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# REVIEWS LEGAL INDUSTRY



In this edition of The Legal Industry Reviews India, **Siddharth Santosh**, senior associate at **Kochar and Co**, comments on the challenges of the new financial year and gives some keys for employers to move forward with them.

We talk with **Dhyan Chinnappa**, Additional Advocate General for the State of Karnataka, India and Founding Partner of **CrestLaw Partners**, reflects on his career and the change that has signified working out and inside the State.

## Arbitrability under Indian Law

The term "arbitrability" of a dispute has various meanings. In *Booz Allen and Hamilton v SBI Home Finance Ltd* (2011) 5 SCC 532 ("**Booz Allen**"), the Indian Supreme Court set out three different meanings of the term "arbitrability" of a dispute in different contexts, namely: (i) disputes capable of being adjudicated through arbitration; (ii) disputes covered by the arbitration agreement; and (iii) disputes that parties have referred to arbitration. Indian jurisprudence on arbitrability has largely discussed "arbitrability" in the first context, i.e. which disputes are capable of being resolved by arbitration under Indian law.

In *Booz Allen*, the Supreme Court held that certain disputes cannot be resolved by a private forum and are therefore "non-arbitrable". In this ambit of non-arbitrable disputes, the court included: (i) disputes relating to criminal offenses; (ii) matrimonial disputes; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters; and (vi) eviction or tenancy matters governed by special statutes.

In 2014, in several decisions, the Supreme Court passed seemingly conflicting decisions on whether allegations of fraud may be referred to arbitration. The Supreme Court settled this ambiguity in 2016 by the decision of *Ayyasamy v. A Paramasivam & Ors*, (2016) 10 SCC 386 ("**Ayyasamy**"). In *Ayyasamy*, the court resolved this ambiguity to find that fraud allegations may be arbitrated unless: (i) they are serious and complex in nature, or (ii) fraud is alleged against the arbitration agreement. In the case of *Avitel Post Studios Limited v HSBC Pi Holding (Mauritius)* (2021) 4 SCC 713, the Supreme Court clarified the meaning of "serious allegations of fraud" as those: (i) which would vitiate the arbitration agreement; or (ii) which are made against the State or its instrumentalities giving rise to questions of public law.

In 2019, the issue of arbitrability of tenancy disputes was raised before the Supreme Court in the case of *Vidya Droila & Others v. Durga Trading Corporation*, 2019 SCCOnLine SC 358. The Supreme Court laid down a four-fold test to decide the arbitrability of a dispute:



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1. The dispute should concern rights relating to actions in personam only, and not as a subset of actions in rem;
2. The dispute does not have any effect on third-party rights or have an *erga omnes* affect;
3. The dispute does not relate to any inalienable sovereign function of the state, for instance, the resolution of criminal cases,
4. It is not expressly or implicitly considered non-arbitrable under any mandatory legislation.

By applying these principles, the Supreme Court found that tenancy disputes are arbitrable so long as they are not governed by any special statute.

The *Vidya Droila* test is the guiding test for determining the arbitrability of disputes in India. This decision, in line with the Indian judiciary's increasingly pro-arbitration approach, has been a welcome step to reduce judicial intervention in arbitration and increase predictability for parties to disputes.







## Practice Area News

**Essar House Pvt. Ltd. v Arcellor Mittal Nippon Steel India Ltd, SPL (C) No. 3187 OF 2021, Supreme Court.** The Supreme Court held that a court exercising powers under section 9 of the 1996 Arbitration & Conciliation Act (to grant interim relief) is not constrained by the rules set out in the Code of Civil Procedure. A copy of the judgment can be found [HERE](#).

**AK Builders v. Delhi State Industrial Infrastructure Development Corporation Limited, O.M.P. (T) (COMM.) 12/2022, Delhi High Court.** The Delhi Court held that a waiver under Section 12(5) of the Arbitration & Conciliation Act, which deals with the ineligibility of certain persons to be appointed as an arbitrator, must be made by express agreement in writing. The court held that such a right cannot be waived by conduct. A copy of the judgment can be found [HERE](#).

**VGP Marine Kingdom Pvt. Ltd. v. Kay Ellen Arnold, Civil Appeal No. 6679 of 2022, Supreme Court.** The Supreme Court held that unless on the face it is found that a dispute is not arbitrable, the issue of the subject matter arbitrability of a dispute should be left to the arbitrator. A copy of the judgment can be found [HERE](#).

**Meenakshi Solar Power Pvt. Ltd. v. Abhyudaya Pvt. Ltd., Civil Appeal No. 8818 of 2022, Supreme Court.** The Supreme Court held that a court may intervene at a referral stage only where it is obvious that the claims are ex-facie time-barred and dead, or that there is no ongoing dispute. The court held that an issue of limitation period should be referred to the arbitral tribunal. A copy of the judgment can be found [HERE](#).

## In the Firm

India has recently permitted foreign lawyers and law firms to practice law in India on a reciprocal basis and in certain areas. Mr. Nishith Desai and Mr. Vyapak Desai have shared their thoughts about this development in the [Live Mint](#) and [the Economist](#) respectively.

We published a comprehensive research paper on resolving disputes between foreign investors and the Indian State / State Entities. For a detailed analysis, Read more [HERE](#).