

ARBITRABILITY IN INDIA: UNTANGLING THE LEGAL LABYRINTH OF COMMERCIAL DISPUTES

ARYAN PANDEY*

The paper is an attempt to delve into the intricate realm of arbitrability in commercial disputes in India. It explores the absence of a clear definition of arbitrable disputes in the Arbitration and Conciliation Act, 1996, and how the Indian judiciary has shaped the boundaries of arbitrability through case law(s). The paper's objectives are threefold: firstly, to define the contours of arbitrable issues in India, focusing on subject-matter arbitrability; secondly, to analyse the interplay between the Arbitration and Conciliation Act, 1996, and the Industrial Disputes Act, 1947, regarding commercial disputes; and thirdly, to examine the arbitrability of shareholder disputes in light of the law governing the arbitration agreement. It also discusses employment agreements in commercial arbitration, emphasising the courts' balanced approach, considering public policy and the bargaining power of employees. Furthermore, the paper investigates the arbitrability of shareholder disputes, challenging a recent Singapore Court of Appeal ruling. In conclusion, the paper underscores the complexity of arbitrability in India and the need for continued clarity and consistency in jurisprudence to address the evolving landscape of business disputes. It emphasises the courts' methodical approach to ensure arbitration aligns with public policy, voluntariness, and fairness criteria.

TABLE OF CONTENTS

I.	INTRODUCTION	35
II.	THE CONTOURS OF ARBITRABILITY	36
III.	EXPLORING EMPLOYMENT AGREEMENTS IN COMMERCIAL ARBITRATION	37
IV.	SHAREHOLDER'S AGREEMENT – A MISCONCEIVED APPROACH?	41

* 4th year student at Jindal Global Law School.

I. INTRODUCTION

As the Indian legislature and Courts continue to create a pro-arbitration environment (on-paper at least), arbitration has slowly found its way as a dispute resolution mechanism in a multitude of commercial disputes. However, despite these efforts, questions still exist as to the scope of arbitrability in India, the reason behind this being that, if one goes through Arbitration and Conciliation Act, 1996 ('A&C Act'), they would turn up disappointed because the statute does not define the contours of arbitrable disputes in India. What this lacuna in law has led to is the conundrum of whether a matter can be referred to arbitration or it is the courts who would be the appropriate adjudicatory authority. In the absence of specific provisions in the statute, the Judiciary entering the legislator's shoes has developed a framework through case laws to establish the contours of arbitrable issues in India. This becomes more important in the face of the fact that the frequency of commercial disputes in India has been growing even before the economy opened up in 1991. For context, strikes were so common in the 80s that between 1980 and 1982 Indian Industrial Workers were engaged in 2055 strikes per year resulting in a loss of approximately 14 million man-days per year.¹ With the progression of time, the nature of these commercial disputes has changed. From workers fighting for their substantial rights like wage rates, and working conditions, to complex employment agreements and shareholder agreements.

The paper thus tries to achieve three broad objectives:

- a) Briefly define the contours of arbitrable issues in India, to set a foundation for the next part.
- b) Having located arbitrability in Indian Jurisprudence, we then move on to locate the interplay of the A&C Act, 1996 and Industrial Dispute Act, 1947. Through case laws, it will be analysed how the Supreme Court ('SC') has taken a very balanced approach considering the societal bargaining powers in play.
- c) The paper then delves into a niche area of commercial arbitration i.e., shareholder's dispute concerning what governs subject matter arbitrability in a

¹ Bibhas Saha & Indranil Pan, 'Industrial Disputes in India-An Empirical Analysis' (1994) 29 Economic and Political Weekly 1081.

Shareholder Agreement.

II. THE CONTOURS OF ARBITRABILITY

If one would look for the term ‘arbitrability’, the only reference would be found in Section 2(3) of the Arbitration Act which states that certain disputes may not be submitted to arbitration. However, it limits itself to that point without clearing any air. It is important to clarify that the concept of arbitrability can encompass multiple dimensions,² be it the existence of an arbitration agreement, or deciding whether the dispute falls outside the parameters of the arbitration agreement, or whether the subject matter of the dispute is suitable for arbitration. For the purpose of our discussions, we would focus solely on the subject-matter of arbitrability.

A requirement of Section 20(4) of the Indian Arbitration Act, 1940 similar to Section 8 of the A&C Act was to provide ‘*sufficient cause*’ in order to keep a matter out of arbitration.³ This clause gave the courts the freedom to treat arbitration with a great deal of scepticism and to reject referrals even on the basis of vague justifications like “*determining that arbitration may not ensure full justice for the parties*”.⁴

Since then, it is through case laws that the SC and the High Courts (‘HCs’) have tried to establish a boundary for the issues that can be arbitrated. The first major landmark case which addressed this issue was *Booz Allen Hamilton v. SBI Home Finance Limited and Others*,⁵ where the court laid a very broad test for arbitrability, the court first acknowledged the character of the Arbitration tribunal, it being a private forum chosen voluntarily by the parties to the dispute, it is on that premise where the court went on to lay a very straightforward finding:

- rights *in personam* to be amenable to arbitration; and
- rights *in rem* to be adjudicated by courts and public tribunals.

However, this is not the complete picture, there were certain disputes arising out of rights *in personam* that would ordinarily be arbitrable but were not because of public

² H. Arfazadeh, Arbitrability under the New York Convention: The Lex Fori Revisited, 17 Arbitration International 73 (2001) <<https://academic.oup.com/arbitration/article-lookup/doi/10.1023/A:1008994201415>> last accessed 30 November 2023.

³ Harshad Pathak & Pratyush Panjwani, The Arbitrability Doctrine and Tribulations of Tribunalisation, 10 Indian J of Arbitration L 72.

⁴ *Majeti Subbiah & Co. v Messes. Tetley and Whitly* (1923) SCC OnLine Mad 92 (India).

⁵ *Booz Allen Hamilton v SBI Home Finance Limited and Others* (2011) 5 SCC 532.

policy considerations. Certain subject-matters like bribery, corruption, matrimonial disputes etc. were explicitly not amenable to arbitration. The test laid down in *Booz Allen* occupied the field for long time till a full bench of the Supreme Court affirmed and further refined the test in *Vidya Drolia v. Durga Trading Corporation* (*'Vidya Drolia'*).⁶ Now, the judgement in *Vidya Drolia* is of particular interest in light of the fact that it was referred to a larger bench because there was a conflicting opinion rendered by two coordinate judge benches in *Himangni Enterprises v. Kamaljeet Singh* (*'Himangni'*)⁷ and *Vidya Drolia* regarding arbitrability. While in *Himangni*, the court ruled that the same can't be referred to arbitration in the absence of a special law and thus, would be governed by Transfer of Property Act, 1882. However, the bench in *Vidya Drolia* was of the opposite view, that absence of arbitrability provision in Transfer of Property Act, 1882 did not negate it. Building upon the criteria laid down in *Booz Allen*,⁸ *Vidya Drolia*⁹ laid down a four-fold test to determine the subject matter arbitrability of a dispute:

“(1) when cause of action and subject matter of the dispute relates to actions in rem, which do not pertain to subordinate rights in personam that arise from rights in rem.

(2) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.

(3) 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; and

(4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s)”.

Having briefly established the contours of subject-matter arbitrability in India, we will now look into exploring how these factors affect arbitration in commercial arbitration.

III. EXPLORING EMPLOYMENT AGREEMENTS IN COMMERCIAL ARBITRATION

⁶ *Vidya Drolia v Durga Trading Corporation* (2021) 2 SCC 1.

⁷ *Himangni Enterprises v Kamaljeet Singh* (2017) 10 SCC 706.

⁸ *Booz Allen Hamilton v SBI Home Finance Limited and Others* (n 5).

⁹ *Vidya Drolia v Durga Trading Corporation* (n 6).

It is quite prevalent for employment agreements to have arbitration agreements, but it is still not a settled law whether such arbitration agreements can be settled by a private arbitration tribunal. It also becomes more crucial in the light of rampant layoffs in the recent time. Different HCs have come up with a very pragmatic and balanced approach by analysing the entire scheme of the Industrial Dispute Act. The nuanced approach taken by the court also very well explains when the court can decide on the arbitrability of a dispute.

The first matter came in front of the Bombay HC in the form of a dispute between now de-functional Kingfisher Airlines and its employees in the case of *Kingfisher Airlines Limited v. Capt. Prithvi Malhotra* ('**Kingfisher**').¹⁰ The respondents filed their petitions with the Central Government Industrial Tribunal-cum-Labour Court according to Section 33(C)(2) of the Industrial Disputes Act and Rule 62(2) of the Industrial Disputes (Central) Rules, 1957 to get their earned wages back. The employer, Kingfisher in this case had submitted petitions to have the parties engaged in this dispute sent to arbitration under Section 8 of the A&C Act. The basis for this request was Clause 17 of the appointment letter of the respondents which referred to disputes arising between the employer and employee relating to validity, interpretation, enforcement or breach of the terms and conditions of appointment to arbitration.

Appearing for the petitioner was Navroj Seervai, who based his arguments on two prongs:

- a) Basing his argument on Section 8 of the A&C Act, Mr. Seervai asserted that the Court upon the finding of a valid arbitration agreement, is obliged to refer issues to arbitration. He placed his reliance on the SC's 2003 ruling in the *Hindustan Petroleum Corporation Limited v. Pinkcity Midway Petroleums*¹¹ to strengthen his point that Section 8 being peremptory in nature, it is the obligation of the court to send parties to arbitration upon finding the existence of a valid arbitration agreement.
- b) That '*industrial dispute*' per se is not something which the SC listed as non-arbitrable in *Bo Allen and Hamilton v. SBI Home Finance Limited and Others*.¹²

¹⁰ *Kingfisher Airlines Limited v. Capt. Prithvi Malhotra* (2013) 7 Bom CR 738.

¹¹ *Hindustan Petroleum Corporation Limited v. Pinkcity Midway Petroleums* (2003) 6 SCC 503.

¹² *Booz Allen and Hamilton v. SBI Home Finance Limited and Others* (n 5).

The dispute in the proceedings between the petitioner and the respondent, according to him, is an action-in-personam in which the rights and interests of the parties themselves in the subject matter of the case, are determined.

Seervai's first argument is negated by the difference in the power of the Court in determining arbitrability under Section 8 and Section 11 of the A&C Act. While under Section 11 the scope of the court's power is limited to finding a valid arbitration agreement and not embarking upon a journey to examine the arbitrability of an issue, the issue of arbitrability is left for the arbitrator to decide. However, under a Section 8 application, it is the court who decides all aspects of arbitrability and not the arbitrator.¹³ Mr. Seervai's argument that matter should be referred to arbitration because Section 8 is peremptory in nature is thus, negated by reliance of the court's decision in *Booz Allen*.¹⁴ To borrow the words of R.V. Raveendran J:

"Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal".

The Court completely disagreed with Seervai's second argument of an *in rem* or *in personam* action in light of the public policy argument. The court was of the opinion that even if an action is *in personam* as claimed by Seervai, if the matter is reserved for resolution by the public as a matter of public policy, the said matter would become non-arbitrable. The Court thus, went into an inquiry into the scheme of the Industrial Dispute Act, 1947.

After analysing the different provisions of the Act, it found that the Industrial Dispute Act, 1947 via different sections have made a composite environment for settlement of dispute between the parties by creating multiple authorities ranging from Workmen Committee under Section 3, Conciliation Officers under Section 4, Labour Courts under Section 7 and Industrial Tribunals under Section 10, and further under Section 10A it provides for voluntary reference of disputes to arbitration.

¹³ *ibid.*

¹⁴ *ibid.*

The Court thus, kept such private disputes between the employer and employee on a different plane; by doing this the Court took a very balanced approach as it indicates that the Court was well aware of the existence of asymmetry in bargaining power when it comes to such disputes. Seeing it as a private dispute between the employer and employee would be like taking a rather very narrow view as any such decision in the broader picture would affect not only that judgement but the entire industry. What also needs to be acknowledged is the judgement doesn't put an express bar on arbitration as a dispute resolution mechanism in such cases, it merely limits the scope of arbitration to the process prescribed in the Industrial Dispute Act, 1947.

Subsequent to the judgment rendered by the Bombay HC, there was a ruling by a solitary judge in the Karnataka HC in the matter of *Rajesh Korat v. Management Innoviti Embedded*.¹⁵ The petitioner in this case first approached the Labour Court, however after not being satisfied with the relief that he got from the Labour Court, he filed an application under Section 8 of the A&C Act. The Court framed the following question for consideration:

“Whether the provisions of Section 10 A (5) of the Act ousts the jurisdiction of the Arbitration Act in respect of proceedings pending before the labour court”.

In a manner similar to the *Kingfishers* case, the HC ruled that because of the substantial and compelling public policy justification, adjudication in such a manner can only be done through the judicial system and specialised tribunals, as stipulated by the Industrial Disputes Act, 1947.

The combined effect of both these verdicts is that India till now has successfully avoided the mandatory unilateral arbitration clauses regime like that in the United States of America. As Nankee Arora rightly points out in her blog,¹⁶ such arbitration clauses are not tenable in the light of two major factors:

- The employee has no real choice to negotiate this term as their employment is contingent upon accepting the conditions of the corporation, thus, the vital aspect of voluntariness in arbitration is essentially missing.
- Globally, arbitration provisions include a broad spectrum of disputes, such as

¹⁵ *Rajesh Korat v Management Innoviti Embedded* (2017) SCC Online 4975.

¹⁶ Nankee Arora, Mandatory Arbitration Clauses: A Threat to Labour in India?, (*IndiaCorpLaw* 7 August 2023) <<https://indiacorplaw.in/2023/08/mandatory-arbitration-clauses-a-threat-to-labour-in-india.html>> last accessed 30 November, 2023.

those concerning different types of leave, pay, and even claims of discrimination based on race or sexual orientation. Permitting these disagreements to stay in the private sphere is obviously against public policy as it can help those who commit wrongdoing to avoid facing consequences.

The public policy argument thus, adopted by the courts is a very balanced and pragmatic approach which keeps the collective bargaining power of the employees as a union into consideration and also excludes non-arbitrable subjects in India which are present in arbitration agreements globally. At the same time, the downside of excessively using the public policy argument should be kept in mind as in that the same does not act as a deterrent to arbitration.

IV. SHAREHOLDER'S AGREEMENT – A MISCONCEIVED APPROACH?

We will now analyse the arbitrability of a niche area of commercial arbitration, but something that is rather growing i.e., shareholders dispute. The recent Ashneer Grover and BharatPe incident only highlights towards the growing number of shareholder disputes in India and thus, it is imperative to analyse their arbitrability. To this end it becomes imperative to analyse the judgement of the Singapore Court of Appeal in *Anupam Mittal v. Westbridge Ventures II Investment Holdings* ('**Anupam Mittal**'). The fundamental flaw in this ruling is its underlying assumption that shareholder disputes in India, particularly those categorised as Oppression and mismanagement ('O&M') actions under Section 241 and Section 242 of the Indian Companies Act, 2013, may not be suitable for arbitration.

In *Anupam Mittal*, there was a Share Holder Agreement ('SHA') between the petitioner and Westbridge Ventures, the SHA also had a clause which provided for arbitrations seated in Singapore, what also is imperative to note at this point is the law governing the SHA was the Indian law. Westbridge was an investor in the petitioner's company People Interactive (India) Private Limited which operates companies like shaadi.com and makaan.com. It was during the time of disengagement of the investor from the company that disputes arose, following which the petitioner approached the National Company Law Tribunal ('NCLT'), raising grievances of O&M by Westbridge. Following this, Westbridge secured an anti-suit injunction in relation to the NCLT proceedings. Mr. Mittal contested this ex-parte order on the grounds that claims of O&M are not arbitrable in India which was in line with the commonly

adopted position of major jurisdictions where it is the law of the seat which determines the arbitrability of the subject matter.

In reaching its verdict the SCA applied the criteria established by the English Court of Appeal in the *Sulamerica v. Enesa Engenharia*.¹⁷ The case lays down that, the governing law of the contract serves as a significant indicator of the law that governs the arbitration agreement. Nevertheless, this indication can be overridden, depending on how the arbitration agreement is structured and how its validity would be affected by applying the contract's governing law.¹⁸ What the SCA interpreted as a necessary implication of this principle was that the intention of parties to include an arbitration agreement in the SHA must be in light of the fact that O&M claims are arbitrable under Singaporean law and to give effective reading to the arbitration agreement, the said dispute should be arbitrated in Singapore.

The judgement globally is being hailed for adopting a pro-arbitration stance but is rather based on a misplaced belief of the position of law in India. Abhinjan Jha and Urvashi Misra have described this line of Indian Jurisprudence in their article. Starting with the Company law board's decision in the case of *Sidharth Gupta v. Getit Infoservices Private Limited*,¹⁹ to *Rakesh Malhotra v. Rajinder Mohan*,²⁰ the jurisprudence has developed in such a way where shareholder disputes are not ousted as non-arbitrable. In *Sidharth Gupta*, a petition was filed under Section 397 and Section 398 of the Companies Act, 1956, alleging O&M. Following a thorough examination of the grievances presented, the Court determined that these complaints originated from a breach of contract, which included an arbitration clause. Consequently, the court directed the parties to pursue arbitration, emphasising that if the allegations pertained to violations of contractual provisions, the arbitration clause would be activated. This case illustrates the principle that in instances involving contractual disputes with an embedded arbitration agreement, the court's inclination is to enforce the arbitration clause when the grievances primarily relate to contractual breaches. Similar reasoning was also employed in further cases of *Gleneagles*

¹⁷ *Sulamerica v Enesa Engenharia* (2012) EWHC 42 (Comm).

¹⁸ Anupam Mittal v Westbridge Ventures II Investment Holdings—a Missed Opportunity? | Oxford Law Blogs, (2023) <<https://blogs.law.ox.ac.uk/oblb/blog-post/2023/03/anupam-mittal-v-westbridge-ventures-ii-investment-holdings-missed>> last accessed 30 November 2023.

¹⁹ *Sidharth Gupta v Getit Infoservices Private Limited* CA 128/ C – II/ 2014 in CP 64 (ND) 2014.

²⁰ *Rakesh Malhotra v Rajinder Mohan* (2015) 2 CompLJ 288 (Bom).

Development Pte Ltd v. T Gurunath Reddy,²¹ and *Chatterjee Petrochem v. Haldia Petrochemicals Ltd.*²²

Further, even a plain reading of the recent jurisprudence laid down in *Booz Allen and Vidya Drolia* would suggest that contractual, *in personam* disputes are capable of being resolved by arbitration and are not non-arbitrable matters.²³ In *Rakesh Malhotra v. Rajinder Malhotra*, the Bombay HC went on so far to say a petition guised as an O&M claim won't be allowed if it is done to oust the arbitration clause.

In conclusion, arbitrability in India is a complex terrain that has to be carefully navigated, particularly when it comes to commercial conflicts. There are still important uncertainties about arbitrability even in the face of legislative and judicial initiatives to promote an arbitration-friendly environment. From *Booz Allen* to *Vidya Drolia*, subject matter arbitrability has been constantly refined. Even if there has been a lot of progress in defining what may be arbitrated, continued consistency and clarity in jurisprudence are essential to provide a strong foundation for handling the changing nature of business conflicts in the nation. The Indian courts have taken a balanced approach to arbitration agreements in employment disputes. Mandatory arbitration clauses have in cases not been enforced because of the existing unequal bargaining power and the need to protect public interest. This prevents employers from forcing employees into private arbitration. However, the courts are open to arbitration of contractual disputes arising from employment. Shareholder disputes present a similar situation. While Indian law allows arbitration of some shareholder disputes, courts reject the notion that all such disputes are non-arbitrable. This approach protects employees and public interest while upholding arbitration agreements for suitable contractual disputes. The court's methodical approach to arbitrability takes into account the subtle differences between various kinds of conflicts and works to ensure that the arbitration process adheres to the public policy, voluntariness, and fairness criteria

²¹ *Gleneagles Development Pte Ltd v T Gurunath Reddy* CA No. 51 of 2016 in CP No. 19/241.HDB/2016.

²² *Chatterjee Petrochem v Haldia Petrochemicals Ltd* (2014) 14 SCC 574.

²³ Anupam Mittal v Westbridge Ventures II Investment Holdings—a Missed Opportunity? | Oxford Law Blogs, (2023), <<https://blogs.law.ox.ac.uk/oblb/blog-post/2023/03/anupam-mittal-v-westbridge-ventures-ii-investment-holdings-missed>> last accessed 30 November 2023.

MEDIATION IN FAMILY DISPUTES: EXAMINING ITS IMPACT ON CHILDREN'S WELL-BEING

AISHWARYA SINHA*

Family disputes exert significant influence on the mental well-being of children who are entangled in the midst of their parental conflicts. Often, the focus during these disputes revolves around the victimised parents, which overshadows the rights and experiences of the children caught in this crossfire. This paper delves into the impact of mediation on children's welfare, considering both Indian and international perspectives in comparison to traditional litigation. In the evolving legal landscape, alternative dispute resolution, especially mediation, is gaining prominence, and we can connect Alternative Dispute Resolution methods with children and child rights stakeholders on the ground, such as CWCs, SCPCRs, NGOs and child rights advocates to support children who are caught in the midst of family conflicts between their parents. Here, mediation will act as a bridge between the courts and ground-based child rights stakeholders who are directly connected with the children's issues on a day-to-day basis. By fostering the importance of healthy childhood relationships in an adult's life, this approach prioritises the best interests of the children involved in child-centric mediation. The present paper will be analysed using the existing literature available on the theme of the paper via using thematic analysis which is a mode of qualitative data analysis. There will be comparisons made using quantitative data as well. This paper aims to contribute to the growing body of knowledge aimed at creating a more child-sensitive approach to family dispute resolution, ensuring a protective cushion for children amidst parental conflicts.

TABLE OF CONTENTS

I.	INTRODUCTION	45
II.	WHAT KIND OF MATTERS CAN BE RESOLVED THROUGH MEDIATION	46
III.	INDIAN PERSPECTIVE ON MEDIATION & CHILDREN IN MEDIATION.....	47

* Legal Officer at Prayas JAC Society, Delhi.

A.	STAGES INVOLVED IN THE MEDIATION JOURNEY IN FAMILY LAW DISPUTES ...	49
IV.	INTERNATIONAL PERSPECTIVE ON CHILDREN IN MEDIATION	51
V.	MEDIATION & FAMILY LAW ACROSS CANADA, CHILD CUSTODY DISPUTES	51
VI.	LONG-TERM IMPACT OF MEDIATION ON PARENT-CHILD RELATIONSHIP & CHILD'S RELATIONSHIP WITH THE WORLD	52
VII.	COMPARATIVE ANALYSIS OF MEDIATION WITH TRADITIONAL LITIGATION	52
VIII.	BEST INTEREST OF CHILD & CHILD-CENTRIC APPROACH IN MEDIATION	53
IX.	JUDICIAL PRONOUNCEMENTS.....	54
X.	CONCLUSION	56

I. INTRODUCTION

A child is a person below 18 years of age as per United Nation Convention on the Rights of Child ('UNCRC'), which was ratified by India on 11 December 1992.¹ A child does not have any autonomy of its own and is dependent upon the adults, mainly parents, teachers in school, legal guardian, etc. for his/her day-to-day activities, in the growing up stage. Therefore, when a dispute occurs in the family of a child either due to property, parental separation or death of one parent etc., it results in huge trauma for the child. Dissolution of marriage or judicial separation of the parents is devastating for a child. A child's distress is heightened when the parents are residing in different states/countries, independently disputing custody before the courts of their respective states/nations, leading to conflicting judicial orders. Often during such instances, the child is used as a weapon by the spouses in marriage.

Mediation stands as an alternative method for resolving disputes, where involved parties willingly reach a settlement with the aid of a third-party, possessing negotiation and communication skills. The process involves the mediator facilitating discussions and guiding the parties to a mutual agreement, which is then formalised into a written contract. The success of mediation hinges on two closely connected

¹ UN Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, art 1 (ratified by India 11 December 1992).

elements, i.e., both the party's readiness to address their dispute amicably and the mediator's adeptness in navigating the process to reach a point of consensus.

II. WHAT KIND OF MATTERS CAN BE RESOLVED THROUGH MEDIATION

The Supreme Court ('SC') of India has provided a concise classification of cases appropriate for mediation and those that are not appropriate for mediation in *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*² The types of cases considered suitable for mediation as per the aforementioned case law are outlined as follows:



Section 5(1) of Mediation Act, 2023 stipulates, regardless of any mediation agreement, participants may willingly & mutually opt to resolve a civil or commercial dispute through mediation before initiating legal proceedings in any court.³ Section 6 of the Mediation Act, 2023, in conjunction with the first schedule, provides an illustrative list of disputes or matters deemed unsuitable for mediation.⁴ This includes, among other things:

- Contentions involving minors or individuals with intellectual disabilities

² *Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd* (2010) 8 SCC 24.

³ Mediation Act 2023, s 5(1).

⁴ Mediation Act 2023, s 6.

- Legal proceedings of criminal offenses
- Any contention relating to levy, collection, penalties, direct/indirect tax refunds,
- Any investigation, inquiry, or proceeding before entities such as the Telecom Regulatory Authority of India, Telecom Disputes Settlement & Appellate Tribunal, and under the Competition Act, 2002, etc.

III. INDIAN PERSPECTIVE ON MEDIATION & CHILDREN IN MEDIATION

In India, where familial ties hold considerable cultural and societal importance, the legal system is increasingly endorsing the practice of mediation. The Mediation and Conciliation Project Committee, set up by SC, has played a pivotal role in advancing the cause of mediation. This committee was formed by the Chief Justice of India at that time, Hon'ble Mr. Justice R.C. Lahoti vide an order dated April 9, 2005 that aims to ensure the successful execution of Mediation and Conciliation throughout the country.⁵ Currently, the Chairman of this committee is Hon'ble Mr. Justice Sanjiv Khanna.⁶ The committee comprises distinct judges from both the SC and HC, Senior Advocates, and the Member Secretary of National Legal Services Authority ('NALSA').

Mediation and conciliation in the resolution of family disputes are referenced in various legal frameworks, including under Section 9 of the Family Courts Act, 1984,⁷ Section 89 of the Code of Civil Procedure, 1908 ('CPC'),⁸ Section 23 of The Hindu Marriage Act of 1955,⁹ and Section 22C of the Legal Services Authorities Act, 1987.¹⁰ These statutes accord a unique position to Lok Adalats, recognising their effectiveness in mediating family conflicts. Section 34(3) of the Special Marriage Act, 1954,¹¹ as well as sub clauses (2) & (3) of Section 23 of the Hindu Marriage Act, 1955,¹² mandate courts to actively attempt mediation in cases where parties are seeking divorce, taking into account the specific details of each situation. Additionally,

⁵ Assam State Legal Services Authority, 'Scheme for Training under Mediation and Conciliation Project Committee' p 16.

⁶ Mediation and Conciliation Project Committee, 'Composition & Governing Body' <<https://mcpn.nic.in/?100004>> last accessed 28 June 2024.

⁷ Family Courts Act 1984, s 9.

⁸ Code of Civil Procedure 1908, s 89.

⁹ Hindu Marriage Act 1955, s 23.

¹⁰ Legal Services Authorities Act 1987, s 22C.

¹¹ Special Marriage Act 1954, s 34(3).

¹² Hindu Marriage Act 1955, s 23(2)-(3).

Section 89 of the CPC¹³ outlines the procedure for court-ordered mediation. The primary goal of Section 89 of CPC is to facilitate a harmonious and mutually agreeable resolution amidst the parties outside the formal court proceedings. The Mediation Act, 2023 outlines the provision for mediation before litigation in Section 5.¹⁴ As per Section 30 of the A&C Act,¹⁵ an arbitral tribunal is authorised to employ mediation as a means to facilitate the resolution of disputes.

While mediation is applicable on civil matters, questions arise when considering cases of domestic violence covered under Section 498A of Indian Penal Code ('IPC'),¹⁶ where rights of children are also involved. Domestic violence cases are non-compoundable under Section 320 of Code of Criminal Procedure ('CrPC'), 1973,¹⁷ raising the issue of how such cases can it be referred to mediation.

The Karnataka High Court ('HC') addressed this issue in the matter of *Mohd. Mushtaq Ahmed v. State*,¹⁸

"In this instance, marital discord arose consequently the birth of a daughter, leading the wife to initiate divorce proceedings & file an FIR under Section 498A of the IPC against her husband. The Karnataka High Court, exercising its inherent authority to promote justice, recommended mediation, resulting in a mutually agreeable resolution. Recognising the unique circumstances, the court allowed the wife to withdraw the initially filed FIR".

In the matter of *K. Srinivas Rao v. D.A. Deepa*,¹⁹ the SC held:

"44. ... though offence punishable under Section 498-A IPC are not compoundable, in appropriate cases if the parties are willing and if it appears to the criminal court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation.... The Judges, with their expertise, must ensure that this exercise does not lead to the erring spouse using mediation process to get out of clutches of the law.... If there is settlement, the parties will be saved from

¹³ Code of Civil Procedure 1908, s 89.

¹⁴ Mediation Act 2023, s 5.

¹⁵ Arbitration and Conciliation Act 1996, s 30.

¹⁶ Indian Penal Code 1860, s 498A.

¹⁷ Code of Criminal Procedure 1973, s 320.

¹⁸ *Mohd. Mushtaq Ahmed v State* (2015) 3 AIR Kant R 363.

¹⁹ *K. Srinivas Rao v D.A. Deepa* (2013) 5 SCC 226.

the trials and tribulations of a criminal case and that will reduce the burden on the courts which will be in the larger public interest”.

In an effort to promote the adoption of mediation for family disputes in India, several significant initiatives have been introduced in recent times. The Delhi HC has established a mediation and conciliation centre known as “*Samadhan*” on 26 May 2006 specifically focused on family disputes, child custody and visitation rights providing free mediation services to the litigants.²⁰ The Centre’s services are accessible for both pre-litigation disputes and those currently under the Court’s consideration.

The mediation process at this centre has garnered positive feedback from participants, and a considerable number of cases have been successfully resolved through its services. In India, all state HCs have established a set of guidelines and regulations governing the Mediation and Conciliation procedure.

A. STAGES INVOLVED IN THE MEDIATION JOURNEY IN FAMILY LAW DISPUTES

Preparation phase	Prior to commencing the mediation process, the mediator has the option to engage with parties, providing guidance on the mediation steps, addressing doubts, and responding to any queries. This discussion is not limited to in-person meetings and can take place via phone or video mode, in accordance with the new The Mediation Act, 2023.
Introduction phase	Initially, the mediator provides opening statements, clarifying their role. The mediator then seeks agreement from both parties to proceed with the mediation process. If both parties consent, the mediation follows the outlined steps. However, if the parties decline mediation, the Court may impose cost

²⁰ SAMADHAN, ‘Delhi High Court Mediation and Conciliation Centre’ <<https://dhcmediation.nic.in/about-us>> last accessed 28 June 2024.

	sanctions as a consequence of disregarding the process in case of court-referred mediation.
Problem Statement	The mediator lays a room for the parties to articulate their concerns in their opening statements. This is done with the aim that by the conclusion of these remarks, both the parties and the mediator will have gained a deeper comprehension of the scenario.
Collective Dialogue	The Mediator engages both parties in discussions, posing pertinent questions to gather additional information. Through this dialogue, the mediator will discern the priority of issues that need resolution.
Private Conversation	Subsequent to the collective deliberation of matters, each party is provided an opportunity to privately communicate their concerns with the mediator, and if desired, with their advocates. This vital stage supports in preparing the parties for negotiations.
Negotiation	The involved parties engage in negotiations until a mutually acceptable settlement is reached. The mediator facilitates a resolution that safeguards the interests of both sides. In the event of unsuccessful negotiations, the case is subsequently referred to the Court.
Resolution Process	Once agreement terms are determined, the parties reconvene. The mediator verbally affirms the settlement terms, which are subsequently documented and signed by the parties. This legally binding settlement is enforceable in Court. Concluding the

	proceedings, the mediator demonstrates thankfulness to the participants for their engagement & cooperation throughout the entire procedure.
--	---

IV. INTERNATIONAL PERSPECTIVE ON CHILDREN IN MEDIATION

Globally, countries like the United States, Canada, and various European countries have embraced the use of mediation to alleviate congestion in family court systems. The UNCRC affirms a child's entitlement to be involved in family dispute proceedings. According to the Art. 12 of UNCRC, a child should be granted the opportunity to express their views, particularly in legal and administrative proceedings that directly or indirectly impact them.²¹ The UNCRC emphasises the applicability of this provision to all pertinent judicial proceedings involving the child, without restrictions, covering aspects such as parental separation, custody and care, juvenile justice, and social security.

The UNCRC additionally stipulates in Art. 3 that, in all actions related to children, regardless of being executed by public or private social welfare institutions, courts, administrative bodies, or legislative entities, the foremost focus should be the best interests of the child.²² The individuals involved in a court mediation represent those directly affected by the dispute, thus, making children's rights a crucial consideration in mediation.

V. MEDIATION & FAMILY LAW ACROSS CANADA, CHILD CUSTODY DISPUTES

According to the Art. 12 of UNCRC, children possess a legal entitlement to express their opinions and have them considered. They express a desire to be acquainted and retrieve facts concerning the disunion or divorce proceedings. Additionally, children seek for their necessities and desires to be acknowledged amidst parental judicial separation or divorce.²³ Children themselves deem their participation rights crucial,²⁴

²¹ UN Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, art 12 (ratified by India 11 December 1992).

²² *ibid* art 3.

²³ Rachel Birnbaum, *The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review*, (June 2009), highlighted in studies by Birnbaum (2007), Marchant, and Kirby (2004), and Neale (2002) at p 10 < <https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/vcsdm-pvem/pdf/vcsdm-pvem.pdf>>.

²⁴ *ibid*.

especially concerning family matters and issues related to legal and social welfare systems.²⁵

VI. LONG-TERM IMPACT OF MEDIATION ON PARENT-CHILD RELATIONSHIP & CHILD'S RELATIONSHIP WITH THE WORLD

In New Zealand, a qualitative study was conducted by Jill Goldson (2006), a social worker & chief researcher on child centric mediation, involving 26 children within 17 families (age 6-18 years).²⁶ The mediator met individually with both parents and children, discussing parenting plan arrangements. Children had the option to decline sharing certain information. A joint session with parents and children, followed by another session two weeks later, addressed parenting plan implementation and any remaining concerns.

Results showed that children consistently appreciated having their voices heard, which led to higher satisfaction with adhering to the parenting plan. They expressed a yearning to engage in reshaping family relationships. Parents noted reduced conflict and increased satisfaction, crediting this to a mediator who communicated with both of the parents concurrently.

Broadly, the study revealed decreased parental strife, enhanced conciliation and cooperation, and increased parental awareness of the impact on children. Children, having their voices acknowledged, conveyed restored and enhanced adoption of their parental split.

VII. COMPARATIVE ANALYSIS OF MEDIATION WITH TRADITIONAL LITIGATION

There are 775 Family Courts functional across the Country, in various states of India as per October 2023, National Judicial Data Grid ('**NJDG**'), Department of Justice, Government of India. Number of Family Court cases pending across all states of India as per NJDG sums up to 11,50,094.²⁷ The case count that have been adjudicated/disposed during the month as per NJDG sums to 66,150.²⁸ This means

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ Department of Justice, 'Family Courts & Cases – No. of Cases Pending' <https://dashboard.doj.gov.in/family-court-cases/fc_pending> last accessed January 2024.

²⁸ *ibid.*

that there were a total of ‘12,16,244’ family court cases in India that came to the court. If we look into the data deeply and analyse it, 775 Family Courts in India were left to deal with/are dealing with approximately 12 lakhs cases pendency²⁹ i.e., each court is supposed to deal with approximately 1569 cases, while in reality each family court was actually able to dispose of 85 cases.

The Central Government has not yet established the ‘Mediation Council of India’, as laid down in the Section 3(c) and Section 31(4) of the Mediation Act, 2023.³⁰ With the setup of the Mediation Council of India, domestic and international mediation in India will be regulated, which will significantly reduce the burden of cases on courts.

The overall figure of family court cases that were scheduled for resolution in Delhi were 2884, and the total case count that were adjudicated by Mediation through the drive week from 02-17.12.2019 in the family courts of Delhi were 2171, as per data taken from the official website of District Court in India.³¹ This data shows that family court cases are resolved speedily through mediation.

Based on the data on referrals and resolutions from March 2006 to February 2023, as provided on Samadhan³² (Delhi HC Mediation & Conciliation Centre), a total of 31,691 cases were addressed. Among these, 10,690 cases were successfully settled, while 16,099 cases were not resolved. Additionally, 7,797 cases were also disposed of due to mediation settlement cases, suggesting a reduction in real-time pendency through the mediation process. This data underscores the significant impact of mediation in achieving resolutions and alleviating the backlog of cases, as demonstrated by the notable number of cases that were successfully settled and promptly disposed of.

VIII. BEST INTEREST OF CHILD & CHILD-CENTRIC APPROACH IN MEDIATION

The key concept of the best interest of the child, outlined in Section 3(iv) of the Juvenile Justice (Care and Protection of Children) Act, 2015,³³ can be effectively addressed through child-centric mediation or pre-litigation mediation. Child-centric

²⁹ *ibid.*

³⁰ Mediation Act 2023, s 3.

³¹ E-Courts Mission Mode Project, ‘Official Website of District Court’
<<https://districts.ecourts.gov.in/sites/default/files/Dataofthemediationdrive.pdf>>.

³² SAMADHAN, Delhi High Court Mediation and Conciliation Centre, ‘Real Time Pendency’
<<https://dhcmediation.nic.in/realtimependency>> last accessed 28 June 2024.

³³ Juvenile Justice (Care and Protection of Children) Act 2015, s 3.

mediation not only saves considerable time for all parties involved but also facilitates the amicable creation of Child Maintenance Cost Agreements between parents until a divorce is granted by the court. This approach ensures that the child's academic performance remains unaffected, as mediation eliminates the need for prolonged court procedures, sparing children from undue harassment. Recognising the non-child-friendly nature of family courts, the option of mediation provides a comfortable, out-of-court environment for both children and parents. Child-friendly mediation not only shields children from the distress of being entangled in their parents' divorce but also allows them to have their voices heard. Moreover, by deciding maintenance agreements and visitation rights amicably, child-centric mediation significantly reduces the case load burden on Family Courts, contributing to a more efficient legal system.

IX. JUDICIAL PRONOUNCEMENTS

In the case of *B.S. Krishna Murthy v. B.S. Nagaraj*³⁴, the SC emphasised the necessity of recommending mediation in disputes arising within family and business relationships. The Court further asserted that legal practitioners should advise their clients to opt for mediation, especially in cases involving family matters, considering that litigation processes often extend over prolonged and exhaustive periods, simultaneously detrimentally affecting both disputing parties without yielding appreciable results. Some studies indicate that a well-functioning family environment fosters growth, confidence, openness, and the ability to confront reality, while inadequacies in family functioning are linked to delinquent behaviour in children.

“Para 1. Heard the learned counsel for the appearing parties. This is a dispute between brothers. In our opinion, an effort should be made to resolve the dispute between the parties by mediation”.

“Para 3. In our opinion, the lawyers should advise their clients to try for mediation for resolving the disputes, especially where relationships, like family relationships, business relationships, are involved, otherwise, the litigation drags on for years and decades often ruining both the parties. Hence, the lawyers as well as litigants should

³⁴ *B.S. Krishna Murthy v B.S. Nagaraj* (2011) 15 SCC 464.

follow Mahatma Gandhi's advice in the matter and try for arbitration/mediation. This is also the purpose of Section 89 of the Code of Civil Procedure”.

In the *B. S. Joshi & Ors v. State of Haryana & Anr*³⁵ case, the Apex Court determined that utilising the authority vested in the court by Section 482 CrPC,³⁶ the HC has the discretion to suspend criminal proceedings. The SC addressed an appeal petition in this matter, involving a scenario where the wife registered an FIR against her husband but later recanted, asserting that the complaint was hastily and thoughtlessly filed, and there was no actual issue in their relationship. Consequently, the SC has emphasised the need for courts to genuine settlements in matrimonial disputes. The Court advocates for the promotion of genuine settlements through mediation at the Court’s mediation and conciliation centre, aiming to uphold the sanctity of marriage and family as fundamental institutions.

“12. The special features in such matrimonial matters are evident. It becomes the duty of the court to encourage genuine settlements of matrimonial disputes”.

In the matter of *Manas Acharya v. State & Anr*,³⁷ the Delhi HC adopted an even more favourable stance towards mediation. It underscored that any agreement or determination, arising from mediation, as well as decisions made by the mediator, are deemed valid and lawful. The court further affirmed that resolutions reached in the course of the mediation process are contractually obligatory for parties involved.

“3. On 18th April, 2011, both parties resolved all their disputes and differences by way an agreement before the Mediation Centre, Tis Hazari Courts, Delhi.....”

“13. Keeping in view the aforesaid, this Court is of the view that the settlement agreement executed between the parties is a comprehensive legal, valid and binding document and respondent No. 2 cannot be allowed to wriggle out of it”.

In the case of *Selvaraj v. Revathi*,³⁸ the SC addressed a custody dispute involving a 12 years 9 months old child. The father challenged a Madras HC order via an appeal, which directed handing over the child’s custody to the mother. The Apex Court allowed the child to remain with the father but granted the mother visitation and

³⁵ *B.S. Joshi v State of Haryana & Anr.* (2003) 4 SCC 675.

³⁶ Code of Criminal Procedure 1973, s 482.

³⁷ *Manas Acharya v State & Anr.* (2012) SCC OnLine Del 4462.

³⁸ *Selvaraj v Revathi* (2023) SCC OnLine SC 1644.

calling rights. Despite the mother's reluctance and the child's initial unwillingness to engage with her, mediation played a pivotal role in improving their relationship. The mediation process, facilitated by Senior Counsel Ms. V. Mohana, helped the child slowly accept interaction with the mother, illustrating the significance of mediation in resolving family disputes and promoting the child's best interests.

Mediation also helped the court understand the child's feelings and the dynamics between the parents. Despite the initial unwillingness, mediation efforts led to a partial improvement in the child's relationship with the mother. The Apex Court's decision to have the child meet a counsellor outside the court premises highlights the flexibility and importance of mediation in creating a comfortable environment for the child in cases of familial discord.

In the *Dr. Jaya Sagade v. The State of Maharashtra*³⁹ case, the state government's circulated directive that prohibited mediation & counselling in domestic violence matters lacking in the court's authorisation was invalidated. In paragraph 23(b)(d)(e) of judgment, the Court further decreed that a victim has to be informed about the legal alternatives, and must be guided about the rights. She should not face coercion to settle her complaint. The Court explicitly stated that there should be no imposition of pressure or force on her to resolve her claim or grievance, and joint counselling/mediation should only commence with the voluntary and informed consent of the aggrieved woman.

X. CONCLUSION

Mediation in family disputes emerges as a significant asset for a country like India, grappling with a vast population and an overwhelming backlog of cases within its judicial system. The timeline for completion of mediation process is 4 months (120 days) as stipulated in Section 18 of The Mediation Act, 2023, which is far less than what family disputes litigation goes through for 5 years or more. Particularly noteworthy is the child-friendly nature of mediation, giving an extrajudicial setting to expeditiously address familial conflicts. To optimise its efficacy concerning children, the Mediation Council of India ought to equip mediators with specialised training in

³⁹ *Dr. Jaya Sagade v The State of Maharashtra*, (2016) (1) Mh. L.J.

child-centric mediation, aligning with the provisions outlined in the Mediation Act, 2023.

As elucidated in research and literature cited above in the paper, recognising the right of children to actively take part in the proceedings which impact them is of critical significance. In this context, the child's involvement not only ensures a holistic mediation process, but also nurtures their ability to comprehend and cope with the repercussions of familial discord. Thus, the active engagement of children becomes an integral facet of the mediation procedure, contingent upon their cognitive capacity to communicate effectively, thereby enhancing the overall outcome.

The measure of child assessment in divorce mediation can be adopted in India. It is a recommended practice by family mediators and therapists in Canada who deal with divorce mediation. Since, it is a general practice, similar methods can be potentially adopted in India.

Considering the socio-economic landscape of India, it becomes imperative to establish a robust connection between mediation and key stakeholders advocating for child rights. This interconnected legal collaboration will ensure that when cases involving children come under the purview of aforesaid key stakeholders, they can promptly refer them for mediation and pre-litigation mediation. Mediation thus, assumes as a bridge between Family Courts and on-the-ground child rights stakeholders contributing to the expedited dispensation of justice, in the best interest of the child