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Arbitration of Labor Disputes in India: Towards a Public Policy Theory of Arbitrability.

Smaran Sitaram Shetty · Sunday, November 26th, 2017

In India, the Arbitration and Conciliation Act, 1996 does not address the question of which categories of disputes are capable of resolution by arbitration, and those that are not. Instead, this question has arisen before and been decided by Indian courts, in a variety of different contexts. In recent times, Courts have determined arbitrability claims in the context of fraud (see here and here), disputes arising out of and implicating trusts and disputes concerning shareholder and intellectual property litigation. Despite the consistent attention the issue of arbitrability in India has generally received, there has been little commentary on the specific issue of whether labor and industrial disputes are arbitrable under the Arbitration and Conciliation Act, 1996. This issue warrants specific commentary for two reasons. *First*, two High Courts have been faced with this very question and have independently arrived at the conclusion that industrial and labor disputes are not arbitrable. *Second*, these judgements call into question the rising practice of inserting arbitration clauses in employment agreements and are therefore instructive for practitioners.

In this post I first begin by discussing the cases that have dealt with and decided the arbitrability of labor disputes. I argue that these cases reach the right conclusion. I also address the potential these cases have for theorizing about arbitrability, that departs from the dominant paradigm currently used to address that question.

1. *Captain Prithvi Malhotra* and *Rajesh Korat*

The arbitrability of labor disputes first arose in *Kingfisher Airlines v. Captain Prithvi Malhotra and others* ("Captain Prithvi Malhotra"). This case arose out of various labor recovery proceedings instituted by pilots and other staff members of the now defunct Kingfisher Airlines. The proceedings were instituted before the specially empowered labor courts for recovery of unpaid wages and other salary benefits. In these proceedings, Kingfisher Airlines contested the jurisdiction of the labor court by relying on the arbitration clause in the employment agreements. To that end, Kingfisher filed an application invoking Section 8 of the Arbitration and Conciliation seeking reference to arbitration in terms of the employment agreements. The labor court rejected the

application and retained jurisdiction over the proceedings.

Kingfisher thereafter moved the Bombay High Court to challenge the correctness of the order passed by the labor court. The Bombay High Court affirmed the order of the labor court and held that labor disputes were not arbitrable under the Arbitration and Conciliation Act, 1996. The Court holds that the inquiry is not solely whether the claim being urged is *in personem* or *in rem* (as was held by the Supreme Court in *Booz Allen & Hamilton v. SBI Home Finance*), but whether the resolution of the claim has been exclusively reserved for adjudication by a particular court or tribunal for public policy reasons. The Court holds that the resolution of labor and industrial disputes has been reserved for resolution before the judicial fora constituted under the Industrial Disputes Act, 1947. By drawing upon the preamble of the Act as well as the scheme of resolution of labor disputes, the Court holds that strong public policy reasons support such a conclusion.

The Court in *Captain Prithvi Malhotra* also goes further than merely determining the arbitrability of labor disputes. It examines the scheme of the Industrial Disputes Act, 1947 and concludes that the Act provides for a unique process for arbitration of collective labor claims. It therefore concludes that if there were to be adjudication of labor and industrial claims outside of the courts and tribunals constituted under the Act, the reference to and resolution by arbitration would have to be governed by the specific provisions of the Industrial Disputes Act, 1947 (and the attendant rules made thereunder) and not the Arbitration and Conciliation Act, 1996. The Court therefore concludes two crucial issues: claims under the Industrial Disputes Act, 1947 are not arbitrable under Arbitration and Conciliation Act, 1996 and by extension, where it is arbitrable, it must be in conformity with the requirements and procedure under the Industrial Disputes Act. It is therefore important to remember that labor and industrial claims are not *per se* non-arbitrable, but are instead only arbitrable in the manner and to the extent permitted by the Industrial Disputes Act, 1947.

A similar question arose five years later in *Rajesh Korat v. Innoviti* (“Rajesh Korat”) before the Karnataka High Court. In this case, when an application for reference to arbitration was made before the labor courts, the application was allowed and parties were referred to arbitration in terms of the arbitration agreement (in contrast to *Captain Prithvi Malhotra* where the labor court rejected the application and retained jurisdiction).

The reasoning in *Rajesh Korat* greatly resembles the reasoning in *Captain Prithvi Malhotra*. The Court concludes that there are strong and compelling public policy reasons to ensure that labor and industrial disputes are exclusively resolved by courts and tribunals under the Industrial Disputes Act. In *Rajesh Korat*, the Court goes slightly further in concluding that the Industrial Disputes Act is a self-contained code, and to that extent the Arbitration and Conciliation Act, does not have any application to matters governed by the Industrial Disputes Act. Although it does not expressly address this question, *Rajesh Korat* impliedly endorses the proposition that any arbitration of labor disputes would have to be in conformity with the procedure under the Industrial Disputes Act, 1947 and not the Arbitration and Conciliation Act, 1996.

1. Evaluating *Captain Prithvi Malhotra* and *Rajesh Korat*

Captain Prithvi Malhotra and *Rajesh Korat* are both decided correctly and they independently reach the right conclusion. Both decisions examine the nature and larger scheme of the Industrial Disputes Act and pay close attention to the various categories of judicial and quazi-judicial fora established under the Act. After undertaking this analysis both decisions correctly conclude that labor and industrial claims are non-arbitrable under the Arbitration and Conciliation Act, 1996, and where they can be submitted to arbitration, such reference and resolution must be in compliance with the procedure under the Industrial Disputes Act.

Importantly, both decisions are attentive to the asymmetry in bargaining power inherent in labor disputes. In large part the Industrial Disputes Act (and labor legislation generally in India), are meant to address this issue. Part of this remedial function is achieved through the creation of specialized courts and tribunals under the Industrial Disputes Act, 1947. A closer reading of both *Captain Prithvi Malhotra* and *Rajesh Kor*at would reveal that the Court was persuaded in large part by the consequences of relegating labor disputes to private arbitral tribunals.

If these cases were decided the other way and labor disputes were held to be arbitrable, it would mean that individual and collective labor disputes would have to be resolved by way of private arbitration where employers would potentially have the sole authority to appoint arbitrators, employers could refuse to participate in the appointment process forcing employees to follow the procedure under Section 11 of the Act and/or could also have the power to designate arbitral institutions, which would beyond the reach and means of industrial workers. In sum, the Courts seem convinced that holding labor disputes to be arbitrable would place undue burdens on aggrieved workers in accessing and thereafter participating in private arbitral proceedings under the Arbitration and Conciliation Act, 1996. The public policy arguments for holding these categories of disputes non-arbitrable, is then both compelling and on the face of it, accurate.

Beyond the correctness of these decisions, lie important lessons for practitioners. Increasingly, employment agreements are being reduced into writing and have arbitration clauses for settlement of disputes that arise out of the employment relationship. These decisions should then educate practitioners about the perils of such a trend and the reality that these agreements are unlikely to be enforced if the employers seek to compel arbitration.

1. Theorizing arbitrability

In view of the Arbitration and Conciliation Act's silence as to the issue of which disputes are capable of private arbitration, it is helpful to think through a possible theory of arbitrability. This is especially useful in the Indian context where the legal and regulatory landscape continues to develop, and question of whether certain kinds of disputes and claims are arbitrable are likely to continue to arise well into the foreseeable future.

In light of the Supreme Court's decision in *Booz Allen & Hamilton*, the primary paradigm of thinking about arbitrability has been the characterization of claims involved. Simply put, *Booz Allen & Hamilton* tells us that where the claim is in the nature of a right *in rem*, such claims are not amenable to arbitration under the Arbitration and Conciliation Act, 1996. However, where the claim is characterized as a right *in personem*, such a claim may be arbitrable. Although this formulation is helpful starting point (and has in fact been used by subsequent judgements to decide arbitrability claims), it does not help us develop a robust understanding of arbitrability.

It is for this reason that the decisions in *Captain Prithvi Malhotra* and *Rajesh Korat* are helpful. They collectively advance the proposition that even where the claim in question is a right *in personem*, it would be still rendered non-arbitrable in view of public policy reasons expressed in the statute that otherwise regulate the exercise of the claimed right whether it be *in personem* or *in rem*. This is an interesting and compelling understanding of arbitrability, one that focusses our attention not only on the nature of the claims or the relationship between the parties, but also the consequences for allowing private arbitration. It allows us to examine whether the statutory framework of legislation either exhibits or has inherent within it, certain limitations to private arbitrations and potential reasons for such legislative policy choices.

To be sure, I do not argue that these decisions present a holistic and comprehensive theory of arbitrability. Instead, they help only partly in diversifying our understanding of arbitrability and pushing our understanding from the holding in *Booz Allen & Hamilton*. In fact, a complete and exhaustive theory of arbitrability may be both illusive and undesirable.

[Disclosure – the author was involved in the *Rajesh Korat v. Innoviti* case. Any views expressed here are solely personal and do not reflect the views of the counsel or the parties to the case.]

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