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# Decoding Arbitrability and Determining the Boundaries of Arbitration in Indian Jurisprudence

*by*

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# Decoding Arbitrability and Determining the Boundaries of Arbitration in Indian Jurisprudence


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## A. Arbitrability – A fundamental concept in arbitration law jurisprudence

Arbitration is a private dispute resolution mechanism where two or more parties agree to resolve their current or future disputes before an Arbitral Tribunal in an alternative to adjudication by courts and other public fora established by law. The mutual consensus of parties to resort to arbitration for resolving disputes is captured in an arbitration agreement, where parties forego their legal right to have their disputes adjudicated in other courts/public fora. Under international arbitration law jurisprudence, it is widely recognised that the term "disputes" only refers to matters that can be settled through arbitration. In other words, arbitration has its own limitations and not all kinds of disputes are amenable to arbitration are "arbitrable".

Arbitrability is a fundamental concept in arbitration law as it relates to the very jurisdiction of an Arbitral Tribunal to act upon a matter. While non-arbitrability has several meanings, the Supreme Court in *Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.*[1] has referred to the following three facets of non-arbitrability:

(*i*) Whether the disputes are capable of adjudication and settlement by arbitration?

(*ii*) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the category of "excepted matters", which are excluded from the purview of the arbitration agreement.

(*iii*) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal or whether such disputes do not arise from the statement of claim and the counterclaim filed by the parties before the Arbitral Tribunal.

From a transnational perspective, non-arbitrability may arise from seven distinct situations[2], these include:

(*i*) The underlying contract itself being invalid for a reason which may not directly strike upon the validity of the arbitration agreement.

(*ii*) The non-existence of an arbitration agreement between the parties.

(*iii*) The arbitration agreement being invalid under the applicable law.

(*iv*) A disputed issue falling outside the scope of the arbitration agreement.

(*v*) The applicable law prohibits arbitration of a disputed issue/subject-matter. In other words, concerns pertaining to public policy under the mandatory law bars the arbitration of disputes otherwise chosen by parties to be referred to arbitration.

(*vi*) An essential precondition or prerequisite for referring the matter to arbitration is not met by either or both of the parties.

(*vii*) The party seeking arbitration has waived its right to arbitrate or is estopped from claiming that right.

## B. Arbitration agreement and its link with arbitrability

For the purposes of arbitrability, it is essential to understand what constitutes a valid arbitration agreement. Section 7 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) provides that an "arbitration agreement" means an agreement by parties to submit to arbitration all or certain disputes which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not.[3]

As per the Arbitration Act, an arbitration agreement has to be in writing, in the form of an arbitration clause in a contract or a separate agreement.[4] An arbitration agreement can also be contained in exchange of letters, telex, telegrams, or other means of telecommunication which sufficiently establish the record of the agreement.[5] Lastly, an

arbitration agreement will be deemed to be in existence if two parties exchange statements of claim and defence in which the existence of the arbitration agreement is alleged by one party and not denied by the other.[6]

While the term "agreement" is not defined under the Arbitration Act, Section 10 of the Contract Act, 1872 (Contract Act) provides that all agreements are contracts, if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not thereby expressly declared to be void.[7] The Supreme Court in *Vidya Drolia* v. *Durga Trading Corpn.*[8] has held that an arbitration agreement, in addition to the mandate under Section 7 of the Arbitration Act, must also satisfy the statutory mandate under Section 10 of the Contract Act. An arbitration agreement which is not enforceable in law is void and not legally valid.[9] In such a case, the disputes that may be sought to be referred to arbitration would be rendered non-arbitrable on account of the non-existence of a valid arbitration agreement.[10]

Arbitration and the reference of disputes to arbitration is a matter of contract, where parties are entitled to fix boundaries to confer and limit the jurisdiction and legal authority of the Arbitral Tribunal. An arbitration agreement can be extensive and comprehensive, covering all disputes, or it can be limited to specific disputes. The question of the Arbitral Tribunal's jurisdiction emerges when the parties in their arbitration agreement decide to carve out arbitrable disputes or exclude matters which are not amenable to arbitration.

## C. Subject-matter arbitrability

The Supreme Court in *Vidya Drolia*[11] while referring to the decision in *SBP & Co.* v. *Patel Engg. Ltd.*[12] opined that there is a difference between a "non-arbitrable claim" and "non-arbitral subject-matter". The former may arise on account of scope of the arbitration agreement and also when the claim is not capable of being resolved through arbitration. However, non-arbitrable subject-matter would generally refer to the non-arbitrability of disputes under the applicable provisions of law.

The provisions of the Arbitration Act provide much needed guidance and recognise that certain kinds of disputes or subjects may not be amenable to arbitration. For instance, Section 2(3) of the Arbitration Act states that, "this part shall not affect any other law for the time being in force by which certain disputes may not be submitted to arbitration".[13] Similarly, Section 34(2)(*b*)(*i*) of the Arbitration Act empowers the courts to set aside arbitral awards where it is found that "the subject-matter of the dispute is not capable of settlement by arbitration".[14]

Insofar as subject-matter arbitrability is concerned, it is generally an accepted norm that every civil or commercial dispute, either contractual or otherwise, which can be decided by a court. is in principle also capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunal is excluded, either expressly or by necessary implication.[15] The lawmakers are entitled to exclusively reserve certain categories of

proceedings the courts, tribunals, or other public forums. Thus, in cases where the public policy mandates that a dispute is non-arbitrable, a referral court acting under Section 11 (or Section 8) of the Arbitration Act would not allow an application for reference of the dispute to arbitration even if both the parties call for the same.[16]

The common examples of non-arbitrable disputes include, amongst others, disputes arising from the (*i*) rights and liabilities arising out of a criminal offence; (*ii*) matrimonial disputes pertaining to divorce, judicial separation, restitution of conjugal rights, custody of children; (*iii*) guardianship matters; (*iv*) insolvency and winding up related matters; (*v*) testamentary matters (such as grant of probate, letters of administration, and succession certificate); and (*vi*) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction.

As may be noted above, matters which are non-arbitrable typically relate to rights and actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. In addition to disputes which involve exercise of rights in rem before civil courts, there are classes of disputes which fall within the exclusive domain of special fora under legislations which confer exclusive jurisdiction to the exclusion of an ordinary civil court. The general principle is that where the jurisdiction of an ordinary civil court is excluded by conferment of exclusive jurisdiction on a specified court or tribunal as a matter of public policy, then such a dispute would not be capable of resolution by arbitration.[17]

For instance, in *Vimal Kishor Shah* v. *Jayesh Dinesh Shah*[18], the disputes relating to private trusts, trustees, and beneficiaries of trust under the Trusts Act were held to be non-arbitrable. Similarly, in *Emaar MGF Land Ltd.* v. *Aftab Singh*[19], it was observed that the purpose behind enactment of the Consumer Protection Act, 1986 (Consumer Protection Act) as a law is to protect the consumer against wrongs and misdeeds for which the remedy under the ordinary law becomes illusionary and ineffective. The Supreme Court in *Emaar MGF*[20] opined that Consumer Protection Act has specific provisions for awarding compensations, imposing penalties, execution of decisions and effective implementation of orders which powers are greater than an ordinary civil court. Hence, consumer disputes under the Consumer Protection Act were held not amenable to arbitration.

Inasmuch as why disputes pertaining to rights in rem are typically non-arbitrable, the Supreme Court in *Vidya Drolia*[21] explained that the distinction between judgments in rem and judgments in personam turns on their power as res judicata. A judgment in rem would operate as res judicata against the world, and judgment in personam would operate as res judicata only against the parties in dispute. The Supreme Court in *Vidya Drolia*[22] also provided a cautionary note stating that the use of expressions rights in rem and rights in personam may not be the precise threshold for determining non-arbitrability. This was because many a times, a right in rem results in a subordinate enforceable right in personam.

From the above, it is clear that arbitration is unsuitable when rendering a decision has an erga omnes effect, that is, it affects the rights and liabilities of persons who are not bound by the arbitration agreement. Further, matters involving the exercise of sovereign functions of State which are otherwise inalienable and non-delegable are non-arbitrable as the State alone has the exclusive right and duty to perform such functions. Sovereign functions for the purpose of the Arbitration Act would extend to exercise of executive power in different fields including commerce and economic, legislation in all forms, taxation, eminent domain and police powers which includes maintenance of law and order, internal security, grant of pardon, etc. as distinguished from commercial activities, economic adventures and welfare activities.[23] Similarly, decisions and adjudicatory functions of the State that have public interest element like the legitimacy of marriage, citizenship, winding up of companies, grant of patents, etc. are non-arbitrable, unless the statute in relation to a regulatory or adjudicatory mechanism either expressly or by clear implication permits arbitration. In these matters the State enjoys monopoly in dispute resolution.[24]

In certain cases, implicit non-arbitrability is established when by the application of mandatory law, the parties are quintessentially barred from contracting out and waiving the adjudicatory procedures of the Designated Court or the specified public forum. The parties in such circumstances do not have a choice and must resort to the forum stated in the applicable provisions of law and no other forum. In other words, the doctrine of election to select arbitration as a preferred mode of dispute resolution is available to the parties only if the law accepts the existence of arbitration as an alternative remedy and freedom to choose is available. To ascertain whether parties have the option of electing arbitration over the prescribed mechanism under a given statute, the parties need to examine the text of the statute, the legislative history, and the inherent conflicts (if any) between arbitration and the statute's underlying purpose.[25]

## D. Interplay of arbitrability and public policy concerns

A controversy erupted as the Supreme Court rendered its decision in *N. Radhakrishnan* v. *Maestro Engineers*[26] holding that matters relating to serious allegations of fraud were non-arbitrable. The Supreme Court in *N. Radhakrishnan* v. *Maestro Engineers*[27] further opined that if justice demands, then notwithstanding the arbitration clause, the dispute would be tried in an open court. In the subsequent decision in *Vidya Drolia*[28], it was held that to accept the reasoning in *N. Radhakrishnan*[29], one would have to agree that arbitration is a flawed and compromised dispute resolution mechanism that could be forgone when public interest or public policy demands that the matter must be tried in a court of law. The Supreme Court in *Vidya Drolia*[30] continuing with its analysis of *N. Radhakrishnan*[31] held that the public policy argument proceeded on the principle that arbitration is inferior to court adjudication as:

(*i*) fact-finding process in arbitration is not equivalent to judicial fact-finding, which is far more comprehensive and in-depth;

(*ii*) there is limited or lack of reasoning in arbitral awards;

(*iii*) arbitrators enjoy and exercise extensive and unhindered powers and therefore are prone in making arbitrary and despotic decisions;

(*iv*) there is no appeal process in arbitration which combined with point (*iii*) above and the limited review of arbitral award in post-award court proceedings, may have devastating consequences for the losing party and undermine justice;

(*v*) arbitration proceedings are usually private and confidential;

(*vi*) arbitrators are unfit to address issues arising out of the economic power disparity and social concerns;

(*vii*) business and industry, by adopting and compulsorily applying arbitration process, leave the vulnerable and weaker sections with little or no meaning choice but to accept arbitration; and

(*viii*) arbitration is expensive and costly in comparison to court adjudication.

The Supreme Court in *Vidya Drolia*[32] upon culling out the above grounds opined that it would not be correct to dispel these grounds as mere conjectures and baseless. However, it would be grossly irrational and completely wrong to mistrust and treat arbitration as flawed and an inferior adjudication procedure unfit to deal with public policy aspects of a legislation. It was observed in *Vidya Drolia*[33] that arbitrators, like the courts, are equally bound to resolve and decide disputes in accordance with public policy of law. The mere possibility of failure to abide by public policy consideration in a legislation in itself is not sufficient to nullify an arbitration agreement or deem certain disputes to be non-arbitrable. A reference was also made in *Vidya Drolia*[34] to the decision of the Supreme Court of Canada in *TELUS Communications Inc.* v. *Avraham Wellman*[35] to opine that the courts must show due respect to principles of party autonomy and limited judicial intervention and ought not to interfere with arbitration agreements particularly in commercial matters.

Basis the above discussion and placing reliance on the decision in *Avitel Post Studioz Ltd.* v. *HSBC PI Holdings (Mauritius) Ltd.*[36] the Supreme Court in *Vidya Drolia*[37] held that the decision in *N. Radhakrishnan*[38] had no legs to stand on. Accordingly, it was observed that disputes involving allegations of fraud could be referred to arbitration, so long as the alleged fraud (*i*) does not permeate the entire underlying contract and the arbitration agreement; and (*ii*) have any ramifications in public domain.

## E. Four-fold test of arbitrability

Upon having extensively discussed the Indian legal position on arbitrability, the Supreme Court in *Vidya Drolia*[39] propounded the following four-fold test for determining when subject-matter of a dispute in an arbitration agreement is not arbitrable:

(*i*) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

(*ii*) When cause of action and subject-matter of the dispute affects third-party rights, has erga omnes effect, requires centralised adjudication, and mutual adjudication would not be appropriate and enforceable.

(*iii*) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.

(*iv*) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

The Supreme Court clarified that the above tests are not watertight compartments; rather, they dovetail and overlap. However, it was observed that on a holistic and pragmatic application, the above test brings a great degree of certainty and help in ascertaining whether a dispute is non-arbitrable.

## F. Who decides non-arbitrability?

As per the Supreme Court, the issue of arbitrability of disputes can be raised at three stages.[40] Firstly, before the court on an application for reference under Section 11 or stay of pending judicial proceedings and reference under Section 8 of the Arbitration Act. Secondly, before the Arbitral Tribunal during the course of the arbitration proceedings. Thirdly, before the court at the stage of the challenge to the award or its enforcement.

### *(i) Before the referral court under Section 8 or Section 11 of the Arbitration Act*

The Supreme Court clarified that the scope of judicial review and jurisdiction of courts acting under Sections 8 and 11 of the Arbitration Act is identical and extremely limited and restricted. The courts at the referral stage ought to undertake a prima facie examination on the existence of a valid arbitration agreement. A prima facie review does not entail a full review or mean that a case is proved to the end. It refers to a first review made by the referral court to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review is intended to cut the deadwood and trim off the side branches in straightforward cases where the dismissal is barefaced and pellucid.[41] The object of exercising the limited jurisdiction under Section 8 or Section 11 of the Arbitration Act, as the case may be, is to protect the parties from being forced to arbitrate when a matter is demonstrably non-arbitrable. Thus, as held by the Supreme Court in a recent case[42], the referral courts are not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of an arbitrator.

### *(ii) Before the Arbitral Tribunal*

Clauses (*a*) and (*b*) to sub-section (1) of Section 16 of the Arbitration Act enact the principle of separation of arbitration agreement from the underlying or container contract. Section 16(1)(*a*), by legal fiction, gives an independent status to an arbitration clause as if it were a standalone agreement, even when it is only a clause and the integral part of the

underlying contract. Section 16(1)(*b*) formulates a legal rule that a decision by the Arbitral Tribunal holding that the main contract is null, and void shall not ipso jure entail invalidity of the arbitration clause. Thus, a successful challenge to the existence, invalidity, or recission of the main contract does not necessarily embrace an identical finding as to the arbitration agreement.

As regards the principle of competence-competence[43], it declares the Arbitral Tribunal as being competent and authorised in law to rule on issues pertaining to its own jurisdiction and further decide on matters of non-arbitrability. Section 16(1) of the Arbitration Act accepts and empowers the Arbitral Tribunal to rule on its own jurisdiction including any objections with respect to all aspects of non-arbitrability including validity of the arbitration agreement.

The general rule, in view of the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability.

### *(iii) At the stage of challenging the award and execution/enforcement of award*

The issue of non-arbitrability can be raised at the stage of challenging the award and the execution/enforcement of the award as well. For instance, it is a well-settled norm that unilateral appointment of sole arbitrators is void ab initio and anything and everything that falls from such an appointment is also non est.[44] An arbitral agreement providing for unilateral appointment of arbitrators is illegal and unenforceable in law. Such a plea can be taken before the court in proceedings challenging the award or even at the stage of enforcement of the arbitral award emerging out of the unilateral appointment of the sole arbitrator.[45]

Another instance where the plea of non-arbitrability and invalidity of the underlying arbitration clause may be raised at the stage of challenging the award or enforcement of the award includes an arbitral award that may be rendered out of proceedings conducted based on an insufficiently stamped or unstamped arbitration agreement. Notably, the Supreme Court in a recent decision has clarified that in case an arbitration agreement is insufficiently stamped or unstamped, the parties cannot act upon the same and the arbitration agreement would be unenforceable in law.[46]

## G. Conclusion

In conclusion, the concept of arbitrability in Indian arbitral jurisprudence has witnessed significant development and reinforcement through the judicial precedents rendered from time to time. The four-fold test in *Vidya Drolia*[47] provides a crucial guiding framework for determining the arbitrability of different types of disputes. However, as rightly pointed out in *Vidya Drolia*[48] the four-fold test cannot act as watertight compartments and would not only dovetail and overlap but also evolve over time. There is no clear-cut dichotomy

between the expressions “rights in rem” and ”rights in personam” insofar as arbitrability is concerned. Matters involving rights in personam could also relate to rights in rem. It is expected that the lawmakers and the courts, in the coming years, will continue to contribute to the development of jurisprudence on arbitrability and delve deeper into the interplay of rights in rem and rights in personam.

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1. (2011) 5 SCC 532.
2. John J. Barcelo III, “Who Decides the Arbitrator’s Jurisdiction? Separability and Competence–Competence in Transnational Perspective”, (October 2003) 36(4) Vanderbilt Journal of Transnational Law 1115-1136.
3. Arbitration Act, 1996, S. 7(1). Notably, the definition under S. 7(1) of an arbitration agreement is expressly restricted to Part I of the Arbitration Act which pertains to domestic arbitration and international commercial arbitrations as defined in S. 2(1)(*f*) of the Arbitration Act.
4. Arbitration Act, 1996, S. 7(3).
5. Arbitration Act, 1996, S. 7(4)(b).
6. Arbitration Act, 1996, S. 7(4)(c).
7. Contract Act, 1872, S. 10.
8. (2021) 2 SCC 1.
9. (2021) 2 SCC 1.
10. (2021) 2 SCC 1.
11. (2021) 2 SCC 1.
12. (2005) 8 SCC 618; *Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.*, (2011) 5 SCC 532; and *Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1.
13. Arbitration Act, 1996, S. 2(3).
14. Arbitration Act, 1996, S. 34(2)(b)(i).
15. *Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.*, (2011) 5 SCC 532; and *Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1.
16. *Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.*, (2011) 5 SCC 532; and *Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1.
17. *A. Ayyasamy* v. *A. Paramasivam*, (2016) 10 SCC 386.
18. (2016) 8 SCC 788.
19. (2019) 12 SCC 751.
20. (2019) 12 SCC 751.

21. (2021) 2 SCC 1.
22. (2021) 2 SCC 1.
23. *Common Cause* v. *Union of India*, (1999) 6 SCC 667; and *Agricultural Produce Market Committee* v. *Ashok Harikuni*, (2000) 8 SCC 61.
24. *Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1.
25. Jennifer L. Peresie, "Reducing the Presumption of Arbitrability", (Spring 2004) 22(2) Yale Law & Policy Review 453-462. Relied upon in *Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1.
26. (2010) 1 SCC 72.
27. (2010) 1 SCC 72.
28. (2021) 2 SCC 1.
29. (2010) 1 SCC 72.
30. (2021) 2 SCC 1.
31. (2010) 1 SCC 72.
32. (2021) 2 SCC 1.
33. (2021) 2 SCC 1.
34. (2021) 2 SCC 1.
35. 2019 SCC OnLine Can SC 25.
36. (2021) 4 SCC 713.
37. (2021) 2 SCC 1.
38. (2010) 1 SCC 72.
39. (2021) 2 SCC 1.
40. (2021) 2 SCC 1.
41. (2021) 2 SCC 1; and *NTPC Ltd.* v. *SPML Infra Ltd.*, 2023 SCC OnLine SC 389.
42. *NTPC Ltd.* v. *SPML Infra Ltd.*, 2023 SCC OnLine SC 389.
43. The doctrine was expounded in *Heyman* v. *Darwins Ltd.*, 1942 AC 356 and subsequently has been affirmed in several international and Indian cases including *Bremer Vulkan Schiffbau and Maschinefabrik* v. *South India Shipping Corpn. Ltd.*, 1981 AC 909, *Harbour Assurance Co. (UK) Ltd.* v. *Kansa General International Insurance Co. Ltd.*, 1993 QB 701; *Lesotho Highlands Development Authority* v. *Impregilo SpA*, (2006) 1 AC 221; *Fili Shipping Co. Ltd.* v. *Premium Nafta Products Ltd.*, 2007 Bus LR 1719; *Firm Ashok Traders* v. *Gurumukh Das Saluja*, (2004) 3 SCC 155; *National Agricultural Coop. Mktg. Federation India Ltd.* v. *Gains Trading Ltd.*, (2007) 5 SCC 692; and *India Household and Healthcare Ltd.* v. *LG Household and Healthcare Ltd.*, (2007) 5 SCC 510.
44. *HRD Corpn.* v. *GAIL (India) Ltd.*, (2018) 12 SCC 471; *TRF Ltd.* v. *Energo Engg. Projects Ltd.*,

(2017) 8 SCC 377; *Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.*, (2020) 20 SCC 760; *Bharat Broadband Network Ltd.* v. *United Telecoms Ltd.*, (2019) 5 SCC 755; *Haryana Space Application Centre* v. *Pan India Consultants (P) Ltd.*, (2021) 3 SCC 103; *Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd.* v. *Ajay Sales and Suppliers*, 2021 SCC OnLine SC 730; and *Ellora Paper Mills Ltd.* v. *State of M.P.*, (2022) 3 SCC 1.

45. *SREI Equipment Finance Ltd.* v. *Sadhan Mandal*, 2023 SCC OnLine Cal 831; *Cholamandalam Investment and Finance Co. Ltd.* v. *Amrapali Enterprises*, 2023 SCC OnLine Cal 605; and *Kotak Mahindra Bank Ltd.* v. *Narendra Kumar Prajapat*, 2023 SCC OnLine Del 3148.
46. *N.N. Global Mercantile (P) Ltd.* v. *Indo Unique Flame Ltd.*, 2023 SCC OnLine SC 495.
47. (2021) 2 SCC 1.
48. (2021) 2 SCC 1.