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## DEMYSTIFYING THE AMBIVALENCE IN THE ARBITRATION OF CONSUMER DISPUTES IN INDIA

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### ABSTRACT

Even during the wake of the e-commerce era where the number of online transactions are skyrocketing on a daily basis, the Indian justice system has not given up its overprotectionist stance of prohibiting arbitration of consumer disputes. Such a paternalistic approach towards consumer dispute arbitration, which was evident in the recent case of *Aftab Singh v. Emaar MGF Land Ltd.*, can lead to India being branded as an unfavourable jurisdiction for businesses. This article is an attempt to demystify the ambivalent positions held by the courts in India in the arbitration of consumer disputes. In order to do so, the paper firstly seeks to decipher the arbitrability doctrine in the Indian courts. Secondly, a brief analysis of the Consumer Protection Act, 1986 (“COPRA”) will be carried out to inquire whether the Act has achieved its goals and if arbitration of consumer disputes is essential. Thirdly, an analysis of the interaction between Indian courts and arbitrability of consumer disputes will be carried out. Fourthly, the major concerns relating to arbitration in India will be highlighted. Fifthly and finally, an overview of the foreign trends/positions on consumer arbitration will be carried out to serve as recommendations for arbitration of consumer disputes in India.

## Introduction

“*I will see you in court!*” is a very popular sentence uttered by overconfident consumers to traders in India. Such threats to bring proceedings against traders are made by consumers due to their superficial belief that the latter have the upper hand in the Indian judicial system. But in reality, the traders are the ones who have the higher bargaining power due to their shrewdly drafted contracts which would often consist of a mandatory arbitration and/or an exclusive jurisdiction clause/agreement. As most consumers only have a shallow glance at the contract, often dubbed as the “*terms and conditions*” document, they are at a disadvantageous position and so often protest the application of mandatory arbitration clauses.<sup>1</sup> With the advent of e-commerce, customers agree to the terms and conditions of purchase often without even looking at them. The abovementioned events have led the courts to take a relook at the application of Section 8 of the *Arbitration and Conciliation Act, 1996* (“Arbitration Act”) that dictates the court to refer a matter to arbitration if there is a mention of a valid arbitration agreement and if the said matter can be subjected to such agreements.<sup>2</sup>

The development of the doctrine of arbitrability has led to the erosion of the Supreme Court’s position in the landmark case of *Magma Leasing*, which stated that courts were required to refer matters to arbitration in the presence of a valid arbitration agreement.<sup>3</sup> Since *Magma Leasing*, there has been a growing trend in courts, especially in consumer dispute matters, to apply the arbitrability doctrine and litigants have also used the doctrine as the primary defence argument against S.8 applications.<sup>4</sup>

Firstly, the paper seeks to demystify the arbitrability doctrine in the Indian courts. Secondly, a brief analysis of the Consumer Protection Act, 1986 (“COPRA”) will be carried out to inquire whether the Act has achieved its goals and if arbitration of consumer disputes is essential. Thirdly, an analysis of the interaction between Indian courts and arbitrability of consumer disputes will be carried out. Fourthly, the major concerns relating to arbitration in India will be highlighted. Fifthly and finally, an overview of the foreign trends/positions on consumer

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<sup>1</sup> National Seeds Corporation Ltd. v. M. Madhusudhan Reddy & Anr., (2012) 2 SCC 506; M/S Emaar M.G.F. Land Ltd. v. Aftab Singh, 2018 SCC OnLine SC 2378.

<sup>2</sup> Magma Leasing & Finance Ltd. v. Potluri Madhavalata, (2009) 10 SCC 103, ¶18.

<sup>3</sup> *Id.* at ¶ 17.

<sup>4</sup> Kingfisher Airlines Limited v. Prithvi Malhotra, 2013(7) Bom C.R. 738; A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386; Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788.

arbitration will be carried out to serve as recommendations for arbitration of consumer disputes in India.

### **The Development of the Arbitrability Doctrine and Special Judicial Fora**

The Arbitration Act like the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") does not properly resolve the issue of the scope/extent of arbitration, i.e., which subject-matters can be resolved through a private arbitration process.<sup>5</sup> Similar to its Model Law counterpart,<sup>6</sup> Section 34(2)(b)(i) of the Arbitration Act provides courts with the power to set aside an arbitration award, if the subject-matter is deemed non-arbitrable. The Arbitration Act does not provide a list of non-arbitrable subject matters, despite the presence of Section 34(2)(b)(i), so this indicates that it was the legislative intent to keep the scope of arbitrability open-ended and hence contestable in courts.<sup>7</sup> In the absence of any rule providing the list of arbitrable/non-arbitrable disputes, the "arbitrability test" was postulated by the Supreme Court in the 2011 judgement of *Booz Allen*.<sup>8</sup> The test held that if certain subject-matters fell solely in the Court's sphere, then disputes arising out of such matters could be held non-arbitrable.<sup>9</sup> Such a holding was arrived at because the legislature had determined that specific subject-matters were part of public policy and so their disputes must be resolved only in the public/special courts.

Special courts such as consumer, labour courts were established by special laws to exclusively deal with the subject-matter disputes. Such special courts are not included within the meaning of "Civil Court" under the Arbitration Act,<sup>10</sup> and the existing positions of the Supreme Court hold that the disputes meant to be resolved by such special public fora cannot be resolved by a private arbitration forum.<sup>11</sup>

### **The Indispensability of Arbitration of Consumer Disputes in the Age of e-Commerce**

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<sup>5</sup> 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).

<sup>6</sup> Article 34(2)(b)(i), UNCITRAL Model Law on International Commercial Arbitration.

<sup>7</sup> P.C.MARKANDA ET AL., LAW RELATING TO ARBITRATION AND CONCILIATION 552 (8th ed. 2006).

<sup>8</sup> *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532 [hereinafter "Booz Allen"].

<sup>9</sup> *Id* at ¶ 20.

<sup>10</sup> Section 2(1)(e), Arbitration and Conciliation Act, 1996.

<sup>11</sup> *Booz Allen*, (2011) 5 SCC 532, ¶ 20; *National Seeds Corporation Ltd. v. M. Madhusudhan Reddy & Anr.*, (2012) 2 SCC 506 ¶ 66. [hereinafter "National Seeds Corporation"];

From consisting of just a few groups of sceptical online shoppers, India has become one of the largest e-commerce markets in the world in a short duration. Although the e-commerce websites offer attractive deals, they do have their record of providing customers with counterfeit products and causing other problems. Despite the existence of special consumer courts, the consumers are hardly done timely justice as such courts are often plagued with backlog of cases and corruption.<sup>12</sup> The COPRA's requirement of the courts to dispose complaints in three months seems to be a far cry,<sup>13</sup> because the consumer courts often take a couple of years to pass a judgement.<sup>14</sup> With the number of e-commerce consumers expected to grow exponentially, the government has introduced the Online Consumer Mediation Centre ("OCMC") to alleviate the load on the consumer courts and also bring consumers timely justice.<sup>15</sup> But, the OCMC does not have many adopters due to its non-binding character of mediation of dispute resolution.<sup>16</sup> OCMC's failure highlights the need to institutionalise Online Dispute Resolution ("ODR") fora because doing so would facilitate e-commerce consumers in approaching the ODR fora by invoking online arbitration agreements, which have been held legal in India.<sup>17</sup> ODR is similar to a traditional arbitration hearing, but is conducted online, which makes it more efficient and inexpensive.

### **The Thorny Relationship betwixt India's Consumer Protection Laws and Arbitration**

In arbitrations, to determine arbitrability of an issue there are two primary factors which are considered, (i) the type of remedy sought, whether *in rem* or *in personam* and (ii) whether such remedy can be granted by a specific forum or an arbitral forum. As held in *A. Ayyasamy*<sup>18</sup> the abovementioned factors have a significant influence on arbitrability. In consumer disputes,

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<sup>12</sup> Delhi State & District Consumer Courts Practitioner's Welfare Association (Regd.) v. Hon'ble Lt. Governor Govt. Of NCT Delhi and Ors., 2018 SCC OnLine Del 7051; *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/>.

<sup>13</sup> Section 13(3A), Consumer Protection Act, 1968.

<sup>14</sup> 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>.

<sup>15</sup> Sanjeeb Mukherjee, *For e-commerce purchases: Centre to open online consumer mediation centre*, BUSINESS STANDARD (Dec. 23, 2016), available at [https://www.businessstandard.com/article/current-affairs/for-e-commerce-purchases-centre-to-open-online-consumer-mediation-centre116122300035\\_1.html](https://www.businessstandard.com/article/current-affairs/for-e-commerce-purchases-centre-to-open-online-consumer-mediation-centre116122300035_1.html).

<sup>16</sup> 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>.

<sup>17</sup> Trimex International FZE Ltd. v. Vedanta Aluminium Ltd., (2010) 3 SCC 1; Shakti Bhog Foods Ltd. v. Kola Shipping Ltd., (2009) 2 SCC 134.

<sup>18</sup> *A. Ayyasamy v. A. Paramasivam*, (2016) 10 SCC 386 305 [hereinafter "A. Ayyaswamy"].

the abovementioned first factor is simple to determine because the dispute arises from the sale contract between the consumer and the vendor, i.e., remedy sought is *in personam*. But the second factor is blockaded due to the presence of special consumer courts, thereby, making consumer disputes inarbitrable. To understand the non-arbitrability of consumer disputes, it is essential to trace the landmark cases which led to such a position.

### 1. Fair Air Engineers v. N.K. Modi (1996)

The queries regarding mandatory reference of consumer disputes to arbitration were answered in *Fair Air Engineers*<sup>19</sup> where the Supreme Court taking a pro-consumer stand held that the COPRA should be given preference as opposed to the Arbitration Act, 1940 to decide consumer disputes. This was because (i) COPRA is a consumer-specific law with remedies for consumers in addition to the remedies of Arbitration Act, 1940 or the Indian Contract Act, 1872 and (ii) COPRA is a recent law compared to the Arbitration Act, 1940, i.e., it was legislated after considering the existing laws and it has an overriding nature.<sup>20</sup>

### 2. Thirumurugan Co-operative Agricultural Credit Society v. M. Lalitha (2003)

In *Thirumurugan Co-operative Society*,<sup>21</sup> it was held that the presence of an arbitration agreement would not impose a bar on the consumer to approach the consumer fora and that the mandatory reference to arbitration would make consumer courts superfluous. The COPRA was legislated to protect consumers and provide an efficient, easy, and equal playing field between two unequal litigants, i.e., the consumer and the corporation.<sup>22</sup> The court in *Thirumurugan* relied on the aforementioned reasoning and the judgement led to the death knell of Section 8, Arbitration Act because COPRA in effect superseded over the Arbitration Act with regards to consumer disputes.<sup>23</sup>

### 3. A. Ayyaswamy v. A. Paramasivam (2016)

In the landmark judgement of *Ayyaswamy*, the court relied on *National Seeds Corporation* and *Skypak Couriers*,<sup>24</sup> but held that consumer disputes were amongst the

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<sup>19</sup> *Fair Air Engineers Pvt. Ltd. v. N.K Modi*, (1996) 6 SCC 385, ¶¶ 15, 16.

<sup>20</sup> *Id.* at ¶ 14.

<sup>21</sup> *Secy., Thirumurugan Cooperative Agricultural Credit Society v. M. Lalitha*, (2004) 1 SCC 305 [hereinafter "M. Lalitha"].

<sup>22</sup> *Lucknow Development Authority v. M.K. Gupta*, (1994) 1 SCC 243, ¶ 2.

<sup>23</sup> *M. Lalitha*, (2004) 1 SCC 305, ¶ 16.

<sup>24</sup> *Skypak Couriers Ltd. v. Tata Chemicals Ltd.*, AIR. 2000 SC 2008 [hereinafter "Skypak Couriers"].

in arbitrable disputes. Consumer courts had exclusive jurisdiction over such disputes, whereas the civil courts did not and so in effect the inarbitrability of consumer disputes became a part of public policy.<sup>25</sup> The court had also held that it was disallowed to act against the requirements of a welfare legislation like the COPRA,<sup>26</sup> and it was opined that the arbitrator could not grant a remedy like that granted by the welfare forum. The central notion of arbitration, party autonomy, is superseded by the over-protectionist judgement thereby rendering the *National Seeds* judgement futile as it had left the reference to arbitration to the consumer's wish.

#### 4. Aftab Singh v. Emaar MGF Land Ltd. (2018)

Another opportunity was presented before the Supreme Court in *Aftab Singh*<sup>27</sup> to resettle the position regarding arbitrability of consumer disputes, but there was no change in the court's position from the abovementioned cases. In the case, Aftab Singh filed a suit against Emaar MGF in a consumer court as the latter had not delivered the former's apartment. Emaar MGF raised a plea to the court to consider the arbitration clause and refer the matter to arbitration due to the (then recent) amendments to Section 8. However, the Supreme Court did not alter its position with regards to inarbitrability of consumer disputes and gave an implied consent to *A. Ayyaswamy*.<sup>28</sup> The case had the opportunity to correct the trend of holding consumer disputes as partially arbitrable or wholly inarbitrable, but it relied on previous judgements and did not take any new stand, thereby, blowing the golden opportunity.

#### **The Major Concerns About Arbitration in the Overprotectionist Regime**

The two major concerns about arbitration in India are; (i) the apprehension of arbitration benches lacking the due process system and (ii) the ever-expanding list of inarbitrable subject-matters.

There is an apprehension in Indian courts that arbitrations do not have a robust due process mechanism and so may not offer "real opportunities" to consumers.<sup>29</sup> Regardless of such concerns being party true, it is debatable if such concerns can supersede party autonomy, a

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<sup>25</sup> *National Seeds Corporation*, (2012) 2 SCC 506; *Skypak Couriers*, AIR 2000 SC 2008; The Arbitration and Conciliation Act, No. 26 of 1996, § 5.

<sup>26</sup> *A. Ayyasamy*, (2016) 10 SCC 386, ¶ 7.

<sup>27</sup> *M/S Emaar M.G.F. Land Ltd. v. Aftab Singh*, 2018 SCC OnLine SC 2378.

<sup>28</sup> *Id.*

<sup>29</sup> *Brekoulakis*, *supra* note 5.

prime feature of arbitration.<sup>30</sup> But it should be noted that arbitration does indeed have a compact due process mechanism along with procedural safeguards such as challenging an arbitrator's impartiality.<sup>31</sup> Arbitrations may not have a detailed due process mechanism like that of a traditional civil court because it aims to eliminate the *due process paranoid* and to provide an expedited and efficient method of dispute resolution.<sup>32</sup> It is also noteworthy that arbitrations are bound by the principles of natural justice and any contravention with them will lead to striking down of the arbitral award.<sup>33</sup>

The Indian Parliament has attempted several times with various amendments to make India a favourable destination for arbitration, but the judiciary's rulings of reducing the scope of arbitrable subject-matters seem to be inconsistent with such a legislative goal. The judiciary arrived at such rulings primarily due to the existence of special statutes and fora for certain types of disputes.<sup>34</sup> Booz Allen's landmark test of arbitrability has been desecrated as its application seems to have no proper consensus. For illustration, in *Kingfisher Airlines*<sup>35</sup> the court held that the matter was inarbitrable as the Industrial Disputes Act, 1947 (special statute) provided for its own arbitration process, regardless of it being different from the usual arbitration process. But, in *Vimal Kishor Shah*<sup>36</sup> the matter was rendered inarbitrable as the subject-matter was governed by the Indian Trusts Act, 1882, despite the absence of any statute-specific arbitration process. This shows that there is no cohesive approach taken by the courts in applying the landmark Booz Allen test, thereby leading to a slippery slope with regards to deciding what is arbitrable and what is not.

### **Global Positions on Arbitrability of Consumer Disputes and Lessons for India**

Due to the advent of e-commerce and the growing number of consumer disputes, the United States of America ("USA") and the European Union ("EU") have become more open to private dispute resolution through arbitrations.<sup>37</sup> The US and the EU have been promoting

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<sup>30</sup> Agnish Aditya & Siddharth Nigotia, *Semantic and doctrinal restructuring of 'arbitrability': examining Brekoulakis' arguments in the Indian context*, 33(4) ARB. INT'L 609-618 (2017).

<sup>31</sup> The Consumer Protection Act, No. 68 of 1986, § 13(1).

<sup>32</sup> Remy Gerbay, *Due Process Paranoia*, KLUWER ARB. BLOG (June 6, 2016), available at <http://arbitrationblog.kluwarbitration.com/2016/06/06/due-process-paranoia/>.

<sup>33</sup> ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263.

<sup>34</sup> Booz Allen, (2011) 5 SCC 532, Rakesh Malhotra v. Rajinder Kumar Malhotra, (2014) SCC OnLine Bom 1146, Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788.

<sup>35</sup> Kingfisher Airlines Limited v. Prithvi Malhotra, 2013(7) Bom C.R. 738.

<sup>36</sup> Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788.

<sup>37</sup> Mindy R. Hollander, *Overcoming the Achilles' Heel Of Consumer Protection: Limiting Mandatory Arbitration Clauses in Consumer Contracts*, 46 HOFSTRA L. REV. 366, 372 (2014).

consumer dispute arbitrations despite having taken different approaches towards subject-matter.<sup>38</sup> A brief overview of both the EU and USA positions will help in extracting the lessons for India's consumer dispute arbitrations.

### European Union

The most important factor of EU consumer dispute arbitrations is the non-recognition of pre-dispute arbitration agreements.<sup>39</sup> The EU is often branded as a “pro-arbitration” destination due to the presence of a robust private dispute resolution system especially for consumer-vendor disputes.<sup>40</sup> The *Regulation on Consumer Online Dispute Resolution* (“ODR Regulation”)<sup>41</sup> and the *Directive on Consumer Alternative Dispute Resolution* (“ADR Directive”)<sup>42</sup> which were legislated by the EU made it the frontrunner in the ADR of consumer disputes. The EU also provides safeguards for arbitration of consumer disputes, which state that the arbitration agreement should be subject to certain directives and failing to meet such directives will lead to interference of the court.<sup>43</sup> Therefore, the EU attempts to bring about a balance between arbitrability of consumer disputes while also providing effective safeguards. The ADR directive necessitates certain prerequisites to be met by the consumer arbitration/ADR mechanism and such prerequisites are *expertise, independence, impartiality, transparency, effectiveness, fairness and liberty*.<sup>44</sup> It is noteworthy that the prerequisites of the ODR Directive are similar to those found in the ADR Directive. The EU encourages litigants to subscribe to the modern ODR practice as it offers the same safeguards provided by the ADR mechanism while being more economical, time-saving and easier to approach, especially for cross-border disputes.<sup>45</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> Dafia 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).

<sup>40</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520035) [hereinafter “Brand”].

<sup>41</sup> Regulation on Consumer Online Dispute Resolution, 2013 O.J. (L 165) 1 [hereinafter “2013 Regulation”].

<sup>42</sup> Council Directive 2013/11, 2013 O.J. (L 165) 63 (EC) [hereinafter “EU Council Directive 2013”].

<sup>43</sup> Anastasia Konina, *Consumer Dispute Settlement in the European Union and the United States*, 20 INT'L TRADE & Bus. L. RE- 1, 24 (2017).

<sup>44</sup> EU Council Directive 2013, *supra* note 42, arts. 5, 6, 7, 8, 9 & 10.

<sup>45</sup> Cohn Rule et al., *Online Small Claim Dispute Resolution Developments-Progress on a So Law for Cross-Border Consumer Sales*, 29(3) PENN ST. INT'LL. REV- 651, 652 (2011).

As mentioned above, the EU does not recognise pre-dispute arbitration agreements in consumer disputes, this is because of the 1993 Unfair Contract Terms Directive (“UCTD”).<sup>46</sup> Such a position is held by the EU to protect consumer interests and prevent them from being forced to take part in compulsory arbitration proceedings to which they did not autonomously consent.<sup>47</sup> The UCTD has also been adopted by the national statute of EU member nations, thereby highlighting the attention paid to consumer dispute arbitration in the EU. Due to such an act, pre-dispute arbitration agreements are void in the EU.<sup>48</sup> There is yet another advantage to the adoption of the UCTD, i.e., if an arbitration agreement bars judicial review of the arbitration, the agreement shall be held invalid.<sup>49</sup> Therefore, the EU provides an environment which is pro-consumer dispute resolution along with the requisite safety-valves, making it an extremely ideal place to arbitrate consumer disputes.

### United States of America

Although there is great recognition of party autonomy for consumer dispute resolution through arbitration in the USA, the arbitration fora are largely unregulated.<sup>50</sup> The most important drawback of arbitration of consumer disputes in the USA is the recognition/validity of pre-dispute arbitration agreements. Due to such a position, the USA statute provides for the compulsory access to courts as a requisite for every arbitration clause.<sup>51</sup> But, over the years the courts in the USA have shown a trend of subscribing to a pro-capitalist approach. The courts in the USA hold that a consumer should compulsorily participate in an arbitration process even if they have a jot of constructive understanding that there exists a pre-dispute arbitration agreement.<sup>52</sup> Such a stance has led to dire consequences for consumers, especially in the e-commerce era.<sup>53</sup>

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<sup>46</sup> Council Directive 93/13, 1993, O.J. (L 95) 29 (EEC) [*hereinafter* "EEC Council Directive of 1993"].

<sup>47</sup> *Id.* at art.7(2).

<sup>48</sup> Pablo Cortes & 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).

<sup>49</sup> Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C.J. INTL L. & COM. REG. 357 (2002).

<sup>50</sup> David Horton, *Federal Arbitration Act Pre-emption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1218 (2013).

<sup>51</sup> The Federal Arbitration Act, 9 U.S.C. §2 (2012).

<sup>52</sup> *Janda v. T-Mobile, U.S.A. Inc.*, (C 05-03729) 2006 W.L. 708936, 5-6; *All American Roofing Inc. v. Zurich American Ins. Inc.*, 404 Ill. App. Ct. 3d 438, 453 (2010).

<sup>53</sup> 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)

There are three primary flaws with the approach taken by the USA court with regards to arbitration of consumer disputes. First, due to the courts' rulings, consumers are forced to take a 'take it or leave it' option while shopping and they fall prey to take part in the compulsory arbitration process when a dispute arises. Second, the 'repeat player' phenomenon favours the corporates/sellers because arbitrators are paid only when they are chosen by corporates/sellers to oversee arbitrations and they are chosen only when there is some incentive to the corporates/sellers from their (arbitrator's) decisions.<sup>54</sup> Although every arbitrator is necessitated to disclose their repeat appointments, the 'repeat player' phenomenon has not been held as a ground by itself to annul an award.<sup>55</sup> Third, the corporates possess the resources to hire a specialised team to draft arbitration agreements, whereas the consumer is forced to agree to an arbitration agreement without any legal guidance.<sup>56</sup> So, on the whole, the approach taken by the USA with regards to arbitration of consumers disputes leads to an uneven playing field where the unguided consumer is expected to take on the corporate muscle.

### Lessons for India

After a brief overview of arbitration of consumer disputes in both EU and the USA, it is fairly obvious that there are lessons for India to learn. From the EU, India should adopt features and safeguards from the new ODR and ADR Directives as they seem promising in providing efficient and economical fora for arbitration of consumer disputes. The Unfair Terms in Consumer Contracts Directive should also be imported from the EU put an end to the trader bias and overprotectionist nature of the Indian courts. When pre-dispute arbitration agreements are outright not recognised for consumer disputes, then the Indian courts could give up their paternalistic approach and give way to the legislative measures to make India a pro-arbitration destination.

### **Conclusion**

The Arbitration Act has had tumultuous times since its foundation, with its woes beginning with the landmark judgement of *Bhatia International*<sup>57</sup> which resulted in India being

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<sup>54</sup> David Horton & Andrea Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 71 (2015).

<sup>55</sup> William Park, *Arbitrator Bias*, 6 TRANSNAT'L DISP. MGMT. 27 (2015); *Halliburton v. Chubb* [2018] EWCA (Civ) 817.

<sup>56</sup> Eric H. Franklin, *Mandating Precontractual Disclosure*, 67 U. MIAMI L. REV. 553, 561(2013).

<sup>57</sup> *Bhatia International v. Bulk Trading S. A.*, (2002) 4 SCC 105.

branded as an unfavourable jurisdiction for arbitration; then continuing with *BALCO*,<sup>58</sup> and are still persistent as highlighted by the 2017 judgment of *IMAX v. E-City*.<sup>59</sup> With respect to consumer disputes in India, there are currently two complicated extreme positions, which either exclude consumer disputes from being arbitrable or give way to the mandatory pre-dispute arbitration agreements. There is an imminent need to bring a balance between the two extremes considering the exponential rise of e-commerce accompanied with the growing number of consumer disputes. The Supreme Court in *Aftab Singh* threw away a great opportunity to bring about such a balance by analysing the global trend (especially the EU) and adopting suitable positions. Considering that arbitration is rooted on party autonomy, it is blatantly unfair to disallow arbitration of consumer disputes under the garb of pro-consumerism. In conclusion, one can only hope that the Supreme Court and the Indian Parliament consider the global developments and imports well-suited measures in order to fulfil the legislative intent of making India a pro-arbitration jurisdiction.

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<sup>58</sup> *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services*, (2012) 9 SCC 552.

<sup>59</sup> *Imax Corporation v. E-City Entertainment Pvt. Ltd.*, (2017) 5 SCC 331.