http://kluwerarbitrationblog.com/2017/03/27/trust-disputes-non-arbitrable-in-india.

57 Aftab Singh v. Emaar M.G.F. Land Ltd., IA/247/2016, July 13, 2017 (National Consumer Dispute Redressal Commission, New Delhi) (India); M/S Emaar M.G.F. Land Ltd. v. Aftab Singh, FAO 395/2017, Nov. 7, 2017, (Delhi High Court) (India).

dispute redressal mechanism. However, contrary to public hope, the Supreme Court turned down the opportunity by dismissing the application.

In the present case, the consumer had filed a complaint before the consumer forum against the builder, Emaar MGF, for delay in giving possession of flats. Owing to the presence of an arbitration agreement, the builder sought to oppose the jurisdiction of the consumer forum. The primordial basis of Emaar MGF's contention was the amendments made to Section 8. It was contended that all the cases of the Supreme Court that had earlier rendered consumer arbitration inarbitrable had ceased to hold force. Upon analysis, the Court held that the concept of Indian arbitrability (as developed through case laws) still holds good and the amendment was only to rectify the effect of a few cases. However, first the consumer forum and then the Supreme Court, by rejecting appellate jurisdiction, squandered the golden opportunity to implement the pressing need for consumer arbitration. Contrary to public hope, the consumer court merely put forth a compilation of the precedent on the issue and chose to concur with them, without an inquiry into the ground level need for implementation of the welfare legislation.

In addition, the appeal preferred to the Supreme Court met an even worse fate as it was refused admissibility.[58] By doing so, the Apex Court in a way gave implied consent to the observation made in the *A. Ayyasamy* case, relating to the arbitrability of consumer disputes.[59] This case presented the Court with an opportunity to undo the transition of consumer disputes from being partly arbitrable to completely inarbitrable, however, nothing was done. The Court did not even demystify how an arbitral award deciding a consumer dispute can still be a valid award and not be against public policy. There still exists a plethora of cases where arbitration has been considered to be an additional remedy at the choice of the consumer, while making the arbitration clause unenforceable if the consumer is reluctant to resort to arbitration. Such a stand is conflicting and diabolical for the reason that it undermines the concept of party autonomy as the arbitration clause then, is entirely dependent on the whims and fancies of one of the parties. Thereby, instead of placing blind reliance on the existing case laws, the Court should have adopted a more holistic approach by carrying out a comparative analysis with other jurisdictions, such as the European Union, and the United States. The position of arbitrability of consumer disputes in these jurisdictions has been discussed subsequently. The Indian position required a fresh look. However, the Court did not see it as a moment most fortune, and squandered the golden egg (opportunity).

V. Does the Rationale for Inarbitrability Evolved by the Troika of Judgments Still Hold Water?

An analysis of the global trend reflects a longing for the choice of arbitration to be treated as a 'one-stop' destination for the adjudication of contractual disputes.[60] The world has been seen to

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58 M/s Emaar MGF Land Ltd. v. Aftab Singh, Civil Appeal No. 23512-23513 of 2017 (Unreported Order, Supreme Court) (India).

59 *Id.*

60 Fiona Trust and Holding Corp. v. Yuri Privalov (2007) 1 Eng. Rep. 891 (UK); Premium Nafta Products Limited v. Fili Shipping Company Limited [2007] UKHL 40 (UK); AT&T Mobility v. Concepcion, 563 U.S. 333 (2011) (finding that Concepcion requires that arbitral class action waivers be upheld, and stating that "[e]ven if [plaintiff]

acquire distaste for the intervention by courts at different stages of a dispute, including on the grounds of 'arbitrability'. As India aspires to be a pro-arbitration state, there is a strong need to balance such judicial vogue, wherein the courts have been increasing the ambit of 'inarbitrable subject matters', with the global trend of upholding the right to avail of arbitration to resolve disputes. Thereby, the rationale for inarbitrability of consumer disputes evolved in the troika of decisions needs to be tested for its relevance, for it has undergone dilution over the years and calls for being countered. The counter is primarily two-fold. *First,* the inherent presumption that arbitration in consumer fora is laden with trader bias can be remedied, and *second*, being over-protectionist and labelling all subject matters governed by a specialized legislation as inarbitrable provides for a slippery slope.

A. Tackling the Need of an Over Protectionist Regime for Consumers: Removing the Trader Bias

Procedural due process has been one of the most significant concerns for barring arbitration in consumer fora as a matter of public policy.[61] As witnessed in *A. Ayyasamy*, the courts are apprehensive about the ability of arbitral tribunals to afford consumers a 'real opportunity' to present their case and appreciate the welfare legislation in its true sense.[62] Although such concerns are not entirely misplaced, the question is whether they are sufficient to over-ride the essentials of party autonomy.[63] Party autonomy forms the fundamental basis for arbitration and the same represents the choice of both the parties for an alternative dispute resolution mechanism. As per the principle, once the parties have mutually agreed to proceed to arbitration, the arbitration agreement is binding on both the parties. In such a case, allowance to the consumers for avoiding the arbitration on grounds that the same might be a costly and cumbersome procedure is in direct conflict with this foundational principle and sanctity of arbitration as a process.

As far as the due process requirement goes in terms of consumer protection, arbitration provides for extensive due process as a fundamental safeguard available to parties. In simpler terms, if the consumer desires to have a more robust due process requirement to ensure that the trader does not cheat him, the same is available to the consumer. Arbitration as a mechanism is to its fullest extent based on the under lying agreement and the same provides for safeguards in the form of the ability to choose the arbitrator and even challenge the impartiality of the arbitrator, if deemed fit. The same is not an option in case of consumer forums, as the parties cannot choose a specialised adjudicator and it is the District Forum that decides the matter.[64] The parties to arbitration also have the option to provide for a mechanism more exhaustive and elaborate than the one provided for in the welfare legislation. However, the extensive due process requirement has not been made a 'mandatory foot-rule' in arbitration cases for a reason: it results in over-

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cannot effectively prosecute his claim in an individual arbitration that procedure is his only remedy, illusory or not."); A. Ayyasamy, (2016) 10 SCC 386, ¶ 46 (India).

61 Brekoulakis, *supra* note 6.

62 A. Ayyasamy, (2016) 10 SCC 386, ¶ 32 (India).

63 Aditya & Nigotia, *supra* note 4, at 609, 611, 618 (2017); JUSTICE R. S. BACHAWAT, LAW OF ARBITRATION AND CONCILIATION 1545 (Anirudh Wadhwa & Anirudh Krishnan eds., 5th ed. 2012).

64 The Consumer Protection Act, No. 68 of 1986, § 13(1) (India).

burdening the otherwise cost-effective and expedited form of dispute resolution.[65] Thereby, the parties have the absolute freedom of choice and the uncalled '*due process paranoia*' i.e. a fear that the arbitration proceeding will also be unduly elaborate and cumbersome, is unfounded. In addition, due process paranoia is not restricted to consumer arbitration, the same pervades all classes of dispute, even those traditionally considered arbitrable. Thereby, due process paranoia is not a significant enough concern to induce a complete bar on the arbitrability of consumer disputes. It is reasonable to assume that arbitral tribunals will exercise reasonable care to adhere to the principles of natural justice even if the arbitration is not governed by any procedural rules. Such a presumption is based on the implied duty of an arbitrator to render enforceable awards by conducting the arbitration in a fair, impartial, and expedited manner.[66] This presumption even attained judicial recognition in *ONGC* v. *Western GECO International*,[67] whereby the Supreme Court allowed the vacation of an award which was in derogation of the principles of natural justice. Such measures protect the consumers by ensuring that the principles of natural justice are adhered to even during arbitral proceedings.

B. The Ever-Expanding Scope of "Inarbitrability" Based on Special Legislations: a Slippery Slope

The Indian Parliament, through successive governments, has made multiple attempts to change India's image of being an *arbitration unfriendly* jurisdiction.[68] This has been facilitated through a plethora of substantial amendments designed to neutralize the unwarranted and increased inference of courts.[69] Inconsistent with the legislative intent behind such amendments, the Supreme Court has been attempting to shrink the scope of arbitrable disputes by labelling certain kind of disputes as inarbitrable. Such judicial lawmaking has been reasoned on the incompetence of arbitral tribunals to adjudicate on matters falling within the ambit of specialised statutes.[70]

Although such reasoning has certain merit, the incoherent stand taken by the judiciary on the capability of a dispute to be adjudicated by arbitration has presented a whole new world of problems. For instance, when the Supreme Court was called upon to adjudicate the arbitrability

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65 Remy Gerbay, *Due Process Paranoia*, KLUWER ARB. BLOG (June 6, 2016), *available at http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/*.

66 The Arbitration and Conciliation Act, No. 26 of 1996, §§18, 18(1), 29A (India); Michael D Schafler et al., *The Appearance of Justice: Independence and Impartiality of Arbitrator under Indian and Canadian Law*, 5(2) INDIAN J. ARB. L. 150, 155 (2017); Andrew de Lotbinière McDougall et al., *Mandatory Time Limit for Rendering Awards Under Indian Law: How Good Intentions Can Lead to Bad Outcomes*, 5(2) INDIAN J. ARB. L. 188, 194 (2017).

67 ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263 (India); Reshabh Bajaj, *The Ever Expanding Scope of Public Policy*, MONDAQ (Jan. 26, 2016), *available at* http://www.mondaq.com/india/x/461362/Arbitration+Dispute+Resolution/The+Ever+Expanding+Scope+of+Public Policy.

68 The Arbitration and Conciliation (Amendment) Act 2015, No. 3 of 2016 (India); Department of Legal Affairs, Report of the High Level Committee to Review the Institutionalization of Arbitration Mechanism in India (July, 2017), *available at* http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf; The Arbitration and Conciliation (Amendment) Bill, 2018 (India) (Details about the bill can be found in the in the official press note, *available at* http://pib.nic.in/newsite/PrintRelease.aspx?relid=177128).

69 The Arbitration and Conciliation (Amendment) Act 2015, No. 3 of 2016 (India); *see also,* Shreeja Sen, *Lok Sabha passes arbitration amendment bill*, LIVEMINT (Dec. 17, 2015), *available at* http://www.livemint.com/Politics/rCIkn8927jFdSI0FykuBAN/Lok-Sabha-passes-arbitration-amendment-bill.html.

70 Booz Allen, (2011) 5 SCC 532 (India); Vimal Kishor, (2016) 8 SCC 788 (India); Rakesh Malhotra v. Rajinder Kumar Malhotra, (2014) SCC OnLine Bom 1146 (India); Natraj, (1981) 1 SCC 523, ¶ 17 (India).

of labour disputes in *Kingfisher Airlines* v. *Captain Prithvi Malhotra,*[71] the Court held that they were not arbitrable and only the special procedure for arbitration provided for in the Industrial Disputes Act, 1947 ["**ID Act**"] itself could be followed.[72] The arbitration provided for under the ID Act is different from private arbitration, referenced to under Section 8 of the Arbitration Act. Under the ID Act, even though arbitration exists as a means, the same has been largely reserved by the legislature for the Authorities established under the Act.[73] Therefore, all disputes pertaining to matters under the ID Act are inarbitrable.

A stark contrast to the same can be seen in the Court's observation in *Vimal Kishor Shah & Ors.* v. *Jayesh Dinesh Shah,* where the court had to ascertain the arbitrability of trust disputes.[74] Unlike the case of labour disputes, here the Court saw the existence of the Indian Trusts Act, 1882 as a bar on the parties' ability to resort to arbitration, as the Act did not provide for the same. Such incoherent reading of the arbitrability test propounded in the *Booz Allen* case has left the commentators of arbitration in a state of confusion, where there is no consensus on what the 'true test' of arbitrability is. The courts have been blindly, without paying due consideration to the need for arbitration, deciding arbitrability based on the text of the Act. In wishing to give the welfare legislation the broadest interpretation possible, the courts have seemed to turn a blind eye to the practical benefits arbitration offers. Such an approach creates a slippery slope and may result in the advent of a day when a majority of subject matters are inarbitrable in India.

VI. What can India Learn from the Global Trend on Arbitrability of Consumer Disputes?

Contrary to the Indian position, European law has witnessed an expansion of private dispute resolution mechanisms across different legal fields, including consumer disputes. One of the things that seemingly propels such a trend is the need for a speedy and effective mechanism to cope with disputes arising out of e-commerce.[75] Such a specialised need has led to the privatisation and fragmentation of consumer rights enforcement. This is not merely a European trend, but an international one. Even though the United States of America ["**USA**"] and the European Union ["**EU**"] demonstrate different outlooks towards consumer arbitration, both the legal systems broadly allow for arbitration in consumer contracts.[76] At present, the global trend seems to favour arbitrability of consumer disputes.

Although both the EU and the USA have redefined the interaction and balance between private and public enforcement mechanisms in consumer-related contracts, there still exist a few

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71 Kingfisher Airlines, 2013 (7) BomCR 738 (Bombay High Court) (India); Smaran Sitaram Shetty, *Arbitration of Labor Disputes in India: Towards a Public Policy Theory of Arbitrability*, KLUWER ARB. BLOG (Nov. 26, 2017), *available at* https://www.arbitrationblog.kluwerarbitration.com/2017/11/26/arbitration-labor-disputes-india-towards-public-policy-theory-arbitrability/.

72 The Industrial Disputes Act, 1947, No. 14 of 1947, §7A (India).

73 *Id.* §10.

74 Vimal Kishor, (2016) 8 SCC 788, ¶ 54 (India); Shradha Rakhecha, *The Curious Case of Arbitration of Trust Disputes*, 2 (2) INDIAN J. ARB. L. 165, 172 (2014).

75 Anastasia Konina, *Consumer Dispute Settlement in the European Union and the United States*, 20 INT'L TRADE & BUS. L. REV. 1, 24 (2017).

76 Mindy R. Hollander, *Overcoming the Achilles' Heel Of Consumer Protection: Limiting Mandatory Arbitration Clauses in Consumer Contracts*, 46 HOFSTRA L. REV. 366, 372 (2014).

differences in their respective approaches.[77] The primary difference being that the EU legislation prohibits pre-dispute binding arbitration agreements in consumer contracts as it considers forcing consumers to arbitration as unfair, while the USA law imposes no such limitation.[78] In this part of the paper, we seek to compare the Indian stand with the global scenario and provide a hypothesis as to whether India needs a change in its stance and how it can learn from the existing models.

A. Analysing the European Stand on Dispute Resolution in Business to Consumer Transactions

Living up to its tag of being a pro-arbitration destination, the EU provides a favourable environment for the development of private resolution mechanisms pertaining to consumer disputes.[79] The same is reflected by the changes brought to the EU consumer protection law by the introduction of the Regulation on Consumer Online Dispute Resolution ["**ODR Regulation**"] [80] and the Directive on Consumer Alternative Dispute Resolution ["**ADR Directive**"][81] in 2013. Such developments have earned the EU the reputation of being a pioneer in the creation of a comprehensive out-of-court dispute resolution system for Business to Consumer conflicts. At the same time, the EU also secures the delicate balance between the need for arbitration and the need for protecting the interest of the consumers.[82] This has been facilitated by the existence of directives that check the terms of the arbitration agreement for fairness, and ensure general access to the courts.[83] This balance between the ability to arbitrate consumer disputes and safety valves to protect consumer interests makes the EU the perfect model for consumer arbitration. To have a more comprehensive understanding of the EU model, it is vital to look at the different factors at play which govern the interplay between consumer rights and arbitration. These factors have been discussed below.

i.The facilitators: the ODR Regulation and the ADR Directive

Even though the regulations and directives of the EU are soft law and are not binding on the members, they largely operate to provide the members with a much-needed push for developing better legal systems.[84] The promulgation of Regulation 524/2013 on consumer ODR and Directive 2013/11 on consumer ADR are examples of progressive lawmaking on the part of the

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77 Jearey H. Dasteel, *Consumer Click Arbitration: A Review of Online Consumer Arbitration Agreements*, 9 ARB. L. REV. 1, 13 (2017).

78 Dafna Lavi, *Three Is Not A Crowd: Online Mediation-Arbitration in Business To Consumer Internet Disputes*, 37(3) U. PA. J. INT'L L. 46, 52 (2016); Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT'L L. & COM. REG. 357 (2002).

79 Ronald A. Brand, *The Unfriendly Intrusion of Consumer Legislation into Freedom to Contract for Effective ODR* 365-380 (Univ. of Pitt. Legal Studies Research, Working Paper No. 2014-42, 2014), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520035 [*hereinafter* "Brand"].

80 Regulation on Consumer Online Dispute Resolution, 2013 O.J. (L 165) 1 [*hereinafter* "2013 Regulation"]; Council Directive 2009/22, 2009 O.J. (L 110) 30 (EC) [*hereinafter* "EU Council Directive 2009"].

81 Council Directive 2013/11, 2013 O.J. (L 165) 63 (EC) [*hereinafter* "EU Council Directive 2013"]; Council Directive 2009/22, arts. 4, 5(1), 6(1), 2009 O.J. (L 110) 30 (EC).

82 Konina, *supra* note 75; Pablo Cortés & Arno R. Lodder, *Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress*, 21 (1) MAASTRICHT J. EUR. & COMP. L. 1, 23 (2014).

83 Konina, *supra* note 75; Maud Piers, *Consumer Arbitration in the EU: A Forced Marriage with Incompatible Expectations*, 2(1) J. INTN'L DISP. SETTLEMENT 209, 218 (2011).

84 Colin Rule et al., *Online Small Claim Dispute Resolution Developments-Progress on a So Law for Cross-Border Consumer Sales*, 29(3) PENN ST. INT'L L. REV. 651, 652 (2011).

EU that provides consumers with an effective and low-cost mechanism for dispute resolution. The aforesaid measures strengthen the confidence of the consumers in the internal market. They foster efficacy, simplicity, and efficiency by providing fast and low-cost methods for resolving domestic and cross-border disputes that arise from sales or service contracts. Lastly, they set a minimum threshold of requirements for ADR, thereby, furthering the object of boosting the confidence of both the consumers and the traders in the digital single market.[85] The combined reading of Articles 4 and 5 of the ADR Directive requires the member States to facilitate this to the consumers for resolving both domestic as well as cross-border disputes.[86] It even puts an obligation on the States to extend the said mechanism to all kinds of transactions, irrespective of their nature i.e. online or offline. To ensure that the resultant ADR mechanism is self-sustained and capable of effectively resolving consumer disputes, the ADR Directive even prescribes the pre-requisites for such a mechanism. In detailing the same, the ADR Directive chalks out the following seven requisites, namely - *expertise, independence, impartiality, transparency, effectiveness, fairness and liberty*.[87] This has the effect of promoting a uniform and more reliable model for online arbitration, a model that consumers can have faith in owing to quality control.

ii.The regulators: the Unfair Terms in Consumer Contracts Directive and mandatory access to courts

Unlike the USA and India, the EU requires its member States' courts to presume that the arbitration agreement is unfair if the parties did not individually negotiate the same after the dispute arose. This negative presumption draws legal backing from the 1993 directive i.e. Unfair Contract Terms Directive that applies to all consumer contracts.[88] The directive contains an indicative and non-exhaustive list of the terms that are regarded as unfair by their very nature in Annex I.[89] In the context of consumer arbitration, this directive seeks to limit pre-dispute binding arbitration clauses in consumer contracts on the ground that such pre-dispute arbitration agreements seek to compel the consumer to mandatorily resolve disputes exclusively through arbitration, and, not by any other legal provision.[90] The practical effect of such a doctrine is reflected in the adoption of the same presumption in the national legislation of the EU member States. As a consequence, almost all the pre-dispute arbitration agreements in consumer contracts of such States are effectively null and void.[91] In addition to this, this directive even applies to arbitration clauses that seek to completely exclude the power of the court to review the arbitrator's award.[92]

The real motivation behind the universal adoption and success of this EU directive is that it assumes that the contract between the consumer and the trader is one of adhesion i.e. a standard form of contract and thereby operates to prevent the abuse of consumers by the trader. Another factor that has had a huge role in its implementation is the recognition of the right of access to a

85 2013 Regulation, *supra* note 80; EU Council Directive 2009, *supra* note 80.
86 EU Council Directive 2013, *supra* note 81.
87 EU Council Directive 2013, *supra* note 81, arts. 5, 6, 7, 8, 9 & 10.
88 Council Directive 93/13, 1993, O.J. (L 95) 29 (EEC) [*hereinafter* "EEC Council Directive of 1993"].
89 *Id.*
90 EEC Council Directive of 1993, *supra* note 88, art. 7(2).
91 Mylcrist Builders Ltd. v. Buck, [2008] EWHC (TCC) 2172; PABLO CORTES, ONLINE DISPUTE RESOLUTION FOR CONSUMERS IN THE EUROPEAN UNION 108 (2010).
92 G H TREITEL, THE LAW OF CONTRACT 251 (9th ed. 1995); Drahozal & Friel, *supra* note 78.

court as a part and parcel of the right to a fair trial.[93] The European Court of Justice in its observation in *Oceano Grupo Editorial SA* v. *Rocio Murciano Quintero*,[94] held that in cases where the consumer is not aware of the protection accorded to them, the Court can, on its own motion, check the arbitration agreement for fairness. This is an edifice of the protectionist regime that the EU provides for in cases of consumer arbitration.

B. An Analysis of the USA Approach to Dispute Resolution in Business to Consumer Transactions

As a general rule, the USA law largely respects the party autonomy in arbitration when it comes to the choice of forum, even in consumer contracts. Although the same approach has been subjected to severe criticism, the courts are inclined towards ruling in favour of such express choice.[95] Unlike the regulations in the EU, the fora of consumer arbitration in the USA remain largely unregulated. Moreover, pre-dispute arbitration agreements are legal and binding. As a consequence of this, the USA law stipulates mandatory access to courts as a requirement in the arbitration agreement.[96] However, in the recent past, the American judiciary has taken such a pro-capitalistic stance that it has adversely affected the consumer dispute resolution regime. At the top of the list of factors that have resulted in this, is the presumption that even constructive knowledge as to the existence of the terms of the arbitration agreement is sufficient for the agreement to be binding.[97] The negative implications of this have been beyond what one can contemplate. By doing so, the courts have given sanction to all pre-dispute arbitration agreements that any individual enters into, whether knowingly or unknowingly, including agreements entered into in the e-commerce space.[98]

The opponents of such a judicial approach attack the reasoning on primarily three fronts. *First*, since all the contracts *per se* offer only a 'take-it-or-leave it' option, the consumers are forced to accept the same as adhesion.[99] Such adhesion consumer contracts result in an inherent unequal access of information between the consumers and traders.[100] Thereby, the consumers are forced to enter into such contracts even when they do not intend to do the same. *Second,* the '*repeat player*' phenomenon reduces the benefits of arbitration in consumer contracts to a nullity.[101] This is because, unlike judges, arbitrators are only paid when they are selected to resolve a dispute.[102]

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93 Charter of Fundamental Rights of the European Union, Mar. 30, 2010, art. 47, O.J. (C 83) 2. 2010; Deweer v. Belgium, 35 Eur. Ct. H.R. 21, ¶ 49 (1980).

94 Oceano Grupo Editorial SA v. RocioMurciano Quintero, 2000 E.C.R. (C-240/98) ¶ 27.

95 Carnival Cruise Lines Inc. v. Shute, 499 U.S. 585 (1991); Brand, *supra* note 79.

96 The Federal Arbitration Act, 9 U.S.C. §2 (2012); H. R. REP. NO. 68-96, at 1-2 (1924); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1218 (2013).

97 Janda v. T-Mobile, U.S.A. Inc., (C 05-03729) 2006 W.L. 708936, 5-6; *see also* All American Roofing Inc. v. Zurich American Ins. Inc., 404 Ill. App. Ct. 3d 438, 453 (2010).

98 Willy E. Rice, *Courts Gone "Irrationally Biased" in Favor of the Federal Arbitration Act?—Enforcing Arbitration Provisions in Standardized Applications and Marginalizing Consumer-Protection, Antidiscrimination, and States' Contract Laws: A 1925–2014 Legal and Empirical Analysis*, 6 WM. & MARY BUS. L. REV. 405, 447 (2015).

99 Neal v. State Farm Ins. Cos., 10 Cal. Rptr. 781, 784 (Dist. Ct. App. 1961); Sierra David Sterkin, *Challenging Adhesion Contracts in California: A Consumer's Guide*, 34 GOLDEN GATE U. L. REV. 285, 289-91 (2004).

100 Eric H. Franklin, *Mandating Precontractual Disclosure*, 67 U. MIAMI L. REV. 553, 561(2013).

101 Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 2010 (1997).

102 Richard W Naimark, *Part 7: Awards Commentary, in* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 267 (Richard W Naimark & C.R. Drahozal eds., 2005); David Horton & Andrea Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 71 (2015).

As a result, the arbitrators may be incentivized to favour the commercial party i.e. '*the repeat player*' to increase their chances of reappointment in other matters wherein the commercial party is involved.[103] This brings about a presumption of bias of the arbitrators in a consumer dispute. Although an arbitrator would be required to disclosure his/her repeat appointments under the requirements of independence and impartiality, repeat appointments by themselves are unlikely to result in a court setting aside the award.[104] *Last*, commercial parties hire the services of professional lawyers in the drafting of such standard pre-dispute contracts while the consumer is obliged to undertake the same without proper consultation.[105] This results in unequal access to information, which is not justified in a contractual relationship. The aforementioned reasons provide a strong argument in favour of the American legislators promulgating an ordinance to curb the validity of pre-dispute arbitration agreements.

C. Lessons for India: How to Facilitate a More Balanced Consumer Dispute Regime

The foremost lesson for India, which as a nation is striving to achieve 'pro-arbitration' status, from the global trend, is that it should release consumer disputes from the clutches of the exclusive jurisdiction of consumer forums. Additionally, the EU model provides for two major areas of learning that can be incorporated into the Indian set up to enable a more balanced regime. *First*, in the post-Jio era, India needs to address the ever-increasing needs of the e-commerce consumer for a more effective and cheaper mechanism for dispute resolution.[106] Adopting the EU model of an online dispute resolution ["**ODR**"] system may be the most viable one for this purpose. *Second*, like the Unfair Terms in Consumer Contracts Directive, there is a need for a negative presumption against pre-dispute arbitration agreements.

As regards the USA regime on consumer arbitration, India can certainly understand which direction not to head in. From the analysis, of the USA's stand and its subsequent criticisms, two observations are apparent and cannot be ignored. *First*, that the consequences of not providing for a strong regime can be far-reaching and detrimental to the interests of the consumers.[107] *Second,* with hardly anyone reading the mandatory terms of the e-commerce agreement, the same should not operate to be binding on mere constructive knowledge.[108]

Even though a lot of other lessons can also be learnt from the global trend, the need for an ODR mechanism for consumer disputes still remains the most important one.

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103 JULIA HORNLE, CROSS-BORDER INTERNET DISPUTE RESOLUTION 30-31(2009).

104 William Park, *Arbitrator Bias*, 6 TRANSNAT'L DISP. MGMT. 27 (2015); Halliburton v. Chubb [2018] EWCA (Civ) 817 (Eng.).

105 Franklin, *supra* note 100.

106 Drahozal & Friel, *supra* note 78; Karen Sewart & Joseph Mahews, *Online Arbitration Of Cross-border, Business To Consumer Disputes*, 56 U. MIAMI L. REV. 1111, 1132 (2002).

107 Kristina Moore, *Future of Class-Action Waivers in Consumer Contract Arbitration Agreements over DIRECTV, Inc. v. Imburgia*, 67 CASE W. RES. L. REV. 611, 632 (2016).

108 Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims,* 42 SW. L. REV. 87, 94 (2012).

VII. The Indian ODR Model: a Mixed Bag of the EU's ODR Directive and the UNCITRAL Draft Rules on ODR

The ODR system appears to be the inevitable future of consumer dispute resolution. The development of this system has primarily been a combined effort of the EU's ODR Directive and the UNCITRAL Draft Rules on ODR. Like the EU, the United Nations recognizing the need to enhance confidence in cross-border trade, enacted the Draft Rules on ODR.[109] Although at the present moment, the UNCITRAL Draft Rules operate complementarily to the EU initiatives, once finalized, they will provide a huge boost to the ODR regime, analogous to the role played by the Model Law.[110] Owing to India's growing need for an ODR mechanism, we stand to benefit from the experience of the two. Both the EU Model on ODR and the UNCITRAL Draft Rules combined, provide for the perfect schematics to develop a similar system for India. The day the Indian legislators wake up to such a need and decide to draw up a similar model, the experience and the salient features of the two existing models will provide for the perfect stepping stone.

A. What should the Notional Indian Model on ODR Seek to Borrow from the EU's ODR Model?

Since the EU Directive is the primary promulgation mandating the establishment of ODR mechanisms in the member States, the same must be analysed first.[111] As a mandate, the directive requires the member States to ensure the creation of adjudicative and consensual extrajudicial processes that facilitate dispute resolution in consumer disputes. With exception to the disputes related to health services or higher education, the directive requires the member States to ensure availability of such mechanism to the consumers, irrespective of whether the dispute is domestic or cross-border.[112] The new law even puts a positive obligation upon the traders to inform the consumers about the existence of such ADR entities that are competent to deal with potential disputes.[113] Such a measure ensures that the consumer is not victimized by the unequal bargaining power that otherwise exists in adhesion consumer contracts. The member States also have the responsibility to ensure that the traders comply with the requirements provided for and are punished for any breaches. To further the trust and faith of the consumers in the system, the directive makes it mandatory for all the ADR mechanisms to be accredited and linked with the EU's ODR platform. The same is to ensure uniformity of standards across all mechanisms. For accreditation, the directive puts in place the six-fold test that has been discussed above.

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109 *See* United Nations Commission on International Trade Law, Online Dispute Resolution for cross border electronic commerce transactions, Rep. of the Working Group III (Online Dispute Resolution) on the work of its Thirty-Third Session, U.N. Doc. A/CN.9/WG.III/WP.140 (2016).

110 Amy J. Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 (1) LOY. U. CHI. INT'L L. REV. 81, 101 (2013); J. Hornle, *Encouraging Online Dispute Resolution in the EU and beyond – Keeping costs low or Standards High?, Research Paper No. 122,* QUEEN MARY SCHOOL OF LAW (2012).

111 Rule et al., *supra* note 84, at 13.

112 EU Council Directive 2013, *supra* note 81, arts. 2, 5.

113 EU Council Directive 2013, *supra* note 81, art. 13; Department for Business Innovation and Skills, *'Implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation'* (2014), *available at* https://www.gov.uk/government/publications/alternative-dispute-resolution-for-consumers/alternative-dispute-resolution-for-consumers.

Similarly, the Indian legislators can seek to draw a nationwide-wide ODR mechanism that can provide for dispute resolution in different languages. Like the EU legislation, the central government can direct the state governments to formulate a proper ODR mechanism at the state level and later integrate the same at the national level, in a manner analogous to the policies that have cropped up to promote start-up initiatives. Considering the awareness regarding rights and the mandatory obligations that exist on the traders under the EU's ODR Directive, this will be of real practical relevance. In addition, the availability of the mechanism should extend to both, online transactions and offline transactions. Last, the six-fold accreditation test should be adopted by India also, to foster the growth of the object with which the COPRA was enacted.

B. What should the Notional Indian Model on ODR Seek to Borrow from the UNCITRAL Draft Rules on ODR?

In essence, the object that the UNCITRAL Draft Rules on ODR seeks to achieve is largely similar to that of the EU's ODR Directive. However, there exists a slight variation. The UNCITRAL Draft Rules are being negotiated with a focus on digital cross-border trade. For instance, a majority of the MacBook users purchase skins from the international vendor *dBrand* and get them imported. The UNCITRAL Draft Rules seek to provide a remedy to consumers in such kinds of cross-border transactions.[114] Even though the Rules have not been finalized, the prospect of having such rules is ground-breaking news for Indian consumers.[115] In today's scenario, this is of seminal importance as a substantial chunk of Indian consumers carry out international purchases.[116]

The two essentials that the *notional Indian Model* can seek to adopt from the UNCITRAL Draft Rules are *first,* a fast-track ODR process for resolving low-value disputes,[117] *second*, in cross-border disputes, even if the parties consent to resort to ODR, the same should not operate as a bar on the remedies available to them under the national consumer laws.[118] The need for such a mechanism is more pressing in instances of a cross border disputes. Keeping in view the above illustration, such consumers who purchase Macbook skins from offshore vendors will have an option to have their complaints addressed over online chat rooms, rather than pursuing a remedy in a foreign jurisdiction. Thus, if the online redressal mechanism sees the light of day, then as a consequence, cross-border trade disputes pertaining to a variety of matters can be disposed in an efficient and better manner.

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[114] Louis Duca et al., *Lessons and Best Practices for Designers of Fast Track, Low Value, High Volume Global E-Commerce ODR Systems*, 4 PENN. ST. J.L. & INT'L AFF. 242, 256 (2015).

[115] Donna M. Bates, *A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27(2) FORDHAM INT'L L. J. 823, 837 (2003).

[116] Ivonnely Fung, *Protecting the New Face Of Entrepreneurship: Online Appropriate Dispute Resolution And International Consumer-To-Consumer Online Transactions*, (12) FORDHAM J. FIN. & CORP. L. 326 (2009).

[117] V. Rogers, *Institute of International Commercial Law (Pace Law School), Note on the Resolution Process Designated by the Draft ODR Rules Vienna*, (14–18 Nov. 2011).

[118] United Nations Commission on International Trade Law, *Report of the Working Group III (Online Dispute Resolution) on the Work of its Twenty- Fifth Session* (21–25 May 2012), ¶ 16, U.N. Doc. A/CN.9/774 (June 2012).

VIII. Conclusion: Longingness for an Alternate Universe

Since its inception, the Arbitration Act has been subjected to a variety of head-turning interpretations by the judiciary; whether be it the holding in *Bhatia International* v. *Bulk Trading*[119] that earned India the infamous tag of being an unfriendly jurisdiction for arbitration, or the recent observation in *IMAX* v. *E-City*,[120] which was a reminder of the spill overs from the prospective over-ruling in the BALCO case.[121] The recent judgments on arbitrability of consumer disputes also reflect a similar trend. The treatment of consumer matters as being completely outside the purview of arbitration must go down as one of the darkest chapters in the textbook of arbitration. Although the arbitrability of consumer disputes presents a very complex interplay between the protectionist national consumer law and the mandatory nature of arbitration, one still expects the courts to balance the interests of both. The need for this has become even more apparent in the wake of the exponential increase in consumer disputes and the limited toothless mechanisms that are akin to civil courts and unable to provide remedies the way they were intended to. In such cases, a speedier form of adjudication like arbitration may possibly be of greater utility to all those involved.

The Indian courts, and most conspicuously, the Supreme Court in *Aftab Singh*,[122] had the golden opportunity to analyse the global trend and decide if there should be a mandatory reference to arbitration. If the Court had grabbed this opportunity with both hands, the fate of consumer arbitration might have been entirely different. The Court had an opportunity to analyse and allow for mandatory arbitration in cases where there existed a post-dispute arbitration agreement. By not acting on the same and taking a tight-lipped approach, the Supreme Court has made it almost impossible for any kind of ODR mechanism to work successfully in India. All said and done, arbitration is based on parties' consent and if the parties provide for arbitration, then the courts should endeavour to further it. Now, the legislature remains the last ray of hope and has the duty to reform the Indian consumer dispute resolution mechanism and align it with global practices.

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[119] Bhatia International v. Bulk Trading S. A., (2002) 4 SCC 105 (India).
[120] Imax Corporation v. E-City Entertainment Pvt. Ltd., (2017) 5 SCC 331 (India).
[121] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, (2012) 9 SCC 552 (India).
[122] M/s Emaar MGF Land Ltd. v. Aftab Singh, Civil Appeal No. 23512-23513 of 2017 (Unreported Order, Supreme Court) (India).