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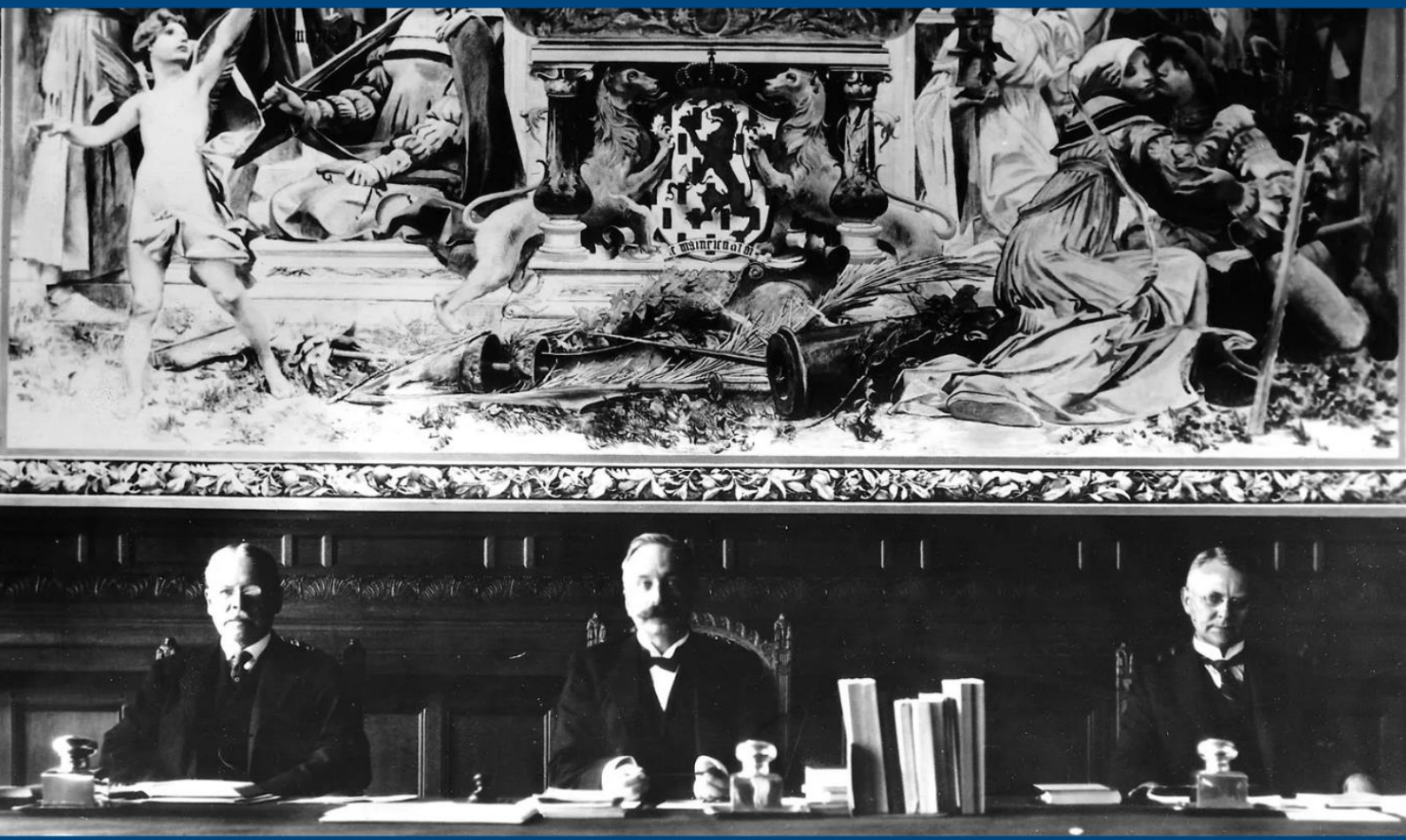

Navigating the Expanding Role of Mediation and Arbitration in Dispute Resolution

CENTRE FOR ALTERNATIVE DISPUTE RESOLUTION

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FOREWORD

JUSTICE A.K. SIKRI

Arbitrator, International Judge - Singapore International Commercial Court,
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Alternate Dispute Resolution ('**ADR**') mechanisms have been evolving at a staggering rate over the past few decades. In a country whose judiciary is notoriously burdened with a heavy backlog of cases, ADR mechanisms act as catalysts to accelerate the delivery of justice. The shortcomings of the judiciary are no secret. Courts are overburdened with a colossal backlog of pending cases, some of which are nearing a century in age. Even otherwise, the average time taken for the pronouncement of a judgment in a civil matter is at least 5 years. More, if the same is appealed. However, that is not the only criticism that the judicial system faces. The overly adversarial system creates an unwelcoming and overwhelming environment, especially for non-habitual litigants. To them, the process seems extremely unfamiliar and difficult, with the amount of time it consumes, the costs incurred, and the inconsistency and unpredictability of the decisions given. To a person who is not very closely linked to the system, a lack of clarity tends to weaken the faith in it as a whole. That apart, the technicalities of an adversarial system do not bring about just and fair resolution of the disputes on many occasions.

It would only be appropriate to mention here that the two said systems, namely court litigation and ADR mechanisms, cannot exist in a vacuum and therefore, are complementary to each other, at least at present. Ideally, in the near future there could exist a possibility that ADR and Litigation become completely independent of each other and have distinct identities of their own.

ADR, as it stands today, has many facets including Arbitration, Mediation and Lok Adalats. The emergence of ADR is not rooted in recent history, but dates back to a time when humanity itself was coming into being. This is primarily because of the fact that conflict is an inseparable part of existence, human and/or otherwise. Instances of conflict resolution outside litigation have been pointed out in almost all the religious scriptures. While resultant settlements and awards (as we would call them now) were not statutorily recognized back then, they were followed

unwaveringly, owing more to social and moral obligations than anything else. One of the primary reasons for its success was of course, that these settlements were specific to the region, culture and oftentimes religion of the parties as well as that of the neutral. In other words, the indigeneity of the process was a key factor that contributed to the success of the ADR mechanisms of the time.

Presently, of course, ADR reigns more supreme than ever before, especially because of the fact that even Courts are actively promoting its use over litigation. By virtue of their power under Section 89 of the Code of Civil Procedure, the Courts themselves refer the disputes to be settled outside litigation, thereby marking a shift of this power from Courts of Law to other bodies such as arbitral tribunals, mediators/conciliators (or panel thereof, as the case may be) or in the unique instance of India, Lok Adalats.

Closely akin to litigation is the theory and practice of adverting to arbitration as a form of ADR, wherein an independent third party, also referred to as a 'neutral', adjudicates disputes between parties. However, unlike traditional litigation, in arbitration and other forms of dispute resolution, the principle of party autonomy prevails. It is as a result of this principle that the parties get the right to choose not only the person(s) who will adjudicate their disputes, but are also free to choose the laws governing the contract and/or the dispute (the two may be chosen separately if the parties wish to do so) and even the procedure that the tribunal ought to follow for the adjudication of that particular set of disputes. For instance, in an International Commercial Arbitration ('**ICA**') wherein one of the parties is from India and the other is from France, they are free to mutually create a system where the law governing the contract is Indian Law, that governing the Arbitration Agreement is the Singaporean Law and the procedure to be followed throughout the entirety of the arbitral proceedings is the Arbitration Rules of the Singapore International Arbitration Centre ('**SIAC Rules**'). Such is the flexibility of arbitration as a form of dispute resolution, which cannot be even remotely dreamt to govern litigation.

All being said and done, inevitably there are certain shortcomings of arbitration as a form of ADR. While one of the major benefits of arbitration over traditional litigation was intended to be cost saving, it has not lived up to that expectation. Per contra, arbitrations have become increasingly expensive on account of several cost components such as exorbitantly high fees charged by arbitrators and counsels especially in high-stakes matters, technical and administrative expenses, venue-

related expenses, high penalties in cases of default, high quantum of damages etc. Following suit is the aspect of time. While arbitration mechanisms were designed to be expeditious, delays have been observed in many stages, not only during the pendency of the proceedings, but also after as the award/settlement agreement invariably undergoes a separate challenge and/or enforcement procedure, and oftentimes both at the same time. The enjoyment of the fruits of such hard labour is delayed and therefore tends to cause a drop of the mechanism's image in people's eyes. Again, arbitration is also adversarial in nature and therefore, has the same limitations about the just and fair outcomes which prevail in court litigation.

That said, it may be noted that the pros outweigh the cons of arbitration in many ways. While there is incurrence of costs, the parties benefit tremendously by not only saving their relationships, but also retain their reputation, commercial and otherwise, on account of the characteristic feature of confidentiality. It is, in fact, a necessary evolution in the approach to conflict resolution as it reshapes the understanding of justice in a world as dynamic as it exists today.

While arbitration is a rights-based approach where one party benefits more than the other, mediation provides for an interests-based approach. In this context, I would like to talk about the most celebrated form of ADR, namely, mediation. In mediation, the primary objective is to reach an amicable and mutually acceptable solution, thereby creating a win-win situation for both or all the parties to the dispute, as the case may be. In my long-spanning experience, I have found these results to be unique and amazing in their own way. Since the settlements are tailored to suit the needs and best interests of the parties, they tend to be much superior in utility than the standard reliefs given by Courts.

Many a times, a cohesive and less formal environment, coupled with a calming approach of the mediator, prompts parties to keep their egos at bay and put on their collaborative hats. Unlike litigation and arbitration, mediation is more facilitative in nature, meaning that the power to resolve the dispute, in essence lies with the parties themselves rather than the Mediator. The Mediator plays a facilitative role by empowering the parties to reach the best possible solution in any situation, while simultaneously ensuring that the results are mutually advantageous. A common practice that mediators employ is the use of caucuses, wherein the actual needs and interests of the parties are assessed through open dialogue. Doing so ensures that the

mediation proceeds in a fruitful fashion and that underlying interests are surfaced and resolved. It is in instances like these, that it becomes safe to acronymize ADR as 'Appropriate Dispute Resolution'.

While the enforceability of Mediation Settlement Agreements was in question up until some time ago, the Mediation Act, 2023 put a halt to said questions. The agreements so arrived at now have the force of law and are at par with a decree of the Court. With this development, the faith of the public in ADR has been reinforced and all qualms regarding the lack of its legal backing have been put to bay. Ultimately, the end goal of the process is not only to resolve disputes that have been tabled, but also to preserve and maintain relationships, if not enhance them.

A major advantage parties have while choosing a neutral to adjudicate their disputes is the option of choosing someone who has an in-depth understanding of the subject matter and would be able to effectively navigate through its nuances as and when required, essentially an expert. In matters involving high technical expertise, it becomes difficult for general practitioners to latch onto underlying problems. These could include *inter alia* construction and engineering disputes, or those relating to shipments and cargoes transported via air or water etc. A nuanced understanding of the subject matter and the intricacies it contains aids the neutral to reach better and more desirable outcomes, especially with respect to the estimation of losses and damages.

Interestingly, there can be instances wherein two or more methods of traditional dispute resolution are employed in a sequential manner for the adjudication of a dispute. These are more common and often more effective than the employment of a single form of traditional dispute resolution. In common parlance, this is called a Multi-Tier Dispute Resolution System ('**MTDRS**'). It can be a case that during the pendency of an arbitration, there are certain disputes that are less complex in nature and require less technical expertise. In instances like these, the major issues may be resolved through arbitration and the issues requiring less intense consideration may be resolved through negotiation or mediation. In essence, all disputes need not be adjudicated with the same amount of vigour. The dispute resolution process can be tailored to suit the specifics of the dispute's nature or its gravity and even urgency of the relief sought. In recent times, and especially in the arena of commercial disputes, MTDRS has become quite popular.

With the advent of advanced technology as it exists in the present day and age, Online Dispute Resolution ('**ODR**') has come into play. This is nothing but the provision of a platform to host one or all of the aforementioned dispute resolution processes . The shift from a physical to a virtual set-up has brought about tremendous convenience in the lives of parties as well as that of the neutrals. Its advantages include but are not limited to reduction in time, costs, labour etc. It becomes extremely convenient for people to remain in the comfort of their homes or office spaces and continue to work effectively, irrespective of the weather conditions and other allied parameters. This mode of dispute resolution can have increased environmental benefits as well, especially if the neutral decides to proceed in a paperless fashion.

Especially after the global Covid-19 pandemic and the corresponding lockdown, the modern world has realised the significance of the internet more than ever before. This is true for populations across various age groups and even economic strata, as the world wide web has deeply penetrated into the homes of even the remotest of villages in the country. Of course, the lack thereof cannot be completely neglected, but in a general sense, a vast majority of the Indian and the global population has been exposed to the benefits of the internet, including ODR. I am happy to witness the emergence of fully digitalised platforms that use and promote ADR by providing end-to-end support with respect to conflict resolution on a virtual mode. Everything from first listening to the grievance, followed by suggesting the appropriate method of conflict resolution, offering a choice of neutrals from their panels, receipt of claims along with corresponding arguments, documents and supporting evidence, hearings, rendering of interim, partial and final awards and even the delivery of orders takes place completely virtually. In this manner, the actual costs incurred for the proceedings are drastically lower than that what would be incurred in a physical set up.

ADR has come a long way already but there is still a long way to go. We are all equal stakeholders in ensuring that the existing pressure on the judiciary is alleviated. This could be made possible only by promoting adequate, effective, timely and amicable resolutions to arrive at harmonious outcomes through cooperative problem-solving.

It gives me immense joy to inaugurate this series of publications for RGNUL's Centre for Alternate Dispute Resolution ('**RGNUL-CADR**'). It is initiatives like these that go a long way in propagating and promoting the ADR movement. Having gone

through the essays myself, I am certain that this is a huge leap forward in the field. I hope it reaches many more people, as it would help masses see how there exist much better and more peaceful forms of dispute resolution in comparison to the adversarial ones. This particular edition has meaningful submissions on ADR vis-à-vis various subjects such as IP Law, Family Law, Insolvency Law, Anti-Trust Law, Media Law, Company Law, Commercial Law, Medical Law. Which I believe will prove beneficial to the masses, academicians and practitioners alike, and will help them gain diversified perspectives on the various subject matters dealt with herein.

Kudos to the efforts of the entire team of RGNUL-CADR, who are increasing the appreciation and significance of the field of ADR through the dissemination of this literature. All the best!

EDITORIAL NOTE

In an aspirational young university, for a young research centre with aspirations, young law students have aspired to take the next first step towards contributing to the literature on the subject that they share a common passion for – Alternative Dispute Resolution. I am happy to introduce the first volume of CADR-RGNUL's *Review of Alternative Dispute Resolution (RADR),* an endeavour that has been afoot for the past seven years, ever since CADR was constituted in 2018. Since CADR's inception, each blog published, each essay writing competition conducted, and every ADR seminar held has been a step towards building the competence, connections, and determination required for embarking on a regular and important academic commitment institutionally.

This maiden volume comes propitiously at a time when alternative dispute resolution is under great legislative and judicial focus. the Mediation Act, 2023 has been enacted recently, and the Supreme Court of India has settled long-standing questions in decisions such as *In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliationt, 1996 and the Indian Stamp Act, 1899* and *Central Organisation for Railway Electrification v ECL-SPIC-SMO-MCML (JV).* Even to commemorate the 75th year of its establishment, the Supreme Court chose to organize a Special Lok Adalat where more than 1000 cases were settled over a period of five days.

Contributors to the present volume of *RADR* have similarly taken up fertile areas of discussion in their papers, dealing with crucial facets of mediating and arbitrating disputes arising out of Intellectual Property Law, Competition Law, Family Law, Commercial Law, Company Law, Insolvency Law, Media Law, and Medical Law. These research papers have undergone rigorous editorial scrutiny and are certain to be of interest and value to students and practitioners alike.

I am grateful to the entire Editorial Board of CADR for the inaugural volume of *RADR,* which in turn stands on the shoulders of past editorial teams. The Editorial Board is also immensely thankful to each member of the Peer Review Board and the Advisory Board, whose input has been worth its weight in gold and has helped steer the editorial process in the right direction.

I am confident that *RADR* will continue to progress from strength to strength, strive to publish quality legal scholarship, and thereby do its part in furthering discourse on alternative dispute resolution and making justice with finality accessible. As remarked by a Supreme Court Justice taking an alternative view of the pendency in Indian courts, increasing litigation is a reflection of the people's confidence in the legal system. I hope our readers repose similar faith in alternative dispute resolution and taste greater success therein.

Rohan Gajendra Pratap Singh
Editor-in-Chief

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NAVIGATING THE ARBITRABILITY OF PATENT DISPUTES: TRACING RELEVANT APPROACHES IN INDIA AND BEYOND

AVNEEK KAUR SETHI* AND SHUBHANSHI PHOGAT**

Intellectual property rights, inherently private yet profoundly impactful, bestow a motu proprio effect on both their infringement and enforcement. This article examines the interplay between patent disputes and arbitration, unfolding an all-encompassing analysis of the intricacies and interconnectedness inherent in this dynamic. The study pivots around the concept of 'arbitrability' of patent disputes, with a keen focus on the Indian landscape, yet it judiciously extends its lens to include global practices for a comparative understanding. Particularly for India, this exploration takes on a critical tone, assessing the delicate balance between judicial intervention and arbitration autonomy. What makes patent disputes in India uniquely arbitrable? The article endeavours to answer this by dissecting the dual nature of patent rights: 'rights in rem' and 'rights in personam,' and their consequent implications on arbitrability. A spotlight is cast on the role of the World Intellectual Property Organization in streamlining arbitration norms and its overarching impact on shaping global patent arbitration. Lastly, it underscores the need for India to recalibrate its arbitration strategies to align with international benchmarks. It calls for comprehensive legislative guidelines, encourages forging synergies with global entities, and advocates for customising arbitration techniques to suit varied patent disputes. The conclusion of this article envisions the integration of cutting-edge technologies and a globalised perspective in arbitration, underlining the significance of a data-driven and inclusive approach to magnify the efficacy of arbitration in the realm of patent law.

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I. INTRODUCTION

Arbitration is a confidential, structured, party-centric mechanism for the resolution of discourse under an agreement that binds the parties. In this process, the arbitrator is bound to deliver the decision according to the law and under the existing agreement.[1] In Halsbury's Laws of England, arbitration is expounded as "*a term which is used in several forms and variations…refer to judicial process or an extrajudicial process… deal with the establishment, declaration and enforcement of existing rights and obligations in accordance with the recognised legal system…declare and ascertain what the arbitrator thinks about the respective rights and liabilities of the parties, but at no cost does it enforce such function, and thus such a function is non-judicial in nature*".[2]

Arbitration at heart is a submission to a private person selected in a manner prescribed by law or the agreement between parties for the determination of disputed matters.[3]

[1] IR Scott, 'ADR: Principles and Practice by Henry J. Brown and Arthur L. Marriott' (1995) 11 Arbitration International 459-462.
[2] *Halsbury's Laws* (4th edn, 2005) vol 2, para 502.
[3] Henry Campbell Black, *Black's Law Dictionary* (4th edn 1968) 134.

Sir John Donaldson observed that arbitration is nothing more and nothing less than private litigation.[4] The principles like party autonomy, *kompetenz-kompetenz* doctrine, and procedural flexibility, are a few reasons for the parties to prefer arbitration over litigation.[5] This quasi-judicial proceeding, in which the parties appoint an arbitrator to adjudicate their dispute, differs from court proceedings as it remains a private adjudication by a consensually chosen forum.[6]

In another domain, Intellectual Property Rights ('**IPR**') such as trademarks, copyrights, patents, and more, protect creations of the human mind. These rights are unique as they protect intangible assets without clear boundaries and grant owners control over the use of their creations.[7] The World Intellectual Property Organization ('**WIPO**') broadly defines IPR, as covering a range of creative and industrial outputs, encompassing rights related to creative and scientific works, artistic performances, inventions, industrial designs, trademarks, and protection against unfair competition, essentially covering all products of human intellect.[8]

Focusing on patents– they grant exclusive rights to inventors for their industrial innovations, provided they are new, useful, and meet the patentability criteria.[9] In India, patents last 20 years and confer the right to prevent others from using or selling the patented item.[10] A patentee holds an exclusive legal right upon the technology for which a patent has been granted. It extends to their right to prevent others from making, using, or offering for sale the patented products in India. Further, third parties in India can be prevented from using the patented process, importing the patented products without permission, or offering for sale or selling the products obtained by the patented process.[11] It allows the patentee to obtain tangible benefits to which they are legally entitled as recompense for their intellectual labour and reimbursement for costs incurred throughout their invention-related research and testing.

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[4] Northern Regional Health Authority v Derek Crouch [1984] EWCA Civ J0217-3.
[5] Tarapore & Co v Cochin Shipyard Ltd (1984) 2 SCC 680.
[6] Afscon Infrastructure Ltd v Cherian Varkey Construction Co (2010) 8 SCC 24.
[7] Henry Campbell Black, *Black's Law Dictionary* (7th edn 1999) 813.
[8] Convention establishing the World Intellectual Property Organization (adopted 14 July 1967, entered into force 26 April 1970) TRT/CONVENTION/001 art 2(viii).
[9] Patents Act 1970, ss 3 & 4.
[10] Patents Act 1970, s 5.
[11] Official Website of Intellectual Property India, 'National Intellectual Property Awareness Mission (NIPAM) launched' (*ipindia.gov.in*, 4 December 2021) <https://ipindia.gov.in/newsdetail.htm?774>.

The article discusses the intersection of arbitration and IPR, particularly patent disputes, across four sections. The first covers arbitration and its concepts, the second explores their interconnection with patent disputes in India through legislative and judicial perspectives, the third examines WIPO's approaches to patent arbitration, and the final section proposes future directions in this field.

This paper is meticulously written to achieve a comprehensive set of research objectives. Initially, it embarks on a mission to scrutinise the arbitrability of patent disputes globally. This endeavour entails a thorough analysis of the nature and scope of such disputes in the context of arbitration. Particular focus is placed on crucial aspects including efficacy, speed, confidentiality, and the upholding of party autonomy.

Subsequently, it delves into the intricacies specific to the arbitrability of patent disputes within the Indian landscape. It aims to unravel the unique challenges and nuances inherent within this context. This exploration includes understanding when the issue of arbitrability surfaces, identifying the decisive authorities, and elucidating the role these decision-making bodies play in the resolution of such disputes. An integral objective of this study is to navigate through potential solutions within the ambit of India's current legislative framework. This entails a critical evaluation of India's existing legal structure for resolving patent disputes through arbitration.

A pivotal component of this research is comparative international analysis. This segment is dedicated to contrasting the varying approaches to patent arbitration across different global regimes, with a special emphasis on the influence and role of the WIPO in steering global patent arbitration practices. It is aimed at assessing the strategies and effectiveness of the organisation in facilitating arbitration in patent disputes at a global level.

Lastly, the paper aspires to distil best practices and derive lessons from diverse approaches, tailored for application in the Indian context. This endeavour is directed towards the enhancement and alignment of India's approach to patent disputes with global standards. The overarching goal is to furnish a comprehensive overview of the current status of patent dispute arbitrability with a key focus on India, and to propose practical and legal improvements to optimise the management and resolution of these disputes through arbitration.

II. DEMYSTIFYING THE CONCEPTS OF ARBITRABILITY IN INDIA: BALANCING COURT OVERSIGHT & ARBITRAL AUTONOMY

Understanding the concept of arbitrability, particularly in its objective form, is crucial for determining if certain disputes are suitable for arbitration. Objective arbitrability involves assessing whether a dispute's subject matter can be resolved under arbitration and identifying the disputes exempt from arbitration proceedings. This is distinct from subjective arbitrability, which focuses on the parties' ability or agreement to arbitrate.[12] Arbitrability or non-arbitrability hinges on the jurisdictional overlap between arbitral tribunals and courts. The concept varies in different contexts. As explained in *Booz Allen*, it includes three aspects: (i) if disputes can be resolved by arbitration or are exclusive to public courts; (ii) if the disputes fall within the arbitration agreement's scope and are part of the joint list of disputes or the pleadings submitted before the arbitral tribunal; (iii) if the disputes are covered or excluded from the purview of the arbitration agreement.[13] The scope of a dispute's arbitrability can also be determined by certain tests, which, while not rigid, aid in ascertaining certainty in dispute resolution. The Apex Court, in *Vidya Drolia,* proposed a four-fold test for examining the issue of capability of a subject matter of a dispute to be arbitrable or not: (1) disputes related to actions *in rem* and not subordinate rights *in personam*; (2) disputes affecting third-party rights, needing centralised adjudication; (3) disputes concerning inalienable sovereign and public interest functions of the State; (4) disputes explicitly or implicitly non-arbitrable as per mandatory statutes.[14]

Applying the aforementioned principles to patent disputes indicates that these disputes are innately arbitrable. Patent disputes typically surpass the established legal tests for arbitrability and inherently exist as 'subordinate rights of action *in personam*,' meaning they pertain to the rights and obligations (action *in personam*) between specific parties rather than rights against the world at large. They do not require centralised adjudication nor involve sovereign or public interest functions that are non-arbitrable. Thus, the *inter partes* effect further affirms the arbitrability of patent subject matters.

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[12] Stavros L Brekoulakis and Loukas A Mistelis, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International 2009).
[13] Booz Allen & Hamilton Inc. v SBI Home Finance Ltd (2011) 5 SCC 532, para 34.
[14] Vidya Drolia and Ors v Durga Trading Corporation (2021) 2 SCC 1.

Understanding the concept of arbitrability, particularly in the context of patent disputes, is a nuanced and multi-layered topic, that requires an in-depth analysis of who decides arbitrability, and at which stages of the arbitration process it arises. Disputes regarding the arbitrability of a matter can emerge at various stages: pre-arbitration, during the arbitration process, and post-award. At each stage, the deciding authority varies, and the nature of the scrutiny changes in accordance with the principles of arbitration and judicial oversight.

III. PRE-ARBITRATION STAGE: COURT'S ROLE & LIMITED REVIEW

Initially, courts handle arbitrability issues at the pre-arbitration stage. Under Section 8 and Section 11 of the Arbitration and Conciliation Act, 1996 ('**A&C Act**'), the court has the authority to refer disputes to arbitration and to appoint arbitrators.[15] Both these provisions are complementary in nature. Section 11 does not provide any criteria for courts to help determine the existence of an arbitration agreement. On the other hand, Section 8 renders judicial review at the stage of reference merely prima facie, and not final. Resultantly, when the courts practice preliminary examination under Section 11 of the A&C Act, the *prima facie* standard equally applies. Therefore, the mandate of the valid arbitration agreement in Section 8 can be read into the mandate of Section 11, that is, the "*existence of an arbitration agreement*".

At this stage, the court's review is limited to a preliminary examination of the arbitration agreement's validity. The courts are merely required to check the extent of an arbitration agreement – nothing more, nothing less.[16] This limited review is crucial for ensuring that non-arbitrable and trivial matters are screened out early in the process.[17] It would be rather odd for the courts to hold that the arbitration agreement exists, even when *ex-facie* the arbitration agreement is invalid in law and the nature of a dispute is non-arbitrable. The court, thus, plays a gatekeeping role, preventing unnecessary judicial intervention and preserving the efficiency and autonomy of the arbitration processes.[18] Herein, though they cannot interfere with the doctrines of *kompetenz-kompetenz* and separability, to hinder arbitration procedures; they can

[15] Arbitration and Conciliation Act 1996, ss 8 & 11.
[16] Duro Felguera, S.A. v Gangavaram Port Ltd (2017) 9 SCC 729, para 59.
[17] NTPC Ltd v SPML Infra Ltd (2023) 9 SCC 385.
[18] Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd and Anr. (2005) 7 SCC 234.

ensure that malicious and trivial matters are dealt with at the outset.[19] Exercising prima facie powers of judicial review of the validity of arbitration agreements will save costs and prevent harassment of the parties at the pre-arbitral stage.

If the courts were to fully scrutinise the arbitration agreement, rather than having a restricted review in ascertaining its validity, incapability, or unenforceability, the arbitration process would have been in suspension until the court's decision.[20] Moreover, if the court's decision was to be considered definitive and conclusive, then it is apparent, that till the matter was seized before the court, the arbitral proceedings would hang in abeyance. Thus, the key rationale behind the court's limited preliminary review is the principle of *kompetenz-kompetenz*; otherwise, this tenet of law, intended to enable expeditious arbitration without unnecessary intervention from judicial authorities, would be defeated.

Lord Mustill's analogy of a relay race aptly describes this process. Initially, the court holds the baton, ensuring that the arbitration agreement is effective and that the dispute is appropriate for arbitration.[21] Once the arbitrators are appointed and take charge, they carry the baton, handling the dispute until an award is made. Post-award, the baton is passed back to the courts for enforcement or further scrutiny of the matter if required.[22]

IV. DURING ARBITRATION: THE PRINCIPLE OF KOMPETENZ-KOMPETENZ

Once the arbitrators are appointed, they take over the resolution of the dispute. The principle of *kompetenz-kompetenz*, as recognised under the United Nations Commission on International Trade Law Model Law, Art. 16, empowers arbitrators to rule on their jurisdiction.[23] The same is reinforced in Section 16 of the A&C Act,[24] wherein the Arbitral Tribunal holds the right to rule on its jurisdiction, encompassing decisions regarding the arbitration agreement's existence or validity. This principle is

[19] Vidya Drolia and Ors v Durga Trading Corporation (n 14).
[20] Sukanya Holdings (P) Ltd v Jayesh H. Pandya and Anr. (2003) 5 SCC 531.
[21] Michael J Mustill and Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd edn., Butterworths; St Paul Minn 1989).
[22] Michael J Mustill and Stewart C Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition [Law and Commercial Arbitration: 2001 Companion Volume to the Second Edition Practice of Commercial Arbitration in England, 1989]* (Butterworths 2001).
[23] UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17 (1985).
[24] Arbitration and Conciliation Act 1996, s 16.

pivotal in minimising court interference, ensuring that the arbitration proceedings progress smoothly and without unreasonable delay.[25]

The arbitrators are equipped with broad authority to manage the arbitration process. They can continue the arbitration proceedings and make an award, even if concurrent judicial proceedings are examining related issues. This broad authority of the arbitrators is crucial in maintaining the integrity and efficiency of the arbitration process. In *M/s* IFFCO, it was held that if the arbitrator holds that it has inherent jurisdiction to decide the dispute then such order cannot be immediately challenged and the process outlined in Section 16 (5) & Section (6) must be completed.[26] It is only after a decision on all issues, that the issue of jurisdiction may be challenged under Section 37(2)(a). However, it has been clarified therein that such a course is to be adopted only in the matter of inherent jurisdiction and not in respect of other issues which may have a flavour of jurisdiction like limitation. Thus, it is clear that the *kompetenz* principle, as enshrined in Section 16, pertains to three key aspects: (1) the existence of a valid arbitration agreement; (2) the proper constitution of the arbitral tribunal; and (3) the alignment of the matters submitted to arbitration with the arbitration agreement.

According to John J. Barcelo III,

"*The greater the number of questions decided at Stage I, the greater is the possibility for disruption of the arbitration process by an obstructive party, regardless of a genuine agreement to arbitrate. An ardent pro-arbitration strategy with little or no judicial scrutiny may refer all questions to the arbitrators, bolstering their power and adjudicatory role. However, arbitration is not a sangraal, and not everyone opposing arbitration is obstructionist, as unless anyone has agreed to arbitrate, everyone is entitled to a hearing in court. A good legal order must assess the opposing values and structure the process to overall maximise the value of the arbitration process and preserve legitimate claims for reasonably prompt judicial decision while minimising the obstructing opportunities*".[27]

[25] Tariq Khan, Everything You Need to Know about Arbitration in India (Thomson Reuters 2022).
[26] IFFCO Ltd v Bhadra Products (2018) 2 SCC 534.
[27] John J. Barcelo, III, 'Who Decides the Arbitrator's Jurisdiction? Separability and Competence-Competence in Transnational Perspective' 36(4) Vanderbilt J. Transnat'l L. (2021).

V. POST-AWARD STAGE: COURT'S SECOND LOOK

After an arbitral award is made, arbitrability issues may resurface if parties challenge the award. At this stage, courts can intervene and set aside the award if the subject matter of the dispute is found to be non-arbitrable under the prevailing law.[28] This post-award stage represents a 'second look' by the courts, balancing the arbitrator's authority with judicial oversight. The courts, at this stage, ensure that the arbitration process has adhered to legal standards and that the award is consistent with the principles of arbitrability.

This 'second look' approach is not meant to undermine the arbitrator's decisions but to ensure that the arbitration process remains fair and legally sound. The courts, thus, play a crucial role in upholding the legal framework within which arbitration operates while respecting the autonomy and finality that arbitration is intended to provide.

For instance, the Supreme Court ('**SC**') in *M. Hakeem*, noted that even though the compensation determined by the competent authority and affirmed by the arbitrator was abysmally low, the court under Section 34 could not directly enhance the compensation, instead, it should have remanded the matter to the arbitrator.[29] Thus, the power to set aside an award under Section 34 does not include the power to modify it. It was clarified that if a court finds that the "*relief granted by the arbitrator to a party could not be granted, the award is to be set aside*. However, if the court finds that the *arbitrator wrongly rejected a claim or granted lesser or higher relief than warranted, it cannot grant the relief itself but must remand the matter*".[30]

VI. BALANCING DECISION-MAKING BETWEEN ARBITRATORS & COURTS

The legislative framework, coupled with judicial interpretations, seeks to balance decision-making between arbitrators and courts. Initially, the courts have a limited yet pivotal role in ensuring non-arbitrable disputes do not proceed to arbitration, thus, respecting the parties' agreement to arbitrate and the principles of arbitration. Once the dispute moves into the arbitration phase, arbitrators primarily handle the dispute resolution process, with courts providing a supportive role to ensure adherence to legal standards and fairness. The A&C Act and its interpretation by the judiciary, aim

[28] Arbitration and Conciliation Act 1996, ss 34 & 37.
[29] *NHAI v M. Hakeem* (2021) 9 SCC 1.
[30] State of Chhattisgarh v SAL Udyog (P) Ltd (2022) 2 SCC 275.

for an efficient and fair dispute resolution process. This balance ensures that while arbitration remains autonomous and efficient, it does not operate in a legal vacuum and is subject to necessary judicial oversight.

VII. EXAMINING THE ARBITRABILITY OF PATENT DISPUTES IN INDIA

After having a basic conceptual understanding of patents in the first section, as a general rule under the intellectual property law, an owner exercises 'right *in rem*' i.e., right exerted against the world at large. Eventually, this provides an owner with an 'action *in rem*' or '*in rem* remedies,' enabling the owner to bind the world at large. Moreover, it is established that a right *in rem* is non-arbitrable. However, it is not a rigid or inflexible rule. There are times when the subject matter of disputes provides 'rights *in rem*'- right to include or exclude, exercisable against the world at large, but entails in itself 'subordinate rights of action *in personam*'- which means a claim for enforcement or infringement against an individual, such an action would bind only the parties in dispute and not the third parties or the world at large, these are derived from the rights *in rem*.[31]

Herein, an interest is protected against an individual resulting in '*in personam*' action/remedies. Thus, disputes of such subject matter are always considered to be arbitrable. Therefore, the question of IPR (patent) disputes non-arbitrability can be struck down by the above-enshrined essence of the rights, nature of permissible action considering the subject matter of patent disputes and, additionally, by applying the established and recognised tests or facets of arbitrability, as discussed in the above portions.

The law on intellectual properties in India is not clear on the nature of disputes explicitly capable of being settled by arbitration, since there is insufficient legislative engagement with this issue in both arbitration and IPR.[32] However, the Commercial Courts Act under the ambit of Section 2 (c)(xvii)[33] read with Section 2(1)(f) of the A&C Act[34] creates a plausible view that IPR disputes are arbitrable by explicitly including IPR (patents) disputes within the definition of the term 'commercial disputes'. Thus, commercial disputes including IPR (patents) can be arbitrated under

[31] Booz Allen & Hamilton Inc. v SBI Home Finance Ltd (2011) 5 SCC 53.
[32] Tariq Khan (n 25).
[33] Commercial Courts Act 2015, s 2.
[34] Arbitration and Conciliation Act 1996, s 2.

Section 10 of the Commercial Courts Act, dealing with the commercial dispute's arbitration.

Nevertheless, the courts in India have adopted an offset approach concerning the scope of arbitrability of IPR disputes. In *Booz-Allen,* it was clarified that "*any commercial or civil dispute, either contractual or non-contractual in nature, which a court can decide, is incidentally capable of being resolved and adjudicated by arbitration unless is it otherwise excluded either expressly or by any legal sanction*". Whereas, in the case of the IPR (patent) disputes that purely arise of contractual rights and obligations, in which the parties consciously decide to refer any contractual discrepancy to a private forum, no dilemma of in-arbitrability arises and the disputes can thus, be referred to arbitration.[35] At this juncture, the author, hereby, clarifies that actions for infringement under IPR statutes or proceedings initiated for challenging the grant or validity of IPR, continue to be litigated before courts, firstly as it requires action *in rem*, and secondly, the adjudicating issues of validity or ownership of IP, a sovereign function, cannot be adjudicated by a private arbitral tribunal as it may trigger public policy considerations. However, any infringement or any passing-off action which binds the parties in the dispute calls for an initiation of an 'action *in personam*', therefore, the same makes patent disputes arbitrable.[36]

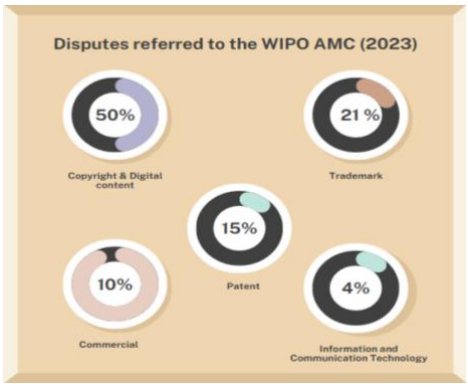
In a way, in India, the existing legislative framework along with the judicial interpretation and approaches provides an infallible and dependable form of dispute resolution (arbitration) for patent infringement, wherein at several stages the accountability of both the authorities as well as the parties to a dispute are bridled. However, the insufficient legislation in both fields of law has its setbacks for the country and causes unwarranted hindrances in expressly forming arbitration as an effective dispute resolution mechanism for patent disputes.

VIII. ROLE OF WIPO IN REFERENCE TO ARBITRABILITY OF PATENT DISPUTES

WIPO is instrumental in fostering the protection of intellectual property worldwide through international cooperation. Its contribution has been significant in shaping the global landscape of patent arbitration, particularly in terms of its scope, practicality, and extent. It established the WIPO Arbitration and Mediation Centre to offer

[35] Hero Electric Vehicles Pvt Ltd v Lectro E-Mobility Private Limited 2021 SCC OnLine Del 1058.
[36] Vijay Kumar Munjal v Pawan Munjal 2022 SCC OnLine Del 499.

alternative dispute resolution mechanisms, such as arbitration and mediation, for intellectual property disputes.[37] This Centre is a significant international provider of specialised services for resolving IPR disputes and is instrumental in bridging the gap between arbitration and intellectual property rights.



WIPO Arbitration and Mediation Centre[38]

The Centre administers various procedures under WIPO Rules,[39] including mediation, arbitration, expedited arbitration, and expert determination procedures. Recognising the concept of arbitrability as generally non-problematic in most jurisdictions, the Centre narrows concern about the universal effect of arbitral awards to academic interest, given that awards are typically binding only on the parties involved. The WIPO-administered arbitration includes detailed regulations for preliminary relief, critical in many intellectual property disputes. The Centre also maintains panels of arbitrators specialising in intellectual property disputes and facilitates party autonomy by providing model clauses for future conflicts and submission agreements for existing disputes. These model clauses are designed to avoid ambiguity and streamline the dispute resolution process. An innovative feature of WIPO is the Clause Generator, which enhances transparency and party-centred resolution. It allows parties to develop their own clauses and submission agreements, tailored to their specific needs, in a straightforward process.

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[37] Trevor Cook, 'ADR as a Tool for Intellectual Property (IP) Enforcement' (World Intellectual Property Organization 2014).

[38] World Intellectual Property Organization, 'WIPO ADR Highlights 2023' (*WIPO*, 2023) < https://www.wipo.int/amc/en/center/summary2023.html#:~:text=In%202023%2C%20the%20WIPO%20AMC,countries%20across%20various%20business%20areas.>.

[39] World Intellectual Property Organization, 'WIPO Mediation Rules, Schedule of Fees and Costs' (*WIPO*, 2021) <https://www.wipo.int/export/sites/www/amc/en/docs/mediation_rules_and_fees_2021.pdf>.

IX. WIPO'S GLOBAL IMPACT & COLLABORATION

As of 2023, over 900 cases have been resolved under WIPO's governance, predominantly based on contract clauses for future disputes, though some were based on submission agreements for existing disputes, including court-referred matters. Parties involved in these cases range from Small and Medium Enterprises ('**SME**') to large companies, inventors, universities, and artists from over 60 countries, with remedy amounts in disputes reaching up to USD 1 billion. Notably, 33% of WIPO arbitration proceedings have resulted in settlements. WIPO has also collaborated with Intellectual Property Offices in various countries, including Australia, Mexico, Serbia, Morocco, Singapore, Korea, and Poland. These collaborations aim to raise awareness of ADR benefits and develop tailored dispute resolution procedures, particularly in arbitration and mediation for intellectual property issues.

X. PATENT ARBITRATION AT WIPO

Empirical examples from other countries demonstrate the success of patent arbitration, highlighting its potential application in India. Notable instances include the following cases:

(A) *Joint Development Agreement of a Medical Treatment*: Two European pharmaceutical companies, engaged in a joint development and patent license option agreement for a cancer treatment, who faced disputes over royalties, sub-license revenue sharing, and patent ownership. They agreed to arbitrate certain issues through WIPO Arbitration. The tribunal, limited to addressing financial elements and patent

co-ownership, comprised patent experts who also ruled on procedural issues. The final award resolved the disputes on royalties and patent ownership status.[40]

(B) *Patent License Dispute*: An Asian inventor holding several US and European patents over sports goods components, entered into an exclusive license agreement with a US manufacturer, specifying WIPO Expedited Arbitration for resolving disputes. A dispute over royalty payments led the inventor to file for arbitration, seeking a declaration of patent infringement. With no agreement on an arbitrator, the Centre appointed an experienced patent lawyer. After addressing various motions, the arbitrator successfully issued a final award on patent infringement.[41]

Additionally, patent infringement disputes submitted for WIPO Arbitration benefit from arbitrators chosen for their experience in arbitration and relevant national patent laws. The Centre has adhered to stringent timelines set by parties, even in complex cross-border commercial disputes, underscoring its commitment to efficient and effective dispute resolution.

WIPO's role in patent arbitration is substantial, providing a framework and tools that facilitate effective dispute resolution in intellectual property. Its efforts have not only streamlined the arbitration process but also enhanced its practicality and applicability across different jurisdictions. The Centre's innovative approaches, such as the Clause Generator and its collaboration with various Offices, have significantly contributed to advancing the use of arbitration and mediation in resolving intellectual property disputes globally.

XI. SUGGESTIONS & RECOMMENDATIONS

The exploration of arbitration as a preferred mechanism for resolving patent infringements, as discussed in this article, reveals a multifaceted landscape where arbitration and intellectual property law intersect. The initial sections highlighted the essence of these two areas of law and their intricate linkage, particularly in the Indian context. It's evident that the nature of patent disputes is inherently arbitrable, with the legislative and judicial landscape in India making strides, albeit insufficient, towards broadening this scope. The practicality of this system, as mirrored in the international

[40] World Intellectual Property Organization, 'Arbitration' (WIPO) <https://www.wipo.int/amc/en/arbitration/>.
[41] ibid.

regime, notably through WIPO's initiatives, underscores its effectiveness and global applicability.

Looking ahead, the future of arbitration in patent disputes seems promising, especially with the integration of advanced technologies. Artificial Intelligence, blockchain, and virtual reality tools are poised to revolutionise arbitration processes, making them more efficient and accessible. Moreover, in an era of globalised commerce, arbitration stands out as a key player in resolving cross-border patent disputes, thereby facilitating international trade and innovation.

Going along with the provided high-level roadmap of understanding, considerations, examination, and establishments of arbitrability of patent disputes in India, the author believes that the country at this stage, needs to trace and learn lessons that can provide an impetus toward its journey as an arbitration capital for patent/intellectual property disputes at both domestic and international levels. Thus, with the emphasis on awareness of the benefits of institutional arbitration, offering the existence of forums for the resolution of patent/IP disputes, providing specialised tools and arbitrators with technical expertise, and stricter timelines for the resolution of patent disputes by arbitration proceedings, it is likely to anticipate that even in India most patent/intellectual property claims will be arbitrated to a final award in the near future and that a finding on merits would have a larger role in the eventual result of such disputes.

The recognition of arbitration as a contractual tool predominantly in IPR cases emerging from written contracts, such as licensing or collaboration agreements, has to be duly noted.[42] These cases often morph into claims under contract law, despite their core involving patent/IPR issues that are well-suited for arbitration. The varied nature of IPR issues and the remedies sought, from monetary relief to equitable solutions, underscore the adaptability of arbitration in this field.[43]

Furthermore, the arbitral award should be given an *inter partes* effect to the extent possible and permissible, rather than being annulled, as an award on patent infringement only concerns with respect to the parties in the arbitration. Otherwise, the issue of patent validity triggers public interest and policy, for which, it can be only

[42] International Chamber of Commerce, ICC International Court of Arbitration Bulletin, 9 (1).
[43] World Intellectual Property Organization, *WIPO Intellectual Property Handbook* (WIPO 2008).

decided by a national court, typically, having an *erga omnes* effect.[44] This can be beneficial for some patent owners as the arbitration process will become less precarious than the court's action. For instance, when the arbitrator invalidates their ownership or other rights, they will only lose their control over the enforcement of that intellectual property against the adversary in the arbitration, rather than against the world at large.

Ultimately, parties should retain free reign in planning or drafting arbitration agreements in order to thoroughly handle any potential restrictions and complications. The courts or the arbitral institutions in the country should take traces from the model clauses of WIPO's centre. Collaboration with international bodies is essential for standardising global arbitration practices. Such partnerships can ensure consistent resolution of patent disputes across jurisdictions. Tailoring arbitration approaches to cater to specific types of patent disputes, with specialised arbitrators for different industry sectors, can further refine the process. In India, the Delhi International Arbitration Centre or the International Arbitration and Mediation Centre, Hyderabad has followed the same lines and provided for model clauses.[45]

To optimise arbitration in patent disputes, parties should have the freedom to draft arbitration agreements with clarity, using universally accepted language, and considering potential restrictions and complications "*flowing through lex arbitri or otherwise*". The leading international arbitration institutions have recommended such language in their model clauses, and it generally encompasses tort, contractual, and statutory claims. Typically, these clauses provide variations of the words like: 'any' or 'all'; 'arising under and in connection with' or 'arising out of and relating to'; 'disputes', 'claims', 'differences' or 'controversies'; and 'the agreement' or 'the contract'. This enhances the likelihood of arbitration of intellectual property-related disputes to be economical and worthwhile with due regard to prioritising the parties and commercial sensitivities. Finally, a data-driven approach to analysing arbitration outcomes will illuminate paths for policy enhancements and identify areas needing improvement. Making arbitration accessible to SMEs, who frequently find themselves entangled in patent disputes, is crucial. By developing cost-effective

[44] Kenneth R. Adamo, 'Overview of the International Arbitration in the Intellectual Property Context' (2011) 2 (1) Global Business L Rev.
[45] IAMC Hyderabad, 'IAMC Model Clauses' (*International Arbitration and Mediation Centre*) <https://iamch.org.in/arbitration/model-clause> accessed December 2023.

mechanisms and possibly subsidised services, arbitration can become a more viable option over traditional litigation.

XII. CONCLUSION

The exploration of the arbitrability of patent disputes underscores the transformative potential of arbitration in the realm of intellectual property law. This investigation reveals that patent disputes, with their complex interplay of rights *in rem* and rights *in personam*, are innately suited for arbitration. The Indian landscape, while progressing, requires further refinement to fully embrace this potential. The integration of global practices, as exemplified by the WIPO, highlights a path forward for India to align with international benchmarks.

The future of arbitration in patent disputes is promising, especially with the integration of advanced technologies such as Artificial Intelligence, blockchain, and virtual reality. These innovations are set to revolutionise arbitration, making it more efficient, transparent, and accessible. In a globalised economy, arbitration is increasingly vital for resolving cross-border patent disputes and facilitating international trade and innovation. To encapsulate, while this article has charted a comprehensive path for understanding and establishing the arbitrability of patent disputes in India, the journey is ongoing. Embracing technological advancements, fostering global collaboration, focusing on sustainability and inclusivity, and continually adapting to the dynamic realms of patent law and arbitration will be key. This progressive trajectory not only solidifies arbitration as an effective dispute resolution mechanism but also harmonises it with broader goals of fairness and legal coherence globally.

India stands at a pivotal juncture in its journey towards becoming an arbitration hub for patent and intellectual property disputes. To achieve this, the country must focus on several key areas: comprehensive legislative reform to clarify the arbitrability of patent disputes, building synergies with international practices, establishing dedicated forums with specialised arbitrators, leveraging cutting-edge technologies, and adopting a data-driven approach to policy enhancements. Additionally, making arbitration accessible through cost-effective mechanisms and potentially subsidised services is crucial for promoting fairness and inclusivity.

The arbitrability of patent disputes offers a dynamic and effective alternative to traditional litigation, fostering a more streamlined, expert-driven, and efficient dispute resolution process. As India continues to refine its approach, incorporating global practices, technological advancements, and comprehensive legislative reforms will be crucial. This progressive trajectory not only solidifies arbitration as a preferred mechanism for resolving patent disputes but also harmonises it with broader goals of fairness, efficiency, and global legal coherence. Embracing these changes will ensure that arbitration remains a cornerstone of intellectual property law, supporting innovation and protecting the rights of inventors worldwide.

A PERSPECTIVE ON RELIGIOUS ARBITRATION

SIMRANJEET KAUR*

This paper seeks to identify the significance as well as challenges of the doctrine of religious arbitration with special reference to Shariat Courts, thereby analysing its scope of application in the Indian legal framework. It explores the linkages between the Western experience and the Indian situation in this regard and strives to bring out the lessons that can be learned by India from the Western conditions in this regard. A lot has already been talked about the legitimacy and importance of religious arbitration in Western countries like Canada and the United States. In the Indian legal scenario, many informal systems have been operating due to the increasing demand for self-governance by certain communities. As we know India is a place of diverse communities and religions it is difficult to bring all under the umbrella of the same laws. Therefore, each religion or community has been given liberty to be governed by their personal laws in relation to matters like Intestate succession, special property of females, marriage, dissolution of marriage, maintenance, dower, guardianship, gifts, trust, and waqfs. Religious arbitration systems have existed for quite a long period in the West, and they have been prominent and successful in countries like the US since the Courts have been able to enforce their awards. The author is of the opinion that such endeavours would help in curing the insecurities of various religious communities by answering their concerns of self-governance on one hand, while balancing the concerns of public interest on the other.

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I. INTRODUCTION

"*Discourage litigation; persuade your neighbours to compromise whatever you can. Point out to them how the normal winner is often a loser in fees, expenses, cost, and time*".

- Abraham Lincoln

Arbitration is a legal technique for extra-judicial resolution of a dispute.[1] It is one of the Alternate Dispute Resolution ('**ADR**') mechanisms, wherein the parties to the dispute refer it to one or more arbitrator(s), by whose decision(s) they agree to be bound.[2] Other mechanisms of ADR are conciliation, mediation, negotiation, lok adalats, etc. In short, arbitration is a form of dispute resolution equivalent to litigation in the courts and entirely distinct from the various forms of non-binding dispute resolution mechanisms, for example, negotiation, mediation, or non-binding determinations by experts.

After going through the meaning of arbitration it is pertinent to understand the relation between arbitration law and religion. Though the relationship between the two does not exist in a formal sense, however, the existence of the relation cannot be denied in a complete sense. The doctrine of religious arbitration is the perfect example of the same.

A lot has already been talked about the legitimacy and importance of religious arbitration in Western countries like Canada and the United States ('**US**').[3] In the

[1] Stephen Louie, 'Arbitration: An Analysis' <https://www.legalservicesindia.com/article/767/Arbitration-An-Analysis.html> accessed 18 April 2021.
[2] ibid.
[3] Aditi, 'Challenges of Religious Arbitration in India' (*Lawctopus*, 1 July 2023) <https://www.lawctopus.com/academike/religious-arbitration-india/> last accessed 21 July 2014.

Indian legal scenario, many informal systems have been operating due to the increasing demand for self-governance by certain communities.[4] As we know India is a place of diverse communities and religions, it is difficult to bring all under the umbrella of the same laws. Therefore, each religion or community has been given liberty to be governed by their personal laws in relation to matters like Intestate succession, special property of females, marriage, dissolution of marriage, maintenance, dower, guardianship, gifts, trust, waqfs. This paper talks about the significance and challenges of dealing with religious arbitration in India with reference to Shariat Courts.

Personal laws are often criticised for perpetuating gender bias, inequality, and discrimination. Muslim personal law based on Sharia has received the most flak and Muslim women have fought the fundamentalist interpretation of Sharia which has allowed men in India to divorce their wives for insignificant matters and also deny financial support to them.[5] India's near about 65 million Muslim women often called a minority within a minority their double handicap of gender and faith is challenging medieval religious laws that have oppressed them for centuries.[6] On the other side of the spectrum, Muslim scholars are of the view that Sharia Laws are a fair and upright set of laws. This brings us to an important question what Sharia laws are?

A. "SHARIAT" – MEANING

The word Shariat literally means "*the road to the watering place or the path to be followed*".[7] Quran, Hadis, Sunna, Ijma, and Qiyas form the body of Muslim common law known as Shariat. It is used to denote the whole of Muslim religious law. It embraces in its orbit all human acts. It is not a law in a modern sense but contains an infallible guide to ethics.[8]

B. HISTORY OF SHARIAT

[4] ibid.
[5] Sabiha Hussain, 'Shariat Courts and Women's Rights in India' (Centre for Women's Development Studies) <https://www.cwds.ac.in/wp-content/uploads/2016/09/ShariatCourts.pdf> last accessed 18 April 2021.
[6] ibid.
[7] Aqil Ahmad, *Mohammedan Law* (Central Law Agency 2016).
[8] ibid.

A tribal social structure was prevalent in Arabia and thereafter Islam was introduced as a religion to them. This tribe determined what was law and the rules that they followed were unwritten. These laws were changing according to the changing needs of the society. The Muslim community was established in Medina by the seventh century and soon started spreading to the surrounding regions. With the establishment of Islam, the will of God, as transmitted in the Quran as the revelations of Muhammad, came to supersede every tribal custom.[9] These writings in the Quran along with unwritten customs, also known as the Shariat are what govern Islamic society.[10] Additionally, the Shariat is also based on the Hadith which means the actions and words of the Prophet as recorded by his companions. Originally, they were very broad and general solutions to practical problems in society. The narrations of 'what the Prophet said, did, or tacitly allowed' are called *Hadis* or Traditions. The Traditions, however, were not reduced in writing during the lifetime of Mohammad. They have been preserved as Traditions handed down from generation to generation by authorised persons. That is why a minute inquiry is necessary to accept a *Hadis*.[11]

It would be a mistake to argue that the Shariat has remained static over centuries.[12] During the period when the Prophet was alive, the legislation mentioned in the Quran kept developing in response to practical problems faced by the Prophet and his community.[13] Thus, Quran contains the very words of God as communicated to Prophet Mohammad through the angel Gabriel.[14]After his death too, the presence of different schools of Sharia and Islamic countries have applied it to their legal domain, thus, proving the capacity in the Islamic law to be interpreted and developed in ways meeting the needs of society.

The four schools of Muslim Law i.e. Hanafi, Maliki, Shafi, and Hanabali developed in four different centuries.[15] Each school of Islamic law interprets the writings in the Quran in different ways which consists of varying rules and regulations for the Islamic

[9] Adrija Roychowdhury, 'Shariat and Muslim Personal Law: All Your Questions Answered' (Indian Express) <https://indianexpress.com/article/research/Shariat-muslim-personal-law-Sharia-history-shayara-bano-shah-bano-triple-talaq-personal-laws-religious-laws-uniform-civil-code-2784081/> last accessed 18 April 2021.
[10] ibid.
[11]Adrija Roychowdhury (n 9).
[12] Aqil Ahmad (n 7).
[13] ibid.
[14] ibid.
[15] ibid.

community world over. Muslim Countries have adopted their Islamic laws based upon one of these schools depending upon their specific situation.[16]

Accordingly, modern Islamic nation-states have responded to the needs of modernity by embracing the Shariat in ways suiting their social and political needs.[17] For instance, Egypt responded to the calls of modernity in the late nineteenth century by extending secular laws based upon theories drawn from the West.[18] The Islamic law, as interpreted by the Hanabali Shafiyya school of thought, is strictly followed in Saudi Arabia.[19]

C. SHARIAT COURTS & INDIAN MUSLIMS

Shariat court or Darul Qaza is an Arabic term. In Arabic term *dar* means '*a house*' and *qaza* means '*final decision or binding decree*'.[20] Thus, Darul Qaza means the house of Qazi or an Islamic scholar i.e. Muslim arbitrator who is authorised to give his views which, however, are not binding on the person going to this house. The binding power is the same as in the case of arbitration. The decision of the arbitrator is not binding on the parties to the dispute. It is wrong to describe a *Darul Qaza* or Shariat court as an Islamic court. In fact, they are arbitration councils or arbitration institutions which have no real or claimed judicial powers or authority whatsoever. Hence, these councils cannot be termed as a '*parallel system*' by any stretch of the imagination, unlike what is (mis)understood by many within and outside the community.[21] Their verdicts are recommendations and advice. It is entirely up to the two parties to accept the verdict or reject it. If the parties reject it, the so-called '*Shariat Courts*' are powerless, and the Muslim community at large enjoys no authority to coerce the rejecting party or enforce the verdict.

It is pertinent to note that the Muslim Personal Law (Shariat) Application Act of 1937 ('**Act**') regulates the lives of millions of Muslims in India.[22] This Act applies to

[16] ibid.
[17] Adrija Roychowdhury (n 9).
[18] ibid.
[19] ibid.
[20] ibid.
[21] Sabiha Hussain (n 5).
[22] Bittoo Rani, *Sharia Courts as Informal Justice Institution in India* (2014) 1 Intl J of Humanities, Social Science & Education 129, 139.

Muslim Personal Law in a number of important matters, in those cases, where parties are Muslims. Section 2 of the Act provides that:

"*Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agriculture land) regarding intestate succession, special property of females including personal property inherited or obtained under contract or gift or any other provision of personal law marriage, dissolution of marriage, maintenance, dower, guardianship, gifts, trust and trust properties and Waqfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)*".[23]

In *Mohamed Islam Khan v. Khalilul Rahman*,[24] it was held that the scope and purpose of Section 2 of the Act is to abrogate custom and usage in so far as these displaced the rules of Muslim Law. Thus, the following are the subjects expressly declared in which Muslim Personal Law (Shariat) shall be applied:[25]

1. Intestate succession,
2. Special property of females,
3. Marriage,
4. Dissolution of Marriage,
5. Maintenance,
6. Dower,
7. Guardianship,
8. Gifts,
9. Trust and Trust properties, and
10. Waqfs

Section 3 of the Act provides that any person who satisfies the prescribed authority:[26]

- that he is a Muslim,
- that he is competent to contract within the meaning of Section 11 of the Indian Contract Act, 1872, and

[23] Aqil Ahmad (n 7).
[24] *Mohamed Islam Khan v Khalilul Rahman* [1947] 51 C.W.N. 832.
[25] Aqil Ahmad (n 7).
[26] Aqil Ahmad (n 7).

- that he is a resident of India

may, by a declaration in the prescribed form and filed before the prescribed authority, declare that he desires to obtain the benefit of the Act, and thereafter the provisions of Section 2 shall apply to the declarant and all his minor children and their dependants as if in addition to the matters enumerated *'adoptions'*, *'will'* and *'legacies'* were also specified.[27]

II. LEGITIMACY OF ARBITRATION IN SHARIAH

Generally, in Islam, there are no arguments regarding the legitimacy of arbitration in Shariah. All Muslim Schools and Muslim thinkers have agreed that Shariah Courts or Darul Qaza can be used as arbitration councils for deciding disputes between the parties. The proof of the legitimacy of arbitration can also be found in the Holy Quran. The Islamic legal tradition or Quran however, has never questioned the propriety of settling conflict through ADR mechanisms. In fact, Islamic jurisprudence insists upon the settlement of family disputes through Sharia principles. Throughout its history, the Islamic legal system has emphasised the importance of *'sulh'* or reconciliation. Focused on ascertaining the truth and dispensing justice with minimal procedural distractions, the Islamic tradition has always favoured *'sulh'* over formal litigation.[28]

III. CONSTITUTIONAL VALIDITY OF THE SHARIAT COURTS

Examining the existence of Sharia Courts *vis-à-vis* Art. 15(1) and Art. 29 (1): According to Art. 29 clause 1 any sections of the citizens residing in the territory of India or any part thereof having a distinct language, script, or culture of its own shall have the right to conserve the same.[29] Thus, Sharia courts can be deemed as a considerable way to *'conserve'* the interest of the Muslim minority in India. According to Art. 15 Clause 1, State shall not discriminate against any citizens on grounds of religion, race, caste, sex, or place of birth.[30] Thus, banning them could be violative of Art. 29(1) read with Art. 15(1).

[27] ibid.
[28] Bittoo Rani (n 22).
[29] Constitution of India 1950, art 29(1).
[30] Constitution of India 1950, art 15(1).

Examining the existence of Sharia Courts *vis-a-vis* Art. 25(1): According to Art. 25(1), all persons are equally entitled to freedom of conscience and the right freely to profess, practice, and propagate religion subject to public order, morality, and health and to the other provisions of the Part.[31] Thus, the existence of the Shariat Court symbolises propagating one's religion.

Examining the existence of Sharia Courts *vis-a-vis* Art. 14: According to Art. 14 of the Constitution, State shall not deny to any person equality before law or equal protection of the laws within the territory of India. Thus, disallowing Shariat Courts would be violative of the principle of "*equality before the law*" as envisaged under Art. 14.[32]

Examining the existence of Sharia Courts *vis-a-vis* Art. 26: According to Art. 26 of the Constitution, Every religious denomination or any section thereof shall have the right to establish and maintain institutions for religious and charitable purposes and to manage its own affairs in matters of religion.[33] Thus, Shariat Courts are not essentially *'courts'* as held by the Supreme Court ('**SC**') in *Vishwa Lochan Madan v. Union Of India*[34] but they can fall under the definition of religious institutions established for managing its affairs and are thus, protected under Art. 26 of the Constitution.

Examining the existence of Sharia Courts *vis a-vis* Art. 21: Not allowing Shariat Courts to function would be violative of Art. 21 of the Constitution. This is because if Shariat Courts are functioning due to the desire of the Muslim Community approaching them is entirely optional. Thus, disallowing them would be violative of *'personal liberty'* as enshrined under Art. 21.[35]

IV. HOW ARE INDIAN SHARIAT COURTS DIFFERENT FROM OTHER COUNTRIES?

In countries like Saudi Arabia, Sharia courts are enforceable and are backed by the state. Whereas, the All-India Muslim Personal Law Board ('**AIMPLB**') has already

[31] Constitution of India 1950, art 25(1).
[32] Constitution of India 1950, art 14.
[33] Constitution of India 1950, art 26.
[34] *Vishwa Lochan Madan v Union of India* AIR (2014) SC 2957.
[35] Constitution of India 1950, art 21.

made it clear that it accepts the Indian Penal Code as far as criminal cases are concerned. [36]

So, unlike some Islamic states, there can be no place for punishments like whipping a guilty or stoning him/her. The Taliban-like verdicts by Sharia Courts in India are a mere exaggeration and a figment of the imagination.[37] Some of the differences are enumerated below:

- **Unlike Western countries the Shariat Courts do not have state backing**: The SC's July 2014 verdict in the *Vishwa Lochan Madan v. Union Of India*[38] case did not delegitimise Darul Qazas, it made it clear that as Darul Qazas were not part of the corpus juris of the state, fatwas issued by them – or for that matter any person or religious body – do not amount to an adjudication of dispute by an authority under a judicial system sanctioned by law.
- **The courts cannot be approached for enforcement of such orders pronounced by such institutions:** As already pointed out by the Supreme Court of India there cannot exist a parallel judicial system hence the judgments pronounced by religious institutions cannot be enforced by the courts. It is pertinent to note that courts will not enforce the orders of such institutions, but it has the power to set aside the orders of the above-mentioned institutions. The said power has been given under Section 34 of the Arbitration & Conciliation Act, 1996 ('**A&C Act**').
- **The enforcement of awards is done through social pressure:** The court, however, refused to declare *Dar-ul-Qazas* (Islamic courts) or the practice of issuing fatwas as illegal, saying it was an informal justice delivery system for bringing amicable settlement and it was for the persons concerned to accept, ignore or reject it, but the enforcement of the same takes place through social pressures of the society and most people do not speak about the injustice done to them.
- The private nature of institutions keeps adding to the already existing complex nature of religious arbitration.

[36] Anand Patel, 'Sharia Courts Decoded' (India Today) <https://www.indiatoday.in/fact-check/story/fact-file-sharia-courts-decoded-1285236-2018-07-13> last accessed 13 July 2018.
[37] Anand Patel (n 36).
[38] *Vishwa Lochan Madan v Union of India* AIR (n 34).

- Considering the social framework of Indian society where religion is deeply rooted, people under social pressure submit to these religious arbitration forums that are established.
- **Problems in interpreting the Shariah law:** By announcing its decision to open Sharia courts, the AIMPLB stirred a controversy that would give a fillip to the politics of polarisation. The ostensible aim is to educate "*the lawyers, judges and the common man about Sharia law*" through the so-called *Tafheem-e-Shariat* (understanding the Sharia) committees.[39] In *Aga Mohammed Jaffer Khan* v. *Koolsum Beebee*,[40] Their Lordships of the Privy Council held that where a passage of the Quran has been interpreted in a particular manner both in the Hedaya (a work on the Sunni Law) and in the Imamia (a work on the Shia Law), it is not open to a court to construe the same in a different manner. In *Aziz Bano v. Mahmmad,*[41] it was held that where there is a conflict of opinion and no specific rule to guide the Court, the Court ought to follow that opinion which is most in accordance with justice, equity, and good conscience.
- Sanctions are inappropriate and against the State Laws.
- **No provision of judicial review unless a separate lawsuit is filed:** There is no provision for judicial review, however, the person who is not satisfied can approach the court and the court has the power to set aside the orders of Shariat courts if any of the conditions under Section 34 of the A&C Act are fulfilled.

V. RELIGIOUS ARBITRATION & INDIAN ARBITRATION LAW

There has been a rising demand by parent institutions like the AIMPLB to grant state backing to the judgments given by such Shariat Courts and grant them a final and binding status. The SC's July 2014 verdict in the *Vishwa Lochan Madan v. Union Of India* case did not delegitimise *Darul Qazas*, it made it clear that as *Darul Qazas* were not part of the *corpus juris* of the state, *fatwas* issued by them – or for that matter any person or religious body – do not amount to an adjudication of dispute by an authority

[39] A. Faizur Rehman, Muslim Law Board Must Stop Calling Arbitration Centres Sharia Courts (*The Wire*) < https://thewire.in/law/muslim-personal-law-board-must-stop-calling-arbitration-centres-as-sharia-courts.> last accessed 16 July 2018.
[40] *Aga Mohammed Jaffer Khan v Koolsum Beebee* (1897) 25 Cal. 24.
[41] *Aziz Bano v Mahmmad* (1920) 47 All. 823.

under a judicial system sanctioned by law.[42] Therefore, a *qazi* or *mufti* has no power to impose his fatwa on anyone and any attempt to do so would be illegal and actionable.

The court's decision not to outlaw *Darul Qazas* was based on its acceptance in good faith of the pleadings of the AIMPLB and Darul Uloom Deoband that *Darul Qazas* were akin to arbitration centres and not part of a parallel judicial system.[43] Thus, an umbrella provision granting finality and enforceability to all the judgments of such institutions would intensify the problems under such a private regime, the idea of formalising these institutions by bringing them under the ambit of state arbitration laws may deserve consideration.

Here the complexities arising in the Western experience with respect to the religious arbitration doctrine may raise doubts about the validity of such an idea. However, an analysis of the provisions of Arbitration Law points out that the Indian setup is capable of filling the voids of the state-backed religious arbitration systems to a significant extent without drawing into the problems that seem inherent in the Western counterpart.[44] As such bringing such systems under the ambit of formal arbitration laws can help reconcile the community objectives as well as individual interests through a pre-existing bridge that has already gained legal and social acceptance.[45]

If we go through the provisions of the A&C Act which is the governing law of arbitration in India, it is enough to diminish any doubts regarding the legitimacy of these institutions under Indian law. The aim of the new act, based on United Nations Commission on International Trade Law ('**UNCITRAL**') model law, is to ensure party autonomy and minimise judicial intervention to every extent possible.

Right from the appointment of the arbitrators to the procedure followed, the parties have full liberty to decide the conditions of arbitration. Section 11 of the Act provides that the parties can agree upon the procedure for the appointment of the arbitrator. In the case of failure of the parties to do so, the matter may be referred to the High Court ('**HC**') or the SC, or their respective designates. However, unlike the Western courts where the power of appointment by the courts may be curtailed owing to the religious

[42] *Vishwa Lochan Madan v Union of India* (n 34).
[43] A. Faizur Rehman (n 39).
[44] Aditi (n 3).
[45] ibid.

question doctrine, the Indian scenario facilitates this to be done under Section 11(8) of the Act. Under this provision, the appointment of the arbitrator by the SC and the HC has to be done while having "*due regard to any qualifications required of the arbitrator by the agreement of the parties*".[46] Therefore, in the case of religious arbitrations, any religious condition regarding the appointment of the arbitrator can be read as 'qualifications' under clause 8 of Section 11.

Also, courts have held the function of appointment of the arbitrators as a judicial one and hence the courts, while interpreting any such conditions can call for any kind of aid to help them interpret the doctrine according to the parties' contemplations.

Following points as to the working of the Shariat courts:

- Parties do not require the presence of lawyers to argue or to put forward their cases before the judge, thus, the ambiance is more informal and user-friendly;
- There is no jury system; hence the case is presented before a single judge i.e. the Qazi who judges upon uncodified principles derived from Sharia rather than on legal standards;
- There is an absence of rigid court procedure i.e. absence of formalities. This makes proceedings streamlined and time-saving;
- Circumstantial and forensic evidence are not required and they do not follow standardised codes;
- The parties to the dispute are required to be Muslims and the principle of privity of contract is followed;
- The verdict of Sharia courts creates a non-binding effect.

Above discussed provisions are indicative of the fact that the freedom of religion which these religious tribunals seek to protect seems to be consistent with the provisions of the A&C Act given its approach upholding party autonomy.

VI. WESTERN EXPERIENCE

Although the challenges of the religious arbitration systems may be different under different legal setups, the remedies are largely the same, thereby placing a heavy

[46] Arbitration & Conciliation Act 1996, s 11(8).

burden on the grounds of public policy. However, their effects sure portray a distinction.[47] The application of public policy by the Indian courts in this regard can enhance the consistency between the functioning of the religious courts and the general community as well as individual interests.[48] In *Richardson v. Mellish*,[49] Justice Boroughs has described the term "*public policy*" as an unruly horse.[50] "*Public Policy*" is an inclusive term that may include within its ambit a wide range of activities that can be termed as public policy. It has been remarked that public policy in its nature is so uncertain and fluctuating; varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. In the case of *Murlidhar Agarwal & Anr*. v. *State of U.P. & Ors.*,[51] the SC had remarked that public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time.

As far as the conflicting interests inherent in the religious arbitration doctrine are concerned, the act also provides appropriate remedies in this respect. These largely include the provisions of equal treatment of parties and challenging an arbitral award. The court cannot set aside it on its own accord. This can be done only in case a party applies to the court under clause 2 of Section 34 of the Act. Interference of court is justified only if any of the following is proved:[52]

- The party making the application furnishes proof that the party was under some incapacity;
- The arbitration agreement is not valid under the law to which the parties are subject;
- The party making the application was not given proper notice for the appointment of the arbitrator;
- The arbitral award deals with the dispute not contemplated in the arbitration agreement;

[47] Aditi (n 3).
[48] ibid.
[49] *Richardson v Mellish* (1824) 2 Bing. 229.
[50] ibid.
[51] *Murlidhar Agarwal v State of U.P.* (1974) SCC 472.
[52] Arbitration & Conciliation Act 1996, s 34(2).

- The composition of the tribunal was not in accordance with the agreement of the parties;
- If against public policy or the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force.

However, this does not jeopardise the party's autonomy by unduly interfering with the arbitration proceedings and awards thereof. The Act makes a provision for the supervisory role of courts for the review of arbitral awards only to ensure fairness. The intervention of the courts is envisaged in a few circumstances only. The courts cannot go into the merits of the case and are generally hesitant to interfere where it involves the application of mind on the part of the arbitrator and any injustice or inconsistency is not prima facie apparent. Courts also cannot interpret the Arbitration Agreement nor can doubt Arbitrator's Interpretation unless inherently illegal or in case of an application under Section 33 of the Act by a party to interpret a part of the agreement. Courts also lack any *suo moto* powers of interference under the Act. As such, the mechanism can be held as appropriate to uphold party autonomy while facilitating the balancing of interests thereby meeting the ends of justice.

VII. CONCLUSION

The Western experience with the concept of religious arbitration, notwithstanding its significance, has not been a pleasant one, thereby leading to a ban in regions like Ontario. In the Indian scenario, however, the Western experience can be used to strengthen the already enhancing socio-legal legitimacy of religious tribunals, while ensuring the general prevalence of basic principles of natural justice in the process.

Some challenges may still remain unanswered, for instance, meeting the formal requirements of written agreements and so on in initially informal setups of religious tribunals, revising the scope of judicial review under the general public policy clause so as to balance the concerns raised by religious arbitrations as against other arbitral matters and so on. Discussion of these challenges is beyond the scope of this paper. However, further evolution and modification of law in this regard can be undertaken keeping in mind the special nature of this kind of arbitration in the future to further mould this concept in order to tap the potential of these institutions while at the same time mitigating the damage caused by it. Appropriate editions can be made to the

Arbitration Laws in India for this purpose with special reference to religious arbitration.

If structured carefully, the framework provided by religious arbitrations can provide the much-needed gateway to the religious tribunals, thereby bringing them under the ambit of judicial scrutiny. Such endeavours would help in curing the insecurities of various religious communities by answering their concerns of self-governance on one hand while balancing the concerns of public interest on the other.

Thus, to conclude, we can infer that Sharia courts today are an important ADR mechanism, its role is complementary to the formal judiciary. Under the present dispensation, Sharia courts or Darul-qaza is an integral dispute redressal forum for Indian Muslims as they are able to resolve disputes expeditiously and amicably. By settling private disputes of such a big community as that of the Muslims, the *Darul-qaza* is complementing the formal Indian judiciary. Apart from its complementary role, the system is inspired by the ideal of service to mankind. In a developing country such as India, the Darul-qaza through its informal approach creates a more flexible and precise instrument for dispute adjudication and reduces the uncertainty and insecurity that emerge from the rigidity of the formal legal system. The institution is fully adapted to the profile and requirements of its community members.

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.

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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 ('**HC**s') 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 i*n personam* that would ordinarily be arbitrable but were not because of public

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[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.

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[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.

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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.

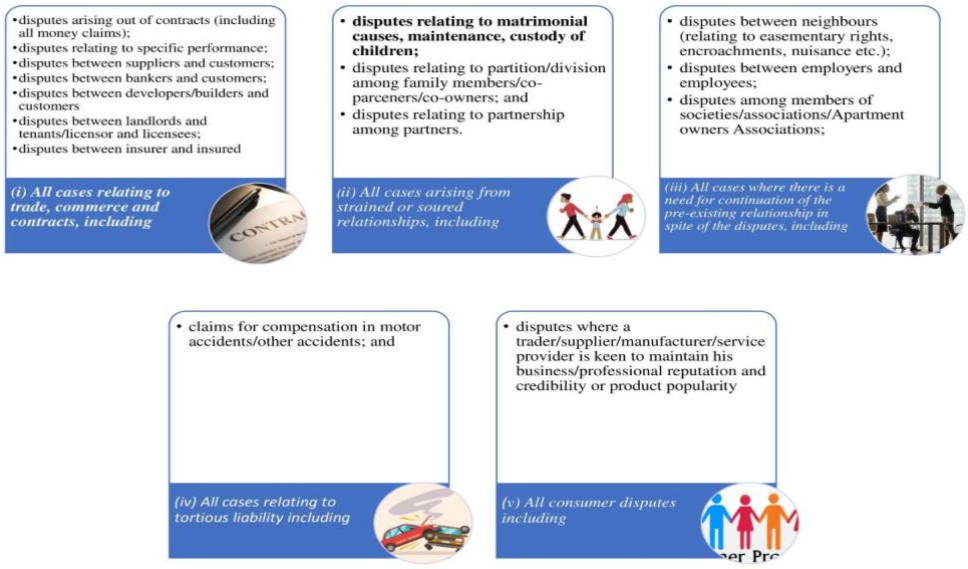
Mediation stands as an alternative method for resolving disputes, where involved parties willingly reach a settlement with the aid of a third-party, possessing negotiation and communication skills. The process involves the mediator facilitating discussions and guiding the parties to a mutual agreement, 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://mcpc.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 CPC[13] 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 pendency[29] 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 Samadhan[32] (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

CONFORMING DISSENT: UTILITY OF DISSENTING AWARDS

SIDDARTH MEHRA* AND RAGHAV MUDGAL**

Dissenting awards in arbitration have long been a puzzle for legal professionals. This article unravels their complex role by examining recent SC judgments that clarify when and how these alternative opinions matter. While dissenting awards provide valuable insights into legal reasoning, the Court has definitively ruled that they cannot replace majority decisions. The research explores the delicate balance between judicial restraint and ensuring fair dispute resolution. It highlights a critical challenge: when a majority award is set aside, parties face the daunting prospect of restarting lengthy arbitration proceedings from scratch. The authors propose an innovative solution—allowing partial resumption of arbitration with a new tribunal—to save time, resources, and the integrity of the dispute resolution process. By offering a nuanced look at arbitration's inner workings, the article provides practitioners and legal scholars with a fresh perspective on managing complex legal disputes more efficiently.

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I. INTRODUCTION

Dissenting awards, though relatively uncommon, hold a pivotal role in the realm of arbitration proceedings. A dissenting award represents a formal written opinion by a member of an arbitral tribunal who disagrees with the majority decision, offering alternative reasoning and conclusions. While their existence enriches the arbitration discourse, in terms of enforceability, their value has been debatable. In a recent ruling,[1] the Supreme Court ('**SC**') has confirmed that a dissenting award cannot replace the majority award if the latter is set aside. This article explores the role of dissenting awards in arbitration, their treatment by the courts in the past, and the way forward in light of the recent ruling of *NHAI v. HCCL* for the future of arbitration in India.

II. SIGNIFICANCE OF DISSENTING AWARDS

Arbitrations, open discussion, collaboration, and unified decisions among tribunal members are essential for procedural fairness and legal integrity within multi-party tribunals. Parties are entitled to impartial and equitable resolutions by the tribunal, which must consider all perspectives, including dissenting ones. While an arbitrator may not be able to sway the other arbitrators on an issue in dispute during deliberations, every arbitrator should have the opportunity to present their alternate views.[2]

The significance of this collaborative approach extends beyond mere procedural requirements. In fact, failure to hold discussions between the tribunal members at the

[1] *HCCL v NHAI,* Civil Appeal No(s). 4658 of 2023.
[2] *Dalling v Matchett* [1740] 125 ER 1138.

time of writing the award can lead to setting aside the same on account of procedural impropriety.[3] The tribunal's power, granted by the parties, applies to both its collective decisions as well as the individual arbitrator's contributions. This dual authority promotes transparency and cohesiveness within the tribunal, ensuring that each member can scrutinise and balance the decisions of others.

III. ROLE IN ENHANCING ARBITRAL AWARDS

Dissenting awards contribute to a more comprehensive understanding of the dispute, enhancing the overall fairness and robustness of the arbitration process. They serve as a crucial avenue for arbitrators to articulate their distinctive findings and viewpoints when their stance diverges from the prevailing consensus within the tribunal. These dissenting opinions often articulate the rationale for potential challenges to the majority award and offer an alternative perspective. That might prove valuable in subsequent proceedings. In some instances, where the majority award faces legal challenges that result in its overturning by the courts, the courts have turned to the minority award for resolution.

A. SUPPLANTING THE MAJORITY AWARD WITH THE MINORITY AWARD

In some instances, the courts have set aside either the majority awards in their entirety or specific sections of them and have instead chosen to supplant the majority view with the minority view, deeming them as binding and operative decisions. Several notable examples are *ONGC Ltd. v. Schlumberger Asia Service Ltd.*,[4] *ONGC Ltd. v. Interocean Shipping (India) Pvt. Ltd.,*[5] and *Modi Entertainment Pvt. Ltd. v. Prasar Bharati.*[6] However, it is worth noting that the Courts did not provide any legal reasoning or justification in these cases, leaving uncertainty about whether such actions align with the provisions and intentions of the Arbitration and Conciliation Act, 1996 ('**A&C Act**').

B. AFFIRMING THE MINORITY AWARD IN THE JUDGMENT

[3] *State of Rajasthan v Larsen & Toubro* (1996 Supp Arb LR 25).
[4] *ONGC Ltd v Schlumberger Asia Service Ltd* 2006 (91) DRJ 370.
[5] *ONGC Ltd v Interocean Shipping (India) Pvt Ltd* Arb. Pet. No. 549 of 2013.
[6] *Modi Entertainment Pvt Ltd v Prasar Bharati* (2017) SCC OnLine Del 7509.

The Courts often tacitly support a minority award by indirectly affirming its findings in the judgment while setting aside the majority award. This subtle guidance informs future arbitral proceedings without direct enforcement, respecting the principle of limited interference in Section 34 of the A&C Act. This approach reflects judicial restraint while still acknowledging the merit of dissenting opinions.

C. UPHOLDING THE MINORITY AWARD WITH THE AIM OF DOING COMPLETE JUSTICE

In the landmark ruling of *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, the SC invoked its extraordinary powers under Art. 142 of the Constitution of India to uphold the minority award and directed execution of the same.[7] The SC used this power to do complete justice between the parties, as referring the dispute to fresh arbitration would cause substantial delays, which would have contradicted one of the key objectives of the A&C Act.

IV. HCCL V. NHAI

In this case, the SC faced a cluster of petitions but singled out a specific one between HCCL and NHAI. The dispute between NHAI and HCCL arose out of a contract related to the Allahabad By-Pass Project, and included, *inter alia*, a differing interpretation of a clause regarding quantification and payment for embankments constructed using soil and fly ash. While HCCL advocated for a composite method, NHAI argued for a bifurcated approach. The arbitral tribunal unanimously decided issues in NHAI's favour on all issues except for the quantification issue, which was decided in HCCL's favour. However, in this regard, a dissenting award was made, which supports NHAI's method.

A. PROCEDURAL ANALYSIS & COURT'S ANALYSIS

HCCL challenged the award under Section 34, A&C Act, which was dismissed by the Delhi High Court ('**HC**'). However, the court upheld the majority award's interpretation of the quantification method in favour of HCCL. This led to NHAI appealing to the Division Bench under Section 37, A&C Act, which ruled in NHAI's favour even on the aspect of and set aside the majority award to the extent of the determination of the quantification method. Interestingly, the court has tacitly

[7] *Ssangyong Engg. & Construction Co. Ltd v NHAI* (2019) 7 SCR 522.

affirmed the interpretation provided in the dissenting award but did not go to the extent of upholding it as enforceable along with the rest of the majority award.

Aggrieved, HCCL escalated the matter to the SC. The SC emphasised that the applicability of Section 34 and Section 37 of the A&C Act should be confined to a narrow scope and invoked judiciously. It strongly advocated for a "*policy of minimal intervention*", asserting that judicial interference in arbitral awards is warranted only when it is unequivocally demonstrated that the tribunal's judgment was fundamentally based on egregious legal errors or a distorted interpretation of facts or contractual terms. As long as the view adopted by the majority was plausible, the court found no reason to intervene.

B. SUPREME COURT'S TREATMENT OF DISSENTING AWARDS

The SC clarified the treatment of dissenting awards, drawing attention to and re-affirming the previous ruling in *Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd.*,[8] wherein while setting aside the majority award, the SC refrained from supplanting it with a minority award despite being in agreement with the same. The discussion in *Dakshini Haryana*, on commentaries on arbitration, namely *Born* and *Russel*, wherein *Russel* explicitly states that a dissenting opinion is not inherently considered an award and even *Born* has refrained from categorising it as an integral part of the award, was also reproduced. The SC stated:

"*26. ...However, the court did not, in Dakshin Haryana Bijli Vitran Nigam Ltd (supra) direct the dissenting opinion to be treated as an award. In the opinion of this court, that approach is correct, because there appears to be a slight divergence in thinking between Russel and Gary Born. The former, Russel is careful to point out that a dissenting opinion is not per se an award, but* "*is for the parties' information only and does not form part of the award, but it may be admissible as evidence in relation to the procedural matters in the event of a challenge*". *However, Gary Born does not expressly say that the opinion is not a part of the award. That author clarifies that this is an essential aspect of the process by which the parties have an opportunity to both, present their case, and hear the reasons for the Tribunal's decision; not hearing the dissent deprives the parties of an important aspect of this process*".

[8] *Dakshin Haryana Bijli Vitran Nigam Ltd v Navigant Technologies (P) Ltd* (2021) (1) SCR 1135.

"*27. It is, therefore, evident that a dissenting opinion cannot be treated as an award if the majority award is set aside. It might provide useful clues in case there is a procedural issue which becomes critical during the challenge hearings. This court is of the opinion that there is another dimension to the matter. When a majority award is challenged by the aggrieved party, the focus of the court and the aggrieved party is to point out the errors or illegalities in the majority award. The minority award (or dissenting opinion, as the learned authors point out) only embodies the views of the arbitrator disagreeing with the majority. There is no occasion for anyone- such as the party aggrieved by the majority award, or, more crucially, the party who succeeds in the majority award, to challenge the soundness, plausibility, illegality or perversity in the approach or conclusions in the dissenting opinion. That dissenting opinion would not receive the level and standard of scrutiny which the majority award (which is under challenge) is subjected to. Therefore, the so-called conversion of the dissenting opinion, into a tribunal's findings, [in the event a majority award is set aside] and elevation of that opinion as an award, would, with respect, be inappropriate and improper*".

In addition to the inability to categorise a dissenting opinion as an '*award*' another reason for refraining from upholding the same, which was cited, was that dissenting awards receive less scrutiny than the majority award. It was emphasised that supplanting a majority award with a dissenting award would be inherently unfair and arbitrary, especially since there would be no recourse to challenge this supplanted award.

V. THE WAY FORWARD

The SC has, vide the *HCCL v. NHAI* ruling, categorically set out now that parties to an arbitration cannot be bound by dissenting awards and had previously, vide the *NHAI v. M. Hakeem*[9] ruling, shut the door to any modification of awards by courts at the Section 34 or Section 37 stage, to implement them. Some jurisdictions, such as the U.K. and Australia, do allow courts to cautiously modify awards in specific situations to ensure their enforceability (a power that was previously available to the courts under Section 16 of the Arbitration Act, 1940). While this might appear to be contrary to the sacrosanct "*no-intervention*" principle, it instils confidence in

[9] *NHAI* v *M. Hakeem* (2021) 9 SCC 1.

arbitration by assuring the parties that the minor problems in an award can be addressed by the courts and that the efforts of the parties in arbitration do not go in vain. However, as it stands today, this recourse is not available to the parties.

A. LIMITED EXCEPTIONS & CURRENT CHALLENGES

The only situation where there may be a modification of an award or a minority award may be upheld is in exceptional circumstances such as those in the *Ssangyong* Judgment, where the SC may invoke its extraordinary powers under Art. 142. However, this recourse is sparingly exercised to deliver justice outside the four corners of the arbitration act.

A major predicament that then remains is that once the award is set aside, the parties find themselves back at the starting point with the time-consuming process of pleadings, evidence, and hearings staring down at them, rendering all their previous efforts wasted. This runs counter to the very essence of opting for what is often regarded as the fast and efficient path of dispute resolution among commercial parties.

B. POTENTIAL SOLUTIONS & RECOMMENDATIONS

At first instance, it seems that a potential solution lies in utilising Section 34(4) of the A&C Act, which grants courts the authority to suspend proceedings and provide the tribunal with an opportunity to rectify defects that led to grounds for setting aside the award. However, the Delhi HC has emphasised in a recent judgment[10] that the power conferred by Section 34(4) should not be misconstrued as a means for the tribunal to re-evaluate findings or alter the award's substance and that this provision is limited to addressing curable defects only.

We believe that a viable solution lies somewhere in between. An effective way to save parties time and resources would be for the courts to allow the parties to refer the dispute back to arbitration, not from its inception, but solely for the determination of issues by a fresh tribunal. This approach can encompass the new tribunal's consideration of written submissions from the previous proceedings or, if necessary, holding oral submissions again.

[10] *NHAI v Trichy Thanjavur Expressway Ltd, O.M.P. (Comm)* 95/2023 DHC.

Section 15 of the A&C Act permits the substitution of arbitrators under various circumstances, with the provision that hearings conducted before may be repeated at the tribunal's discretion. By leveraging the intent of this section and potentially amending relevant provisions, courts could authorise the replacement of the tribunal after setting aside an award. The newly appointed tribunal could then resume arbitration proceedings at the argument submission stage or be directed to render findings on limited issues, particularly in cases where only a partial award has been set aside.

However, this solution is limited to cases where awards are set aside on grounds that are capable of being rectified by a fresh tribunal and do not vitiate the proceedings as a whole. For instance, when an award is set aside on grounds of being against the public policy of India under Section 34(2)(b)(ii) of the A&C Act, a fresh tribunal can utilise the prior pleadings and hearings up to the final stage of arguments to issue a new award. This approach not only saves parties from starting afresh but also gives them an opportunity to challenge this new award, much like the previous one. This approach holds the potential to streamline proceedings, save parties valuable time and resources, and ultimately improve the efficiency and effectiveness of arbitration processes.

VI. CONCLUSION

The treatment of dissenting awards in Indian arbitration law has evolved significantly, particularly through recent SC judgments. While dissenting opinions serve valuable purposes in enhancing the quality and transparency of arbitral decisions, their legal status and enforceability remain limited. The current framework while respecting the principle of minimal judicial intervention, creates challenges when majority awards are set aside.

The proposed solution of allowing partial resumption of proceedings with a fresh tribunal offers a balanced approach that could preserve the efficiency of arbitration while maintaining its integrity. As arbitration continues to evolve as a preferred mode of dispute resolution, the role and utility of dissenting awards will remain important in shaping its future development

THE REEL DEAL: INEFFICIENCIES AND INEQUALITIES IN ADR ON FILM AND TV

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This paper delves into the portrayal of ADR in film and TV, analysing its effectiveness and examining inequalities within the processes. Focusing on Roman Polanski's 'Carnage', it analyses a derailed negotiation, revealing gender biases and power imbalances through the principles propounded by Fisher and Ury. In Peter Morgan's 'The Crown', the mediated divorce between Charles and Diana is examined, highlighting the mediator's failure to address power disparities and gender-related differences in bargaining power. Finally, an episode of 'The Good Fight' is explored to evaluate the pitfalls of mandatory arbitration, where an employee faces unjust proceedings. Overall, the paper contends that these fictional depictions echo real-world challenges in ADR, serving as a lens to objectively scrutinise and address inherent inequalities.

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I. INTRODUCTION

The representation of Alternative Dispute Resolution ('**ADR**') in pop culture has risen significantly in the 21st century, like its popularity and real-world application. Although it might not be as popular as courtroom dramas which audiences find more

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thrilling, the use of ADR in pop culture can be observed in non-legal contexts as well. For instance, Roman Polanski's *Carnage* is about two sets of parents who engage in a rather unproductive negotiation to resolve a conflict between their sons. This is a very good example to understand how one must not negotiate – with emotions running high, and parties constantly being distracted and deviating from the issue at hand, the negotiation is absolutely unsuccessful. A slightly more efficient use of ADR through mediation can be seen in an episode of Peter Morgan's *The Crown* where Charles and Diana are trying to settle the terms of their divorce through a mediation facilitated by the Prime Minister. An episode of *The Good Fight* depicts arbitration proceedings which turns out to be less than ideal when an employee opts for mandatory arbitration against his billionaire employer. Similar to its real-life application, mediation, negotiation and arbitration in films and Television ('**TV**') series have some concerning elements to them. A common thread in the two TV series and the film is the existence of inequalities between the parties. There is a palpable power imbalance, resulting in unequal bargaining power between the parties to the ADR mechanism in all the visual media. There are sexist undertones and grave financial inequalities which tend to marginalise already relegated groups. In this paper, I seek to analyse the use of ADR mechanisms in the abovementioned visual media to understand how effective the process was and how the inequalities between the parties affected the resolution of the dispute.

II. *CARNAGE*: NEGOTIATION IN SHAMBLES

Carnage[1] revolves around the parents of Zachary Cowan (Nancy and Alan) and Ethan Longstreet (Penelope and Michael) attempting to negotiate how they should deal with the children after Zachary hit and badly injured Ethan. Analysing this negotiation by comparing it with the principles laid down by Fisher and Ury in *Getting to Yes*[2] shows how effective this negotiation was. These include separating the people from the substantive problem, focusing on interests underlying the problem and not the parties'

[1] This paper is concerned only with the portrayal of a negotiation in the film. The paper and the author do not endorse and are not in support of the director's personal views or actions

[2] Fisher R and Ury W, *Getting to Yes: Negotiating an Agreement without Giving In* (Random House Business 2012).

positions,[3] being open to creative alternatives that could solve the dispute,[4] and insisting on using objective criteria in the negotiation.[5]

In the very beginning of the film, both sets of parents are willing to make concessions for each other and are being collaborative – when Ethan's parents are typing up their statement about the incident, Zachary's parents are not happy with the use of the phrase "*armed with a stick*".[6] Ethan's parents are accommodative and agree to replace the word 'armed' with 'carrying', and both parties are happy. In fact, Penelope Longstreet says it is "…*better than getting caught up in that adversarial mindset*". This is a productive way to resolve disputes where they are not arguing over positions. This discussion is efficient, is improving, or at least is not damaging the relationship between the parties and is resolving the conflict – all hallmarks of a wise agreement.[7] It could be argued that the Longstreets were employing soft negotiation techniques, though not to an extent that it would compromise the efficiency of the negotiation. While they conceded to the Cowans' requests, it was not to their own detriment – they were focusing on their interest and were ensuring the harm caused to their son was adequately acknowledged, rather than fixating on the position of loving, but irrational, parents. This interaction is perhaps one of the last productive discussions in the negotiation process. The departure from Fisher and Ury's principles from hereon is significant and very apparent.

The negotiation goes downhill when the parents begin to talk about the next course of action and is exacerbated by the nonchalance of Alan, Zachary's father. The Longstreets ask the Cowans if Zachary would be willing to apologise to Ethan, and Nancy, his mother, agrees saying it would be good for them to talk.[8] They are working together to resolve the problem rather than fighting amongst themselves. Having Zachary apologise would likely have been for the mutual gain of the parties – their relationship might have persevered through the conflict. If they had agreed to this, they would have had a principled negotiation.[9] However, Alan intervenes saying Zachary is only eleven years old and does not understand the seriousness of the

[3] ibid.
[4] ibid.
[5] ibid.
[6] Carnage (SBS Productions 2011).
[7] Fisher and Ury (n 1).
[8] Carnage (n 5).
[9] Fisher and Ury (n 1).

incident. At this juncture, there is a shift from principled negation to hard positional bargaining. According to Fisher and Ury, when this happens, the parties solidify negative impressions of each other and try to score points by blaming the other party.[10] Such actions are detrimental to both parties. Instead of trying to prevent any miscommunications and emotions from taking over the conversation, they give in to them. When Nancy suggests Longstreets should come over to their house so that Zachary can apologise to Ethan, Michael declines as he believes the "*victim shouldn't be the one to make the trip*".[11] While it is perfectly valid to feel that their son was wronged, refusing a *bona fide* attempt at reconciliation based on such feelings will not bring them closer to a solution. Neither party is willing to see the situation from the other party's perspective. The words used by the Longstreets – "*disfigurement*" – to describe what had been done to their son, are understandably not well-received by Alan. It is counterintuitive to the negotiation process since the Cowans have already accepted that it was Zachary who caused harm and are willing to let the boys talk and resolve the dispute.

Throughout the negotiation process, we see the women being side-lined by the men. Both Alan and Michael lash out at their own wives and at the other's. Aside from the negative implications of individuals within the same party having opposing views, it is highly discriminatory and counterproductive to the negotiation. There is a disparity in the bargaining powers of men and women. However, since there is one each in both parties, it does not have too much of a detrimental effect on either party. Sexist remarks were made during the course of the negotiation. Alan says to Penelope, "*Women think too much*".[12] She asks Alan how he can live without a "*moral sense of the world*". This is common in negotiation proceedings where male negotiators cast aspersions on female negotiators' femininity and gain a psychological advantage.[13] Her husband then affirms Alan's statements saying family is the worst ordeal God inflicted on them. Men are also likely to use forceful language while negotiating.[14] Alan tells his wife he does what he wants, despite them both negotiating from the same side. When Penelope is crying, he says when "*women cry, men are pushed to a*

[10] ibid.
[11] Carnage (n 5).
[12] ibid.
[13] C B Craver and D W Barnes, 'Gender, Risk Taking, and Negotiation Performance*'* [1998] Mich J. Gend. L 299.
[14] ibid.

breaking point".[15] The presupposition by the men in the negotiation here is that the women are not adversarial and will be cooperative – this is especially true of Alan who seems to expect his wife to go along with everything he says. When the negotiation reaches breaking point, he says to the women that they are involved problem solvers, but the women he likes are "*sensual, crazy and shot full of hormones*".[16] This is an obvious indication of the lack of bargaining power of the women in the negotiation as their opinion is not valued at all.

The separation between the people and the problem is also largely lost. Alan becomes busy with a problem at work and is repeatedly on the phone. He is not actively listening to or acknowledging what is being said.[17] He is also not speaking for a purpose – he says he is '*useless*' and asks for the negotiations to continue without him, and he calls his son a '*maniac*'. The Longstreets launch personal attacks on the Cowans and the two couples begin to have intra-party disagreements. New issues, previously relegated, resurface when the Cowans take issue with Ethan's name-calling of Zachary, to which the Longstreets take offence. The parties are not speaking to each other in a constructive manner, or in a way that is understood by the other party.[18] The main conflict is not at the forefront; the parties' attentions are engaged in finding faults in each other's positions. There is an attempt at conciliation and retaining '*fair-mindedness*',[19] but it does not last long. The couples decide it was the worst day of their lives and the negotiation comes to a standstill. The negotiating parties begin insulting each other towards the end, after which the Cowans leave. Outside, Zachary and Ethan are playing together amicably. The entire negotiation was essentially pointless. The negotiators did not have full information about the issue – they do not seem to know what their boys were fighting. They were unable to keep a check on their emotions, and nor were they able to prioritise their interests over their position. The Cowans were focused on minimising their child's actions while the Longstreets were attempting to ensure their son was perceived as a victim. There are no objective criteria to settle the dispute, they go back and forth, renegotiating the same issue or bringing up new points about issues that were already settled. They fail

[15] Carnage (n 5).
[16] ibid.
[17] Fisher and Ury (n 1).
[18] ibid.
[19] Carnage (n 5).

to abide by all four principles propounded by Ury and Fisher. Perhaps in such a situation, if there had been a real problem, mediation would have better suited the parties. Both parties made valid points and most of them had a genuine interest in reaching a resolution, but the discussion lacked much-needed structure, and the parties should have been more cognisant of their own biases and prevented their emotions from side-lining the main issue.

III. *THE CROWN*: MEDIOCRE MEDIATION

The presence of a mediator in the episode *Couple 31* of *The Crown*[20] ensured that such issues did not affect the Prince and Princess of Wales reaching a mutually agreeable divorce settlement. A neutral third party with no personal stake in the case would help the parties reach a solution that is mutually agreeable to them. A mediator, unlike an arbitrator, facilitates the exchange of information, promotes understanding between the parties and encourages them to find creative solutions to their disputes.[21] Here, John Major, the Prime Minister ('**PM**') was the mediator. Diana and Charles had agreed to divorce by mutual consent and were finalising the terms. Correspondence between the two parties is happening through their legal teams, neither of which is known for their ability to make peace, according to the PM. When he is asked to be a mediator by the Queen, it does not seem like he has no vested interest in the mediation. He is, after all, the PM, and a successful mediation would mean his public image is bolstered, especially in such a high-profile case. Apart from this shortcoming, he handles the mediation very well.

Diana wants to keep her residence and her office and is seeking a one-off payment of thirty-five million pounds. She threatens to revoke her consent to the divorce if he did not agree. Charles is outraged at this request. A mediator's role in such a situation is to facilitate the exchange of information constructively. They can do this by structuring the remarks made.[22] The PM's interpretation of Diana's demand to Charles is that she is preventing being beholden to him for a long time while also securing her financial independence. By asking for a lump sum, both of them are being liberated. The PM is attempting to clear the emotionally tarnished image the parties have of

[20] 'The Crown: Couple 31' (Netflix 9 Nov. 2022).
[21] Kimberlee K. Kovach, T*he Handbook of Dispute Resolution* (Michael L Moffitt & Robert C Bordone., Jossey-Bass 2012).
[22] ibid.

each other and is helping Charles understand the rationale behind the demand in an objective manner. He encourages them to be more flexible in their thinking.

However, he does not acknowledge their unequal bargaining power. Diana has suffered a lot of emotional abuse from Charles and is not very well-regarded by his family. By virtue of their position, they are unlikely to be able to take this matter to court. Further, the sphere of mediation in the UK is not regulated by any formal body. The 'voluntariness' of the process means disadvantaged parties can be strong-armed into agreeing to an unfavourable settlement. Here, Diana is used to a certain quality of life and is economically dependent on her husband. Her position is therefore weaker compared to Charles's. Although she has the capability of harming him by disparaging him in the media, she was not viewed favourably when the settlement was happening.

A more formal system can ensure equality is maintained in such proceedings and that women are protected.[23] This is primarily because judges are better equipped to deal with these cases than untrained mediators, especially because no qualifications are specified for mediators in the UK. Since mediation is unregulated, women are left to fend for themselves. Further, it is argued that women tend to play the role of self-sacrificing peacemakers where they negotiate for others rather than for themselves, or they take on a fault-finder role where they blame the husband for the breakdown of marriage and base their entitlements on their sense of betrayal and are unable to focus their inner resources for themselves.[24] Diana's situation resembles the latter category. She fell out of favour with the public and the royal family, leaving her vulnerable.

Additionally, she was being hounded by the press. Her needs in this situation are unique because she has to ensure she is safe. She feels this can all be solved by taking money from Charles. She is rightly incensed about the way divorce is proceeding, especially considering the involvement of the Queen and the presence of Camilla. Her anger towards Charles might have prevented her from thinking about other important concerns such as security, in addition to her monetary demands. The PM could have been more aware of gender-related differences in bargaining power and facilitated

[23] Carol Lefcourt, 'Women, Mediation and Family Law' [1984] Clearinghouse Rev. 266.
[24] Isolina Ricci, 'Mediator's Notebook: Reflections on Promoting Equal Empowerment and Entitlements for Women' [1985] J. Divorce 49.

mediation such that they could be overcome. While this might raise questions about mediator neutrality, the concept of selective facilitation where the mediator where the mediator selectively leads, constrains and structures client discussions and seeks inputs from them is not new to the field of mediation.[25]

Although the parties cannot be held to the standards of a conventional heteronormative couple, the mediation process was skewed in Charles' favour because of his position and actions which served to hurt Diana emotionally, preventing her from adequately advocating for herself. The mediator could have made the parties aware of this imbalance and helped them reach a more holistic agreement. Sadly, he seemed more interested in swift resolution and ingratiating himself with the Queen. He credits Charles for instigating the breakthrough – indicating plainly that he had the upper hand since he sought nothing from Diana and simply agreed to give her a lesser sum than she asked for. Her role in the family – which was an inherent part of most of her adult life – is not discussed and is left uncertain. Though the PM performed adequately in that he helped them reach a settlement, a more experienced mediator might have been able to address the inequalities within the process and could have included other important issues about the roles of the parties in future. They also could have encouraged the parties to engage with each other personally rather than conducting the entire process through their legal teams. The couple's relationship was fraught with tension even before the mediation began. Their lawyers focused mostly on the transactional aspects of the divorce like property and money. These factors, coupled with their lack of direct communication resulted in a further breakdown of Charles and Diana's relationship. Their personal relationship might have survived if they felt a sense of psychological ownership over the process and the resolution.[26] An experienced mediator could have established this sense of ownership by better educating the parties about the process and understanding their expectations from it.

IV. THE GOOD FIGHT: ARBITRATION GONE AWRY

In the episode '*First Week*',[27] Maia, a novice lawyer, takes on the case of Frank, a worker at BMI, a sporting goods store worth billions of dollars. During a *pro bono*

[25] D Greatbatch and R Dingwall, 'Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediator*s*' [1990] Council. CTS. Rev. 53.
[26] Kimberlee K. Kovach (n 20).
[27] 'The Good Fight: First Week' (CBS 19 Feb 2017).

consultation with members of a workers' union, Frank approaches Maia for advice as he was accused of stealing 400 shoes by BMI and was forced to confess to having done this lest he should be fired. He was also questioned by BMI for 7 hours without being allowed to leave. Coerced, he signs the confession because of which his wages are lowered to account for the cost of the stolen shoes.

Aggrieved by this, he chose to go to arbitration as there was a mandatory arbitration clause as part of his contract with the company. Such clauses have become increasingly common in the United States.[28]

Arbitration, which is supposed to allow for easier and more convenient access to justice, has been weaponised against employees. According to Staszak, compulsory arbitration clauses mandated by employers serve to save their own skin by evading the courts, making the clause disproportionately in the corporation's favour.[29] In Frank's case, the arbitrator hardly took any time to consider evidence. Maia advocates for Frank, and BMI's representative denies the claims. Based only on this, the arbitrator rules in BMI's favour. Additionally, when Maia brings up the issue of false imprisonment before the arbitrator, he immediately rules in favour of BMI. However, as she points out later, as per the agreement between BMI and Frank, the arbitrator cannot determine tort claims. The efficiency and quick resolution of disputes through arbitration is no doubt desirable. However, the arbitrariness and lack of due diligence can be to the detriment of weaker parties like Frank. The lack of an appeal mechanism puts Frank in a situation with no tangible remedy.

Moreover, hiring lawyers to challenge the award or, indeed, to represent them in the arbitration proceedings, might not be feasible[30] for employees who have been fired or have had their wages reduced, especially considering their financial resources as opposed to their employers'. In this case, there was a single arbitrator and the portrayal of the arbitration gave the impression that Frank had no control over their appointment. The arbitrator decided matters after hearing them for mere minutes. This lack of opportunity given to parties goes against the principles of natural justice and

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[28] Seema Nanda, 'Mandatory Arbitration Won't Stop Us from Enforcing the Law', (*US Department of Labor Blog* 20 March 2023), <http://blog.dol.gov/2023/03/20/mandatory-arbitration-wont-stop-us-from-enforcing-the-law> accessed 1 May 2024.

[29] Sarah Staszak, 'Privatizing Employment Law: The Expansion of Mandatory Arbitration in the Workplace'[2020] Stud. Am. Polit. Dev. 239.

[30] Jean R Sternlightt, 'How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection' [2015] Brooklyn Law Rev. 80.

would not have happened in a court of law. Further, as Frank explains earlier in the episode, he is struggling to pay rent and is clearly reliant on this job to make ends meet. A court might have looked favourably on Frank and would have been aware of the potential negative implications of power imbalance between the two parties.

Furthermore, BMI, like most corporations, is likely to have drafted the arbitration clause with little input from its employees who agree to bind themselves to it. Although they consent by signing on the dotted line, it would be difficult to determine if it was truly agreed to freely when it represents a choice between gainful employment and financial insecurity. Employers often do not have standardised means of appointing and administering arbitration proceedings, nor do they adopt any specific rules and procedures to guide the proceedings.[31] This could lead to employers choosing procedures that benefit them, causing further harm to already disadvantaged employees. In Frank's case, in particular, it seems as if BMI has created a scenario where it acts as judge, jury, and executioner. BMI made the allegation against Frank, investigated the claim by interviewing him, and penalised him by garnishing his wages. In addition to this, a sole arbitrator, likely chosen by BMI as he is one of the company's managers, assisted by another employee of the company who questioned Frank for seven hours, is deemed appropriate to decide this matter. This reflects the adversarial attitude of employers towards their employees – the former succeeds when the latter fails to get past the hurdle of mandatory arbitration clauses in their employment contract.

V. NAVIGATING CONFLICT: POTENTIAL SOLUTIONS

Although this paper reviews a film and episodes of TV shows, such inequalities are not wholly alien to the way negotiations, mediations and arbitrations occur in the real world. The parties and mediators in these situations were amateurs and as they did not practice this regularly, they were unaware of the ideal manner of negotiating or mediating, nor were they aware of the ethical standards they needed to be mindful of. An experienced negotiator or mediator would be able to recognise inequalities in parties and rectify them. This is essential in such unregulated dispute resolution

[31] Alexander JS Colvin, 'Mandatory Arbitration and Inequality of Justice in Employment' [2014] Berkeley J. Emp. Lab. L. 71.

mechanisms to ensure parties are not worse off, especially when they enter into it in good faith, hoping to preserve and continue their relationship.

Had the Cowans and Longstreets been more mindful of the dispute they intended to resolve rather than attacking each other, their negotiation might not have derailed. It is understandable that the involvement of their sons made the negation more emotionally charged. However, the parents making personal remarks against their own partners and the other couple, and the casual misogyny were unwarranted. Perhaps they would have benefited from the presence of a neutral third party in the form of a mediator, who could have structured their interactions to bring out more fruitful outcomes.

Conversely, Charles and Diana's lack of involvement and the introduction of an inexperienced mediator could have contributed to some of the unfavourable terms in their settlement. Divorce is complicated and it is not uncommon for parties involved to be hostile towards each other. A mediator should ideally be able to create an environment where this hostility can be set aside, even if temporarily, to have conducive discussions on the terms of the division of assets, custody arrangements, etc. Here, the PM was unfortunately unable to facilitate such discussions.

Both situations would have benefited if the parties to the negotiation were more focused on the problem and not their positions, and if the mediator was more experienced and had some qualifications in mediation.

In the case of arbitration, the arbitrator and the proceedings were deliberately set up to disadvantage one party who already had lesser bargaining power. Although there are laws governing the selection and appointment of arbitrators, parties with lesser bargaining power may not be aware of or be able to adequately exercise their rights. While it is unrealistic to expect a lawyer to be readily available free of cost to represent people like Frank, the episode highlights the importance of lawyers like Maia who can inform and speak up for people in his position. Of the three, these arbitration proceedings resulted in the most successful dispute resolution outcome. Maia was able to identify the loopholes and advocate for Frank's rights in a system that seemed to work against his interests.

VI. CONCLUSION

Depictions of alternative dispute resolution processes in pop culture can sensitise viewers to the inequalities in bargaining powers due to various reasons like gender and financial status, among others. The conflicts portrayed here are primarily for entertainment and are not intended to echo realistic situations. Nevertheless, it allows viewers to examine these dispute resolution processes objectively, with no vested interest in the dispute or its outcome. It has the potential to help viewers make generalisations and realise the pitfalls of these ADR mechanisms if conducted arbitrarily. It also shows that ADR spaces are no exception to the misogyny and inequalities which pervade all aspects of life. In essence, while pop culture representations of ADR processes may not always mirror real-world scenarios, they act as a valuable lens through which viewers can scrutinise the complexities and potential injustices prevalent in these systems

USE OF ARBITRATION FOR RESOLUTION OF HEALTH CARE DISPUTES: A CRITICAL APPRAISAL

SUPREET GILL*

The paradigm shift towards non-judicial avenues for dispute resolution, such as arbitration, has gained traction in the healthcare sector over the past few decades. This paper critically evaluates the prevalence and effectiveness of arbitration in healthcare disputes, especially focusing on the use of arbitration clauses in contracts and consent forms within the industry. By conducting a comparative analysis on a global scale, the study aims to shed light on whether arbitration serves as a fair and efficient means of resolving disputes or merely functions as a tool for healthcare entities to circumvent public scrutiny and legal processes. Methodologically, this research employs a doctrinal approach, analysing primary and secondary data sources to gauge the prevalence and success rates of arbitration in healthcare across different jurisdictions. The research scrutinises the lack of procedural guidelines, undefined evidentiary standards, and questions of arbitrator impartiality in healthcare arbitrations. One of the main contentions surrounding healthcare arbitration is the perceived imbalance of power between corporate hospitals and patients, as well as the additional financial burden placed on parties due to the costs associated with arbitral proceedings. The paper also delves into how confidentiality clauses in arbitration agreements can shield healthcare providers from negative publicity, potentially hindering transparency in holding wrongdoers accountable. The analysis reveals concerns related to mandatory arbitration clauses in healthcare contracts, including issues of patient awareness, mental capacity, and vulnerability during stressful situations. The paper also examines the enforcement of arbitration agreements in court and the implications of recent legal precedents in upholding such clauses.

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I. INTRODUCTION

In the course of the last two decades there has been a paradigm shift in the role of judiciary in settlement and adjudication of legal disputes, where several parallel institutions emerged to share this burden. Courts have always been the primary means of justice delivery system wherein judges were the sole flag bearers of dispensing justice to respective parties. However, this ever-increasing burden reached its pinnacle and cases kept piling for years at end, without seeing the light of day which led to serious denial of justice to the concerned parties. In this scenario, the aggrieved turned their attention to non-judicial avenues of alternative dispute resolution like arbitration and mediation, in pursuit of their quest for justice. Arbitration emerged as one of the most effective and efficient forums for redressal of countless issues, which is used across a variety of sectors with much ease.

With the emergence of arbitration as an effective means of dispute resolution it was witnessed that a lot of business organisations began to include arbitration clauses in their transactional contracts as a matter of policy. For most of its existence, matters subject to arbitration were largely confined to labour disputes, certain consumer issues and business disputes where particular businesses included in their transactional documents an arbitration provision. The practice is found to be more prevalent in

sectors where consumer interaction is extensive, as this gives an organisation an alternative to the contemporary judicial approach which is more public in nature and hence more damaging to the reputation of companies involved in legal trials and class actions. The most fitting example of this situation is the healthcare sector where most of the business and market value is reputation driven. In the United States of America, this practice is widespread and recently, *The New York Times* also brought to light the extent of use of arbitration in medical cases.[1]

II. METHODOLOGY

The present research will focus on the extent to which arbitration in the healthcare sector is prevalent in India by giving a comparative analysis of its use across the world. An attempt shall be made to critically evaluate the extent of prevalence of the practice of arbitration in the healthcare sector in India. Also, an analysis shall be made to understand whether arbitration is a fair and effective way of resolution of disputes or, whether it is merely a route taken by big players in the industry to bypass the judicial process in order to avoid bad press. Furthermore, an investigative endeavour shall be made to discover whether arbitration clauses form a part of standard form of contracts. If yes, then does it cast any shadow of doubt in the context of informed consent of the patient.

The hypothetical establishment is that use of arbitration clauses is not widespread in the healthcare sector, and, where they are utilised, it is essentially owing to an organisation's policy requirements. The author will make an effort to identify the prospective effects of arbitration in the healthcare sector by critically evaluating the existing literature on the issue. The research methodology adopted for the same shall be doctrinal research, where both primary and secondary sources of data shall be evaluated from both jurisdictions which give indication towards the prevalence and success of its use.

The main point of contention in healthcare arbitration is the same as arbitration in any other sector. There is a suspected absence of procedural guidelines in arbitration and the evidentiary standards are not well defined. There is always a question of

[1] J Silver-Greenberg and M Corkery, 'In Arbitration, a 'Privatization of the Justice System' *New York Times* (1 Nov. 2015) <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

impartiality of the arbitrator as they are on the payroll of the parties involved. This predicament is more pronounced in health care related arbitrations as there is a huge economic gap between corporate hospitals and their patients. Also, bearing the expenses of the entire arbitral proceedings adds to the financial burden of the parties. Arbitral awards are not straightforwardly enforceable, and eventually the parties have to approach a court of law for enforcement of awards. Therefore, this adds another layer of institutional interference in seeking justice. Therefore, it is often said that the so-called benefits of arbitration are nothing but veiled drawbacks. Furthermore, there have been several studies which indicate that in the majority of cases, arbitration proceedings are often tilted in favour of big corporations.[2] The confidentiality clauses in arbitration agreements shield the healthcare providers from negative publicity about their wrongdoing and the general population is kept from getting answers concerning the litigant's wrongdoing, for example, negligence. The New York Times inferred that notwithstanding precluding legal claims, constrained intervention understandings drive people into a '*privatised adjudication system*' that works without the straightforwardness, or consistency of the judicial process.[3]

III. A HISTORY OF DISPUTE RESOLUTION IN HEALTH CARE

Law and medicine are reckoned to feature amongst some of the oldest professions practiced since the dawn of human civilisation. As societies progressed from their elemental state to more organised entities, there was a shift in approach towards treatment of disease and illness, as well as in crime and punishment. Since its inception, the field of medical science has proliferated itself from its rudimentary state which was limited to diagnoses of disease, prescription of medication or at the most surgical treatment. Contemporary healthcare has overstepped its original boundaries and extended to new subject matters and advancement in technology in healthcare has revolutionised the earlier organic forms of treatment to new, but sometimes, ambiguous issues. Medical profession has earned the reputation of being a noble cause because it deals with saving human life. History stands witness to the fact that in every civilisation, doctors and physicians were held in the highest social regard for

[2] J Silver-Greenberg and R Gebeloff, 'Arbitration Everywhere, Stacking the Deck of Justice', *New York Times* (31 October 2015) <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.
[3] J Silver-Greenberg and R Gebeloff (n 1).

they were considered to have the power of healing. Historical traditions like the swearing of the Hippocratic Oath reiterate the faith of humanity in the physician, and in turn, the physician takes upon himself the moral and ethical responsibility to work to the best of his knowledge, care and ability and lead a life devoted to this cause. In a country like India, where logic often makes way for sentiment, superstition prevails over science and emotions are hugely exaggerated, doctors are considered to be no less than gods. We heedlessly place ourselves in the vigilant care of doctors who are trusted to perform their duties in the patient's best interest. However, we fail to accommodate the thought that doctors too, like the patients they are responsible for treating, are human, and hence, fallible. One may be able to endure pecuniary loss caused by negligent act or behaviour of another even and the hardship may fade with time. However, the loss of a loved one or physical incapability caused due to the negligence of a medical practitioner bears scars that are incomparable and we often feel compelled to circumvent our anguish. Although making a generalisation for each medical negligence case might be unsympathetic, it is the opinion of the author that in cases of medical negligence the petitioner's anger or a feeling of fixing responsibility often stems from a feeling of grief. Having stated that, a lapse in duty to take reasonable care cannot be completely ruled out in the case of healthcare professionals, especially in an overpopulated and over-burdened medical system like India. However, this fact cannot be used as an excuse to deviate from standards; moral, ethical, professional or legal which are expected of a physician as the stakes are high.

The idea of holding a medical professional or a physician accountable for his/her actions can be traced way back to the Code of Hammurabi, an extensive legal document from Mesopotamia, wherein it is stated that, "*If the doctor has treated a gentleman with a lancet of bronze and has caused the gentleman to die, or has opened an abscess of the eye for a gentleman with a bronze lancet, and has caused the loss of the gentleman's eye, one shall cut off his hands*".[4] The punishment prescribed by the Code of Hammurabi may seem harsh, even barbaric for the present times, but the reader here has to bear in mind that punishment dates back to the times when retributive form of justice prevailed. However, human civilisation as well as the justice system has evolved into its compensatory and reformative alternatives.

[4] Kim Price, 'Towards the History of Medical Negligence', (2010) 375 The Lancet 192.

Medical malpractice law, as it is known today in much of the Western world, can be traced back to the Romans, who developed the legal foundation of medical malpractice. Roman law spread throughout continental Europe around 1200 AD, and many countries' current laws regarding personal injury and medical malpractice are derived them.[5] English common law was greatly influenced by the Romans, and in turn, 19th century English common law had a substantial influence on the Indian legal system.[6]

In the Indian context, several ancient literatures make mention of law relating to negligence. According to Kautilya's *Arthashastra*, any physician desirous of practicing medicine could only do so with the prior permission of the King and if during the course of his practice, he caused harm to a vital organ of the patient, it was considered equivalent to causing physical harm.[7] The *Brihaspati Smriti* also stated that, "*a physician who, though unacquainted with drugs and their effects or is ignorant of the nature of diseases, yet takes money from the sick (for giving treatment) shall be punished like a thief*".[8] Even during the Mughal regime, only those *hakims* could practice who had successfully qualified in the examination. Even a *Hadith* stipulates that "*he who does not know the science of medicine and treats the patient is too held liable to pay compensation*".

At the time when the British set foot in India, there were not many physicians who practiced modern medicine, and most physicians were brought to India by the British themselves to look after the officers of the East India Company. Even though it took several decades, the British eventually realised that the conduct of doctors who were practicing medicine in India had to be regulated in order to fix some accountability. During this period a number of events of indiscipline, insubordination, malpractice was recorded and penalised.[9] Finally, in 1857, with the enactment of the General Medical Council in Britain, British doctors serving in India were brought under a legal regulatory and disciplinary system. The newly established council also provided for compulsory registration of British doctors, irrespective of whether they served in

[5] 'Medical Malpractice Law: Ancient History to Recent Controversies, A Brief History of Medical Malpractice Law*'* (*American Baby and Child Law Centre*) <https://www.abclawcenters.com/resources/medical-malpractice-overview/>.
[6] ibid.
[7] Kautilya, *Arthashastra* (RP Kangle tr, 2nd edn, Motilal Banarsidass 1972).
[8] "Brihaspati Smriti" 8:360.
[9] D. G. Crawford, *A History of Indian Medical Service:1600-1913* 677 (W. Thacker, 1914).

Britain or in its colonies. However, as the system of imparting medical education evolved in India, the British Government took the inevitable step of establishing some form of regulatory mechanisms for them as well. This was realised with the establishment of Grant Medical College Society in 1880 and introduction of the Bombay Medical Act, 1912, which was closely followed by the Bengal Medical Act, 1914, the Madras Medical Act, 1914 and the Medical Council. The success of these legislations was followed by the enactment of Indian Medical Degree Act, 1916 by Legislative Council which was approved by the then Governor General in the year 1916.

Once India became independent and adopted its own Constitution, health, medical education, medicine and drug control and family planning were enumerated under the Concurrent List and hence are matters of concern for the Union Government as well as State Government.[10] Over the course of the last seven decades, several legislations were enacted in order to regulate the conduct of medical professionals. However, for the purpose of this paper it is pertinent to mention that in the context of medical negligence, regulatory bodies serve as a deterrent wherein medical professionals ensure that proper care is taken while performing their duties, failing which their registration may be cancelled. Additionally, the act of medical negligence was also kept in check through various consumer protection legislations. Even though patients are not customers in a strict sense of the word, nonetheless they could sue a medical practitioner under consumer protection law in case of any deficiency of service. Initially the issues of civil medical negligence were covered under the Consumer Protection Act, 1986 which was repealed keeping in view advancements in the field of information technology which widened the ambit of consumer access. Presently, the Consumer Protection Act, 2019 governs all matters related to consumer grievances. In addition to civil medical negligence, the law on criminal medical negligence is addressed in Section 106 of the Bharatiya Nyaya Sanhita, 2023 ('**BNS**') (previously the Indian Penal Code, 1860).

IV. ISSUES IN HEALTHCARE ARBITRATION

A. THE JOURNEY FROM LITIGATION TO ARBITRATION: A PARADIGM SHIFT

[10] M.P. Jain, *Indian Constitutional Law* (4th ed., LexisNexis, 1987).

Conventionally speaking, healthcare disputes typically were positioned on the medical negligence landscape where adjudication was limited to determining if a healthcare professional had failed to meet the legal standard of care. As stated above, with the passage of time, the patient became more aware and educated about his rights and healthcare professional's corresponding duties and hence a spurt in litigation was observed. This litigation, which was mostly limited to consumer disputes, fell in the domain of public information, nonetheless. Owing to the public nature of the proceedings which were sometimes aggressively reported in the media, there were grave concerns voiced by the medical fraternity expressing fears of damage to reputation which was seldom restored even if the case was decided in favour of the healthcare professional. Hence, there was a sharp increase in the shift towards including arbitration clauses in contracts and consent forms, at least in the case of corporate hospitals. Since arbitration proceedings are confidential in nature, the hospitals could guard their reputation from being unnecessarily smeared in public.

B. CONFIDENTIALITY: A DOUBLE-EDGED SWORD

Where on one hand, confidentiality can protect the reputation of the doctors (and sometimes even patients involved); on the other, it creates an unnecessary layer of opaqueness in matters which are of immense social importance. If this is allowed, it would amount to a cover-up, espacially in cases which ought to be brought out in the public domain so that the medical fraternity does not become complacent about the duty owed to its patients. Allowing arbitration in health care disputes could set a very dangerous precedent wherein doctors and healthcare professionals could begin to exploit this to their benefit given the reassurance that all proceedings against them shall be confidential. We cannot deny that moral and legal compliance is largely driven by fear of social or societal shaming; and if we remove the aspect of public accessibility to healthcare disputes, the motivation behind moral and legal compliance may be diminished to a certain extent. This goes to question the very root of validity of such contracts and enforceability of arbitration clauses.

C. ENFORCEABILITY OF ARBITRATION CLAUSES IN HEALTHCARE

At this juncture, a question of extreme importance needs to be asked. Whether health care facilities can enforce arbitration contacts in a court of law. In 2017, the United States' Supreme Court ('**SC**') answered this question in affirmative even though the

issue did not concern a doctor patient relationship, but a long-term care facility and its residents. Nonetheless, this species of geriatric care falls in the larger genus of health care. The Court, in *Kindred Nursing Centers v. Clark*,[11] while confirming (ruling in favour of nursing homes in ratio 7:1) the enforceability of binding arbitration agreements with its residents held that, "*mandatory arbitration agreements are enforceable even when an individual with a power of attorney binds someone else to mandatory arbitration agreements and that such agreements should not be disfavoured compared to other agreements*". It is interesting to note here that the lower courts in this case had decided against the enforceability of arbitration agreements and had allowed litigation to proceed. Even when the case reached the Kentucky SC, it was held that such arbitration agreements which were mandatory in nature were effectively non-binding if entered with people under a power of attorney as such people did not have specific permission to enter into binding arbitration agreements in the first place as it violated the "*clear statement rule*". The Kentucky SC stated that if a person wished to give up his rights in such a manner, then he/she can only do so by making an explicit statement of forfeiture to that end. However, when the matter reached the US SC, the decision of the lower courts was overturned. The Court observed that mandatory arbitration agreements should be kept on the same footing as any other ordinary arbitration agreement. It went one step ahead and expressed that even lower courts should exercise caution in disfavouring or undermining arbitration agreements as the Federal Arbitration Act ('**FAA**') states that an arbitration agreement must ordinarily be treated as "*valid, irrevocable, and enforceable*".[12]

D. MANDATORY ARBITRATION CLAUSES

Mandatory arbitration clauses have become ubiquitous in a broad range of industries, including the healthcare industry.[13] Unfortunately, most patients are unaware they are waiving their right to a jury trial or judicial oversight of their disputes when signing health providers' patient intake contracts.[14] A vast majority of patients do not read medical disclosures, or have the sophistication to understand the information

[11] *Kindred Nursing Centers v. Clark* [2017] 137 S. Ct. 1421.
[12] Federal Arbitration Act, 1947 s 2.
[13] Jean R. Sternlight, 'Creeping Mandatory Arbitration: Is It Just?' [2005] Stan. L. Rev. 1631.
[14] Sarah Sachs, 'The Jury is Out: Mandating Pre-Treatment Arbitration Clauses in Patient Intake Contracts' [2018] J. Disp. Resol. 54.

contained within them and even if patients were to read the fine print of health providers' contracts, patients are still likely to fail to recognise that the contract contained an arbitration clause.[15] Also, one has to be mindful of the situation and circumstances in which these mandatory arbitration agreements may be signed. Imagine someone whose child or parent has to undergo a life-saving surgery in urgent circumstances. Now this person, who is entirely physically and emotionally consumed with concern for their parents or child, would hardly be in the mental state to read or comprehend the implications of signing this piece of paper. The researcher draws attention to this point based on personal experience of signing a consent form before a surgery was due to be performed on her child. Even though upon affixing the signature, the consent form becomes a legally binding document, the researcher would argue that such form or contract would not have been signed while being in charge of full mental faculties. Also, one cannot deny that arbitration clauses are based on contract law. Therefore, courts must first determine whether a valid contract exists prior to assessing the validity of the arbitration clause.[16] Therefore, in the absence of a valid arbitration clause, the courts can not compel the parties to enforce it, as even the law of arbitration does not require parties to arbitrate when they have not agreed to do so.

E. LACK OF CAPACITY: MENTAL DISTRESS

Corporate hospitals may compel their patients into signing arbitration clauses, which they may have signed at a time when they were under tremendous mental or physical stress. This would again raise questions about the validity of arbitration clauses as one party can always argue that there was diminished legal capacity owing to mental distress experienced by them at the time of signing the agreement. However, it is pertinent to bring to the attention of the reader that arguing against validity of an arbitration agreement on the basis of diminished mental capacity may prove to be exceedingly difficult in a court of law. Usually, mental distress is not viewed on the same footing as incapacity of the mind, even though one's decision-making power/capacity may be compromised to some degree. Diminished mental capacity due to stress may not prove useful in arguing in favour of violability of contract but

[15] Myriam E. Gilles, 'Operation Arbitration: Privatizing Medical Malpractice Claims' [2014] TIL 671.
[16] *TranSouth Fin. Corp. v Rooks* [2004] 604 S.E.2d 562.

can play a key role in determining coercion or fraud. Irrespective of that, one cannot deny that there is a certain element of coercion at play here because patients are rarely in a position to negotiate the contract.[17] However, with the ongoing debate surrounding mental health it is difficult to predict if courts will begin to take a sympathetic view of the same in the times to come. At the end of the day, the acceptance or rejection of a defence boils down to the sensibility and perception of the judges as well (who are also human and may bring their own mindset in each case).

V. CONCLUSION

Originally, theology, medicine, and law were regarded as learned professions; special knowledge is a *sine qua non* for professional attainment.[18] Therefore, medicine is regarded as one of the noble professions and doctors are held in highest regards among their patients. One often comes across the signboard in hospitals and clinics, which says, "*We Serve, He Cures*", which points to the fact that the medical profession is a service to humanity and not a business. During their training and education, medical students are moulded in such a fashion that they treat their patient as the priority, with highest regard and this emotion is reciprocated by the patients who treat them equivalent to God. The medical profession has always been regarded as noble and has commanded respect in society. The recent outbreak of the Coronavirus has brought the entire world to a standstill. People from all walks of life and professions were forced to give up their normal way of life and be trapped within the four walls of their homes to ensure safety of their own and their loved ones. However, there were a select few who were not afforded the luxury of being within the warmth of their homes and those select few are fighting on behalf of the rest of us. The tireless work of healthcare professionals involved in the fight against this pandemic is commendable, and they deserve the much-needed credit that was due to them.

As much as the public may be sympathetic towards healthcare professionals, with the ongoing healthcare crisis continuing to develop, health providers will leave no stone unturned to cut costs to deal with the present situation. It is predicted that there will

[17] Lydia Nussbaum, 'Trial and Error: Legislating ADR for Medical Malpractice Reform' [2017] Md. L. Rev. 275.
[18] A. Prasad & C.P. Singh, *Legal Education and the Ethics of Legal profession in India* (University Law House, 2005).

be a spurt in litigation in the post-COVID world, and arbitration may be seen as a cost-effective way to settle any disputes that may arise. Numerous wellbeing suppliers view arbitration clauses as an expense-saver for clinical negligence claims. Doctors and medical clinics are discreetly including mandatory arbitration clauses in their pre-treatment forms. Arbitration clauses are getting more normal and could turn into an acknowledged practice in the clinical field, without patient mindfulness, until after a debate emerges. In the medical care setting, patients with an agreement with an arbitration ckause are the more vulnerable party, who have not yet imagined the chance of future clinical negligence debates emerging. Reforms should occur to secure patients. Sooner or later, all people depend on clinical consideration from a doctor or an emergency clinic framework. Reliance on doctors and medical clinic frameworks is crucial to people's prosperity. The present set of laws weakens patients, and unreasonable supports doctors when clinical negligence claims emerge.

Recently, the New York Times ran a report highlighting the impact of forced arbitration on consumers, citing a number of examples in the healthcare arena.[19] The problem has led a group of US senators to express deep concerns about a system that "*consumers are involuntarily forced into, that lacks transparency and is not subject to meaningful appeal*".[20] A gathering of Senators called constrained discretion in long haul care arrangements "*unreasonable to occupants and their families*" and encouraged the Centres for Medicare and Medicaid Services to deny senior-care offices it contracts with from utilising intervention arrangements. The counter contention is that mediation arrangements are a helpful device for saving patients and offices time and cash—assets that are better spent on persistent consideration, with reports that dispute resolutions reached outside of the court system cost, on average, sixteen percent less than claims not involving arbitration.[21]

[19] J Silver-Greenberg and R Gebeloff (n 2).
[20] Steven P. Blonder, 'Arbitration in Health Care: Have We Created a Private Court System?' [2015] Health Care L. Monthly 2.
[21] 'Long Term Care General Liability and Professional Liability Actuarial Analysis' (Aon Risk Solutions 2013) <http://www.aon.com/risk-services/thought-leadership/reports-pubs_2013-long-term-care-benchmarking-report.jsp>.

MEDIATION IN INSOLVENCY DISPUTES: FURTHERING SPEEDY RESOLUTION UNDER THE INSOLVENCY & BANKRUPTCY CODE

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The Insolvency and Bankruptcy Code, 2016 (IBC) revolutionised the resolution of distressed businesses in India by consolidating fragmented laws and establishing a time-bound process for insolvency proceedings. However, despite its progress, the system remains burdened with delays and inefficiencies, as evidenced by the substantial backlog at National Company Law Tribunals (NCLTs) and the inability to meet statutory deadlines. This paper explores the integration of mediation as a viable alternative dispute resolution mechanism within the IBC framework. Mediation, already recognised globally for its effectiveness in resolving insolvency disputes, offers a time-efficient and cost-effective solution that preserves relationships and maximises asset value. The study examines the role of mediation in addressing systemic bottlenecks, drawing on best practices, judicial precedents, and recent legislative developments like the Mediation Act, 2023. By analysing domestic and international case studies, the paper highlights the potential of mediation to alleviate the burden on adjudicatory bodies, enhance the efficiency of insolvency resolutions, and fulfil the IBC's original objective of ensuring timely and fair outcomes for all stakeholders.

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I. INTRODUCTION

The enactment of the Insolvency and Bankruptcy Code, 2016 ('**IBC**' or '**Code**') marked a pivotal moment for the recovery of struggling businesses in India. Prior to the IBC, the insolvency mechanism in India was fragmented across various laws, often leading to lengthy and inefficient procedures. Insolvency often lost its existence under the guise of recovery proceedings. While insolvency proceedings are completely anti-theses to the recovery process, however, it is more often than not that the insolvency process is initiated to ensure speedy recovery under the threat of losing control of the debtor. The subject matter of both the said processes was completely different and governed by different statutes. The need for the IBC arose from the shortcomings of the legal system in effectively addressing the growing number of non-performing assets ('**NPAs**') in the banking sector. Following extensive discussions on how to manage the existing issues and tackle financial distress in struggling companies, whether through resolution or liquidation, the Bankruptcy Law Reforms Committee ('**BLRC**') proposed an insolvency framework. They advocated for a gradual approach, considering the evolving challenges and international best practices, while also taking into account the current state of insolvency processes and their maturity.

Following the BLRC's suggestions, the Code was implemented in the year 2016 as a comprehensive law aimed at consolidating and amending laws concerning the resolution of insolvency for corporate entities, partnership firms, and bankruptcy for individuals within specified timeframes. Essentially, the Code aimed to tackle existing challenges by offering a unified structure that simplifies insolvency proceedings, enhances asset value, fosters entrepreneurship, and credit availability, and ensures a fair balance of interests among all the involved parties.

IBC superseded several antiquated laws and regulations related to insolvency and bankruptcy, including the Sick Industrial Companies (Special Provisions) Act of 1985 ('**SICA**') and some provisions of the Companies Act, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), the Recovery of Debts due to Banks and Financial Institutions Act

(RDDBFI Act), 1993, etc. Due to the fragmented presence of various laws on this subject, there were different adjudicatory forums leading to complexities and inordinate delays in the timely resolution of disputes often leading to the devaluation of assets and further entangling of issues by the time a matter was finally decided.

Corporate Insolvency Resolution Process ('**CIRP**') is a unique process provided under the IBC for the resolution of the insolvency of a corporate debtor. In order to reach the stage of liquidation, except for voluntary liquidation, the corporate debtor has to go through the CIRP. Besides the matters relating to CIRP, the National Company Law Tribunal/s ('**NCLT**' or '**NCLTs**') are also saddled with the responsibility to adjudicate disputes regarding matters under SICA (which remained undecided on the date of enactment of IBC), oppression and mismanagement under the Companies Act, shareholder disputes, disputes relating to manner of operations of the company, management and business of the company, actions taken by the Registrar of Companies ('**ROC**'), striking off the companies, etc. These matters were earlier adjudicated by High Courts ('**HC**') ordinarily, often taking an enormous amount of time. There have been company petitions pending in the HCs for over a decade and this issue also formed the basis for establishing a specialised forum to expeditiously decide disputes relating to company matters. With the IBC coming into effect, all of these matters were transferred to NCLT to decongest HCs. It is thus, evident that the NCLTs have a huge roster of cases to be decided whereas there is one principal bench with only nine regional benches at Ahmedabad, Prayagraj, Bengaluru, Chandigarh, Chennai, Guwahati, Hyderabad, Kolkata, and Mumbai; and five other benches at Cuttack, Jaipur, Kochi, Amravati, and Indore. Typically, in each regional bench, there is only one courtroom having one judicial member and one technical member to decide such wide-ranging matters, which are a mix of insolvency matters where IBC has provided a mandatory timeline for resolution and company matters that are of no less importance considering the interest of stakeholders. This situation has been causing an inordinate delay in the disposal of cases by NCLT and attracting criticism from the stakeholders who see no difference in the pre and post IBC regime.

The overarching effect of IBC over other disputes was to ensure that IBC would be a one-stop solution for disputes concerning insolvency and bankruptcy matters and also of matters relating to winding up, liquidation, mergers, acquisitions, amalgamations, oppression, and mismanagement, ROC arising disputes which otherwise were being

handled by different forums such as Company Law Board and HCs. However, the number of benches in a regional bench and the strength of members to decide these matters is not commensurate with the caseload and this has led to IBC not achieving its goal of providing speedy resolution.

In the Economic Survey of India for the period 2022-23, it was recognised that over the last seven years, the IBC has consistently contributed to improving the business environment in India. Its ability to ensure timely resolutions for corporations, thereby facilitating smooth exits, has proven instrumental in helping the financial system absorb external shocks, including tightening global financial conditions and high volatility in financial markets.[1]

While the law and application of the IBC in India have progressed to encompass entire value chains, aiming to address business distress and facilitate insolvency resolutions through a 'creditor-in-control' model and collective deliberation process within statutory deadlines, challenges persist. Despite marked improvements in insolvency resolution outcomes over seven years of implementation, the IBC processes remain time-consuming, contentious, and resource intensive. Time consumed for final disposal of matters still remains a bone of contention and it may not be incorrect to state that none of the applications under Section 7 and Section 9 IBC have ever been admitted or rejected within the 14-day time period prescribed under the said provisions.

In the fiscal year 2022-23, the average duration for the NCLT to approve resolution plans from the commencement of the CIRP was 831 days (including excluded time) and 682 days (excluding excluded time) for 180 cases. As of March 2023, 92% of CIRPs had exceeded the statutory timeline of 270 days for completion under the IBC.[2]

The Section 7[3] and Section 9[4] of IBC clearly mention a time limit of 14 days for the admission or rejection of the application for Corporate Insolvency Resolution. However, the data from 2020-2022 shows that not even a single application has been

[1] 'The Economic Survey of India 2022-2023', (Department of Economic Affair, Ministry of Finance, Government of India, 31 Jan 2023) 116.
<https://www.indiabudget.gov.in/economicsurvey/doc/echapter.pdf> last accessed 11 November 2023.
[2] 'Annual Report 2022-23' (*Insolvency and Bankruptcy Board of India*) 22 < Initial Pages.pmd> last accessed 11 November 2023.
[3] Insolvency and Bankruptcy Code 2016, s 7.
[4] Insolvency and Bankruptcy Code 2016, s 9.

accepted or rejected within the prescribed time limit of 14 days. It is understandable that such delay could be caused because of the requirement that the adjudicating authority needs to ascertain whether there exists a debt or not and also test the application on other factors mentioned in the Code, however, the fact remains that there is a time period prescribed in the Code which has not been met.[5] The IBBI in its consultation paper published data relating to time consumed in deciding applications under Section 9 of the Code which is as follows:

Year	2020-21	2021-22
Application admitted under Section 9	153	207
Average time taken for Admission from date of filing (days)	468	650
No. Of applications where it took more than 1 year	54	39
No. Of applications where it took between 1 to 2 years	84	86
No. Of applications where admission took more than 2 years	15	82

The above-mentioned data clearly depicts that the timeline mentioned in the Code has not been followed even in a single case. Although the Financial year saw a commendable improvement in the number of cases approved for resolution, there is still a lot of ground to cover. As of March 2024, the total number of CIRP cases

[5] Insolvency and Bankruptcy Board of India, 'Consultation Paper on issues related to reducing delays in the Corporate Insolvency Resolution Process' (*Insolvency and Bankruptcy Board of India*, 13 April 2022) 1.

admitted since the commencement of the code is 7567, out of which 1920 are still ongoing.[6]

The total time, ideally should be 330 days including the extensions provided for the completion of the CIRP. However, in most cases, the admissibility of the application itself takes more than a year, as is evident from the data presented above.

While the resolution process within the IBC is intended to be a non-adversarial process, its practical implementation in India has become increasingly litigious. This shift is primarily attributable to various contentious matters brought before the NCLT for resolution by parties such as the corporate debtor ('**CD**'), both financial creditors ('**FC**') and operational creditors ('**OC**'), members of the Committee of Creditors ('**CoC**'), and occasionally, the appointed Resolution Professional ('**RP**') overseeing the CIRP. Additionally, the involvement of third parties filing applications under Section 60(5) of the IBC further contributes to the proliferation of litigation during the CIRP.[7] Consequently, this situation gives rise to numerous systemic bottlenecks and results in cascading delays in the resolution process, exacerbating the backlog of cases.

Very often it is felt that IBC needs a pre-adjudication process to filter out certain kinds of disputes before they reach the Bench/adjudicating authority. Such cases are matters relating to oppression and mismanagement which require tedious fact-finding exercise taking a huge amount of time for conducting a trial-like exercise. These can be resolved by court-appointed umpires or mediators and would some a lot of judicial time since anyway by the time these matters are finally decided much damage is already done. Another form of dispute falling in the above-said category is the proceedings under Section 7 and Section 9 of the code since these are anyway proceedings initiated under the guise of recovery. If that is so, then mediation or conciliation is the best form of resolution of dispute rather than engaging the Adjudicating Authority. Doing so will only further the cause of justice under IBC since post-admission settlements are already recognised under the code. Not just post-admission settlements but in a lot of cases the settlement is made during the pendency of dispute before the adjudicating authority and the cases are disposed of accordingly.

[6] Insolvency and Bankruptcy Board of India, 'Insolvency and Bankruptcy News' (*Insolvency and Bankruptcy Board of India*, 2024) 11, 12.
[7] Insolvency and Bankruptcy Code 2016, s 60(5).

The solution to this above is mediation, which is already a practice prevailing in other countries to tackle the backlog in insolvency cases, for example, in 2017, Singapore also recommended the use of mediation in insolvency resolution to transform into an international insolvency resolution hub.[8]

II. MEDIATION

Against this backdrop, the Insolvency and Bankruptcy Board of India ('**IBBI**') engaged in formal dialogues and consultations with stakeholders regarding the potential integration of mediation within the IBC framework in India. During these discussions, it was observed that the IBC was not explicitly exempted from the scope of the Mediation Bill of 2021. Consequently, a recommendation was made to introduce a facilitating provision for mediation within the Code, allowing the IBBI to outline the specifics of the mediation framework under the Code.[9]

The IBBI established an Expert Committee[10] ('**Committee**') chaired by Dr. T. K. Viswanathan (Former Secretary General, Lok Sabha Secretariat and Former Law Secretary). Its members included Mr. Sudhaker Shukla (Whole Time Member, IBBI), Dr. Rajiv Mani (Additional Secretary, Ministry of Law and Justice), Mr. Bahram Vakil (Founder and Partner, AZB & Partners), Mr. Shardul S Shroff (Executive Chairman, Shardul Amarchand Mangaldas), Mr. Sumant Batra (Founder Partner, Kesar Dass B. & Associates), and Mr. Satyajit Roul (Joint Director, Ministry of Corporate Affairs), with Mr. Santosh K. Shukla (Executive Director, IBBI) serving as its member secretary. The Committee's mandate was to develop a comprehensive framework to define the scope for the utilisation of mediation under the Code, and subsequently present its recommendations.

The Committee employed a comprehensive approach, which involved internal discussions, consultations with experts, and engagement with representatives from various industries and academia. It scrutinised the current Alternative Dispute

[8] Justice AK Sikri & Anuroop Omkar, 'Mediation In Corporate Insolvency: A Game Changer' (*Business World*, 24 July 2024, 02:30 PM) <https://businessworld.in/article/mediation-in-corporate-insolvency-a-game-changer-171872> .
[9] Insolvency and Bankruptcy Board of India, 'Report of the Colloquium On Functioning And Strengthening Of The IBC Ecosystem' 43 <Report 12-12-22.indd>.
[10] IBBI Order No. Board-22/2/2023-IBBI/8937, 'Constitution of expert committee to propose a detailed framework for use of mediation under the Insolvency and Bankruptcy Code, 2016' (*Insolvency Board of* India, 6 March 2023).

Resolution ('**ADR**') landscape in India, studied global literature, and analysed best practices concerning insolvency mediation processes. This methodology aimed to gain deeper insights into the utilisation, functionality, and potential challenges associated with insolvency mediation frameworks.

The Committee thoroughly reviewed and discussed several versions of the Report before finalising it in its current state. As the Mediation Act, 2023 ('**2023 Act**') was introduced in Parliament in July 2023 and enacted in September 2023, while the Committee's recommendations were in an advanced drafting stage, the Committee decided it was prudent to reassess and reconsider its recommendations in light of the 2023 Act for the present Report. However, the Committee strived to ensure that its recommendations align with the provisions of the 2023 Act. These recommendations do not seek to supersede or conflict with the Act in any way.

Mediation as a method of dispute resolution for Insolvency and related matters could surely be seen as the emerging alternative to court marathons. Mediation involves the engagement of an impartial third party to facilitate the negotiation and settlement of a dispute, aiming to resolve conflicts among two or more parties. Typically, mediation begins with the mutual consent of the involved parties, through a pre-agreed contractual clause, by referral from a court or tribunal, or as a mandatory requirement under the law. As an ADR mechanism, mediation is widely recognised for enhancing the efficiency of dispute resolution and providing flexibility to the parties involved. It enables parties to explore mutually acceptable commercial resolutions to business disputes, without direct intervention from the courts.[11]

The mediation process maintains a flexible, private, and confidential environment. Such characteristics encourage the preservation of relationships between the involved parties. In numerous cases, mediation proves to be more cost-effective and time-efficient compared to litigation or other alternative dispute resolution methods like arbitration.[12]

[11] Mondaq, 'United States: What Is Mediation and Why Mediate?' (*Mondaq*, 15 July 2021) <https://www.mondaq.com/unitedstates/insolvencybankruptcy/1091428/what-is-mediation-and-why-mediate> last accessed 11 November 2023.

[12] Salem Advocate Bar Association T N v Union of India (Salem II) (2005) 6 SCC 344; Afcons Infrastructure Limited & Anr versus Cherian Varkey Construction Company Private Limited and Ors (Afcons) (2010) 8 SCC 24.

Depending on the nature of the conflict and the level of involvement by the mediator, various mediation models can be employed, including facilitative, evaluative, court-mandated, and transformative approaches. In these scenarios, a mediator is tasked with several functions, as outlined in the Consumer Handbook on Mediation:

1. Establishing an environment conducive to the mediation process.
2. Clarifying the mediation process and establishing ground rules.
3. Facilitating communication between the parties using diverse communication techniques.
4. Identifying and addressing obstacles to communication between the parties.
5. Collecting information about the dispute.
6. Identifying the underlying interests of the parties involved.
7. Maintaining control over the process and guiding focused discussions.
8. Managing interactions between the parties.
9. Assisting parties in documenting agreements on disputed points.[13]

In India, mediators commonly employ a blended approach, incorporating elements from both facilitative and evaluative mediation models. Facilitative mediation, a traditional method, involves the mediator assisting parties in negotiations without expressing personal views on the dispute's merits. Additionally, in a facilitative role, the mediator guides parties to consider the implications of not reaching a settlement, such as potential litigation and evaluates the merits of the case. The mediator encourages parties to explore alternative solutions and motivates them to agree on mutually acceptable terms.[14]

Conversely, evaluative mediation assigns a more active role to the mediator. Drawing on their expertise in specific sectors, mediators in this model assess the strengths and weaknesses of each party's case based on legal principles. Typically, the mediator guides parties through reality-testing exercises, evaluating potential outcomes if the

[13] Ashok R. Patil, 'Consumer Handbook on Mediation (FAQ)' (Ministry of Consumer Affairs, Food and Public Distribution and Chair on Consumer Law and Practice, National Law School of India University, 2021 https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/ConsumerHandbook_Mediation.pdf last accessed 10 November 2023.

[14] Misha, Shreya Prakash, and Kritika Poddar, 'Applying Mediation in Corporate Insolvency Situations in India' (Insolvency and Bankruptcy Board of India Publication, 2022) https://ibbi.gov.in/uploads/publication/599cf8fb50be73f518fca467311304db.pdf last accessed 10 May 2023.

case were to proceed to court. However, it is important to note that the ultimate decision to settle rests with the parties involved.

During its discussions, the Committee observed that the 2023 Act encompasses mediation in disputes, whether commercial or otherwise, and offers provisions for exclusions, inclusions, or modifications to the existing mediation framework to ensure consistency in the process. The 2023 Act mandates that the process be established and officially announced by either the Central Government or the Mediation Council of India. However, this implementation is still pending.

In the interim, the Committee observed that before the enactment of the 2023 Act, mediation procedures lacked unified regulation under a single legislation in India, leading to variations across different forums and statutes. Generally, the Committee acknowledges that the mediation process comprises multiple stages that can be adjusted to achieve the intended results.

The essence of IBC was *stricto sensu* timely resolution of disputes and today, the said essence has not only been diluted but lost. Today, IBC is a lost cause inasmuch as the NCLTs all over the country are heavily backlogged, and timely resolution of disputes is a rarest of the rarest cases. This situation although unfortunate and deplorable, however, is not something that cannot be resolved. Means of resolution of the current bottleneck require to be explored, with greater inclusion of ADR. In light of the recent legislative developments, we require deeper research to understand the role ADR mechanisms can play in resolving IBC-related disputes.

III. RECOMMENDATIONS OF THE EXPERT COMMITTEE ON THE FRAMEWORK FOR USE OF MEDIATION UNDER IBC

The Expert committee in its report laid out a framework for the incorporation of the mediation process in the Insolvency and Bankruptcy Code proceedings. The Committee suggested that a mediation framework within the Code should ideally function as a self-contained system, complete with its own infrastructure to fully support the Code's objectives. Given that in-rem rights and public interest factors are frequently implicated at various stages of proceedings under the Code, the Committee sees a strong basis for pursuing an exemption, either by amending the 2023 Act directly or through a notification under Entry 13 of the First Schedule to the Act.

Additionally, the Committee recommended a gradual introduction of voluntary mediation as a dispute resolution tool within the Code, ensuring that this addition respects the timelines of the existing insolvency resolution processes.

IV. JUDICIAL PRECEDENCE

In *Pioneer Infrastructure v. Union of India*,[15] the SC ruled that proceedings under the IBC are classified as proceedings *in rem*. Since it is well-established that in rem proceedings, due to their public interest nature, cannot be referred to arbitration under Section 8 of the Arbitration Act, this principle can reasonably be extended to suggest that mediation may also be unsuitable. This rule originated with the landmark case *Vidya Drolia and Others v. Durga Trading Company*,[16] which examined the types of disputes eligible for ADR. In this case, the Court clarified the difference between *in rem* and *in personam* disputes, specifically identifying insolvency disputes as non-arbitrable.

Private, confidential settlements for matters that are *in rem* appear contradictory to the settled principles of law upheld by Indian courts.[17] The introduction of the Mediation Bill, 2021, raised expectations for a unified mediation framework within India. However, Schedule II clearly restricts certain types of disputes from mediation, including those related to family and industrial matters, resulting in a relatively limited scope for the legislation. Consequently, its practical effectiveness remains uncertain, and it may not serve as a reliable foundation for assessing whether mediation could be extended to insolvency-related disputes.

It is also untrue that the process of mediation is a completely new process in the field of insolvency, in Indian Courts. There have been instances where the parties have opted for mediation in Insolvency cases. In *Parvinder Singh v. Intec Capital Ltd.*,[18] a Section 7 application against Jagtar Singh & Sons Hydraulic Private Limited, was subsequently admitted by the Adjudicating Authority. Parvinder Singh, representing the promoters of the Corporate Debtor, appealed, indicating their readiness to settle

[15] Pioneer Infrastructure v Union of India (2019) SCC Online SC 1005.
[16] Vidya Drolia and Ord v Durga Trading Company (2019) SCC Online SC 358.
[17] Aakriti Anurag Tewari, 'Situating Mediation within India's Insolvency Framework: An Innovative and Efficient Intervention' (*Anusandhan* Exploring new perspectives on Insolvency, 2022) < 599cf8fb50be73f518fca467311304db.pdf > 1-16.
[18] Parvinder Singh v Intec Capital Ltd (2019) SCC OnLine NCLAT 1365.

the financial creditor's claims before the Committee of Creditors was formed. The Hon'ble NCLAT directed the interim resolution professional to ensure the corporate debtor continued operations and not to form the Committee of Creditors. Since both parties agreed to mediation, a retired judge was appointed to facilitate the settlement discussions. Following mediation proceedings, a settlement was achieved, and the NCLAT ordered that the mediator's recorded terms be treated as its binding order, to be followed by all parties. Additionally, it was stipulated that the corporate insolvency process could be revived by the petitioner if the settlement terms were breached. The NCLAT instructed the interim resolution professional to allow the corporate debtor's Board of Directors to manage operations, provided that no assets, movable or immovable, would be sold, transferred, or encumbered by the Corporate Debtor or its officers during the settlement period.

V. CONCLUSION

Considering the fact that the IBC was enacted solely with the intent of ensuring time bound resolution mechanism and that NCLT and the appellate tribunal were constituted to carry out the functions under the IBC, it is no more a secret that the said forums are saddled with the humongous caseload and unreasonable expectations to carry out functions under the code. There is so much to do with such little resources and means, especially time. It is seen that the induction of mediation in the present IBC regime will resolve a lot of issues related to the delay in proceedings and better resolution of disputes. Mediation is a time-bound proceeding that resolves the issue in the least amount of time with the best possible outcome. Mediation has proven to be a catalyst for speedy and effective dispute resolution even those relating to cross-border insolvency matters. For example, in MF global holdings case,[19] for several undertakings undergoing insolvency processes in the U.S.A. and U.K., a court-appointed mediator facilitated the agreement between the stakeholders present in different countries. This ensured the maximisation of asset value and avoided long-drawn cross-border expensive litigation. In Lehman Brothers case, the U.S. Bankrupt court appointed mediators to facilitate the resolution of complex commercial disputes involving over two hundred stakeholders.[20] In the said proceedings, out of 77

[19] *In re MF Global Holdings Ltd* 469 B.R. 177 (Bankr. S.D.N.Y. 2012).
[20] In re Lehman Brothers Holdings Inc 415 B.R. 77 (N.D.N.Y. 2009).

proceedings, 73 were closed successfully in terms of the settlement reached in mediation. The examples are innumerable, and it is high time that India also acts swiftly to give way for mediation insolvency and company-related disputes. India is the future, and it must lead by example.

BALANCING THE GROUP OF COMPANIES DOCTRINE: STRIKING THE EQUILIBRIUM BETWEEN ECONOMIC ASPIRATIONS AND LEGAL REALITIES IN INDIA

SHAURYA KAPOOR*

The Group of Companies ('*GOC*') *doctrine is pivotal in arbitration jurisprudence, extending arbitration agreements to non-signatory entities under certain circumstances. Originating from the Dow Chemical Company v. Isover Saint Gobain1 this doctrine recognises implied consent within corporate groups, enhancing dispute resolution inclusivity. This paper critically examines its application in the Indian arbitration framework, employing a doctrinal research method that includes case law analysis, comparative perspectives, and evaluation of judicial reasoning in landmark cases such as Chloro Controls India (P) Ltd v. Severn Trent Water Purification2 and Cox & Kings Ltd. v SAP India (P) Ltd.3 The study highlights inconsistencies and challenges, including paradoxes of mutual intent, corporate veil conflicts, and economic implications. By exploring the interplay between the doctrine's legal framework and its economic implications, the study provides a fresh perspective on the impact of its application on legal predictability, corporate autonomy, and the broader business environment. A comparative analysis of international practices indicates that the GOC doctrine needs refinement to suit India's aspirations in terms of its economic and legal principles. A well-balanced approach—contractual clarity and mutual intent coupled with the limitation of arbitrary liability extensions—can help nurture legal certainty and ease of business. The study concludes that adopting such reforms will enhance arbitration's efficacy without undermining foundational corporate and contract law principles.*

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[1] *Dow Chem v Isover Saint Gobain* ICC Case No. 4131, Interim Award, 23 Sept. 1982.
[2] *Chloro Controls India (P) Ltd v Severn Trent Water* Purification (2013) 1 SCC 641.
[3] *Cox & Kings Ltd v SAP India (P) Ltd* (2022) SCC OnLine SC 570.

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I. INTRODUCTION

The Group of Companies doctrine ('**GOC**') has emerged as a pivotal concept in arbitration jurisprudence. The conventional boundaries of signatories to an arbitration agreement have been liberalised and extended by virtue of this doctrine. A finer delivery of justice and increased accountability are aimed at, enhancing inclusivity in the process of dispute resolution. It originates from the French arbitration jurisprudence, notably the *Dow Chemical Company v. Isover Saint Gobain*[4] case ('***Dow Chemical***'). This case, adjudicated by the International Commercial Court ('**ICC**'), pertains to contracts for the distribution of thermal insulation products, which were signed by Dow Chemical A.G. and Dow Chemical Europe; both were subsidiaries of the Dow Chemical Company. Arbitration clauses were included in the contracts, and delivery obligations were fulfilled by Dow Chemical France, but it wasn't a signatory to the agreement. Disputes arose, which led to an arbitration claim brought by Dow Chemical A.G., Dow Chemical Europe, Dow Chemical France, and the parent company against Isover. However, the tribunal's jurisdiction was challenged by Isover on the grounds that Dow Chemical France and Dow Chemical

[4] *Dow Chem* (n 1).

Company were not signatories to the agreement. However, it was opined by the ICC Court that a non-signatory can be compelled to arbitrate if the consent for the same can be implied from its conduct. Such non-signatories could include entities such as parents, subsidiaries, or facilitators involved in any form of contractual performance of the signatory.[5]

The GOC doctrine, therefore, serves as a crucial instrument in addressing the complexities surrounding modern corporate structuring. It attempts to recognise the implied underlying consent to arbitrate behind the relationships between parent companies, subsidiaries, and other associated entities/ affiliates, etc. This further broadens the scope of arbitration, which leads to the enhancement of efficacy and inclusivity of dispute resolution by ensuring that all the relevant parties are held accountable. This holistic approach not only attempts to enforce the integrity of the arbitration proceedings but also throws light on the evolving commercial realities of the world.[6]

The relevance and application of the GOC doctrine in India are critically examined in this paper, and its impact on business practices and legal implications are highlighted. The evolution of this doctrine is explored within the Indian arbitration framework via an analysis of key cases and judicial perspectives, and recommendations are proposed for its effective integration into the Indian legal system. The challenges and paradoxes inherent in the doctrine's application, particularly concerning mutual intent, issues with subsidiaries, and clashes with other principles such as the corporate veil, are further revealed and discussed by the analysis. It is argued that while the GOC holds significance in the Indian legal landscape, a nuanced evolution is required to align it with Indian economic aspirations and global best practices.

II. FROM CONCEPT TO LAW: CHARTING THE RISE OF THE GROUP OF COMPANIES DOCTRINE IN INDIA

The first instance of discussion of the doctrine in the Indian context has been in the case of *Sukanya Holdings v. Jayesh H Pandya.*[7] The idea of binding a non-signatory, upon appeal, was rejected by the Supreme Court ('**SC**') with the reasoning that no

[5] Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2012) 94.
[6] Bernard Hanotiau, Complex Arbitrations: Multi-party, Multi-contract, Multi-issue—A Comparative Study (2nd edn, Kluwer Law International, 2020) 95, 96.
[7] Sukanya Holdings (P) Ltd v Jayesh H Pandya (2003) 5 SCC 531.

provision under the Arbitration and Conciliation Act, 1996 ('**A&C Act**') existed to bind non-signatories as parties. *Chloro Controls India (P) Ltd v. Severn Trent Water Purification*[8] ('***Chloro Controls***') was the first case where the doctrine was upheld. This was done by placing reliance upon Section 8[9] and Section 45[10] of the A&C Act, which allows for parties to be referred to arbitration in the presence of an arbitration agreement. Section 8(1)[11] stipulates that parties must be referred to arbitration by the judicial authority if an application is made by a party to the arbitration agreement or any person claiming through or under that party before submitting the first statement on the substance of the dispute unless it is found that prima facie no valid arbitration agreement exists. Whereas Section 45[12] specifically addresses the judicial authority to refer matters to arbitration governed by international arbitration agreements. This section is linked to Section 44[13] of the A&C Act, which specifies that Part II of the A&C Act applies to foreign awards pursuant to certain international conventions. Therefore, Section 45,[14] being a part of Part II of the A&C Act, relates to international arbitration agreements. This section simply ensures that a wider range of arbitration scenarios are covered within the ambit of the phrase "*claiming through and under*".

The phrase "*claiming through or under [a party]*" was held to imply that a judicial authority can refer parties to arbitration at the request of not just the original parties to the agreement but also at the request of anyone who derives their rights from or under those original parties as was observed in *Chloro Controls*.[15] The three-judge bench, in this case, relied on international instances of the doctrine being upheld while listing several factors to determine mutual intent. The specific factors to ascertain mutual intent include a direct relationship between the non-signatory and signatory, a commonality of subject matter, composite performance transactions, the performance of the contract, and most importantly, if justice can be served by referring the dispute to arbitration. In *Chloro Controls*,[16] the rationale that if entities are not a party to the main agreement but are a part of interconnected agreements that ultimately form a

[8] Chloro Controls (n 2).
[9] Arbitration and Conciliation Act 1996, s 8.
[10] Arbitration and Conciliation Act 1996, s 45.
[11] Arbitration and Conciliation Act 1996, s 8(1).
[12] Arbitration and Conciliation Act 1996, s 45.
[13] Arbitration and Conciliation Act 1996, s 44.
[14] Arbitration and Conciliation Act 1996, s 45.
[15] Chloro Controls (n 2).
[16] ibid.

composite transaction, were held to be bound by the arbitration agreement based on mutual intention. This judgment was followed by multiple other decisions that led to additional factors for the determination of mutual intent, while others broadened the application of the doctrine in the Indian arbitration jurisprudence. In *Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited*,[17] wherein an application was made to implead an international affiliate of one of the signatories to an arbitration agreement. The SC held that the onus to prove the non-signatory's intent to consent to the arbitration agreement is on the party wanting to implead them. It further held that the involvement of the non-signatory party in the negotiation and performance of the underlying contract is a key determinant of intent to be a party to the arbitration agreement. Moreover, the SC also opined that merely agreeing to indemnify a party does not automatically make the indemnifier a party to the arbitration agreement of a different contract altogether. The SC also took a stern view of post-contractual negotiations to indicate an intention to be bound by the arbitration agreement. In *MTNL v. Canara Bank*,[18] the dispute was over the sale, purchase, and transfer of bonds. MTNL had issued secured bonds and kept a sizeable share with Can Bank Financial Services Ltd., which is a wholly owned subsidiary of Canara Bank. Due to a financial crunch, CANFINA (subsidiary) could not pay for the bonds. Canara Bank purchased some of the bonds. However, MTNL refused to directly transfer them in Canara Bank's name and later cancelled some of the bonds, leading to the dispute. Subsequently, two primary issues arose: firstly, whether there is a valid arbitration agreement existing among the three entities, and secondly, if CANFINA can be roped in as a party to the arbitration proceedings. The SC, while opining in the affirmative for both issues, relied on the concept of a "*single economic unit*," amongst other factors. The doctrine was held validly invoked on the basis of a tight organisation structure, forming a "*single economic unit*".

The GOC doctrine has not been restricted to binding non-signatories; rather, in *Cheran Properties Ltd v. Kasturi and Sons Ltd.*[19] ('***Cheran Properties***'), it was expanded even to impose arbitral awards on non-signatories. In this case, three parties had an arbitration agreement with another fourth party. As per the arbitral award, two parties were required to return certain documents of share and some title documents,

[17] Reckitt Benckiser (India) Pvt Ltd v Reynders Label Printing India Pvt Ltd (2019) 7 SCC 6.
[18] *MTNL v Canara Bank* (2020) 12 SCC 76.
[19] Cheran Properties Ltd v Kasturi and Sons Ltd (2018) 16 SCC 413.

whereas one party was required to pay a certain amount. The award was challenged by the party, which was required to pay the amount by claiming itself as a non-signatory. However, the ruling by the court stated that even non-signatories are bound by the terms of an arbitration agreement based on intent, relationship, and conduct; therefore, the award was enforced by reliance upon the doctrine.

The doctrine, broadly based on the *Chloro Controls*,[20] has also been relied upon in adjudicating the recent case of *ONGC Ltd v. Discovery Enterprises Pvt Ltd*.[21] A contractual default occurred on the part of Discovery Enterprises, and arbitration proceedings were initiated against it along with Jindal Drilling. Jindal Drillings was excluded from the arbitration proceedings by the arbitration tribunal and the Bombay HC. However, the case was sent back by the SC for reconsideration of evidence for including Jindal Drilling based on economic unity between the two entities. The performance of the contract and the idea of a "*single economic unit*" were thus, emphasised as essential factors in binding a non-signatory to an arbitration agreement.

III. SHIFTING JUDICIAL PERSPECTIVE: EMPHASIS ON THE IDEA OF CONSENT

A significant shift was observed shortly after the decision in *ONGC Ltd v Discovery Enterprises Pvt Ltd.*[22] Although the doctrine remains accepted in India, its application has been significantly altered by the SC in its *Cox & Kings Ltd. v. SAP India (P) Ltd.*[23] ('***Cox & Kings***') ruling. In this case, the dispute originated from software licensing agreements entered into by Cox & Kings with SAP India Pvt. Ltd., with a General Terms and Conditions Agreement containing an arbitration clause to be bound by the A&C Act. Assistance was provided by SAP SE, the parent company of SAP India from Germany, with regard to issues concerning the software project. When fresh arbitration was initiated by Cox & Kings Ltd., SAP SE was included as a party despite not being a signatory to the agreement. The entire line of reasoning with regard to the doctrine's application was subsequently subjected to scrutiny. Before referring the question of the doctrine's applicability to a larger bench, the court identified that the doctrine is predominantly oriented toward economics and convenience rather than

[20] Chloro Controls (n 2).
[21] ONGC Ltd v Discovery Enterprises Pvt Ltd (2022) 8 SCC 42.
[22] ibid.
[23] Cox & Kings (n 3).

legal principles. This approach was subsequently characterised as a "*modern approach to consent*".[24]

Furthermore, the ambit of the phrase "*claiming through and under*" of Section 8[25] and the scope of Section 45[26] of the A&C Act, which allows for parties to be referred to arbitration in the presence of an arbitration agreement, was questioned in this case by Justice Ramana.[27] Justice Ramana opined that these provisions based on the phrase "*claiming through and under*" cannot be used to read the doctrine into the Indian arbitration jurisprudence. The commercial reality of subsidiaries being separate legal entities is jeopardised if the doctrine is read into Indian law with reference to Section 8[28] and Section 45[29] of the A&C Act. The basis of the application and not the doctrine itself was questioned. Even the jurisprudential precedent given in *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya* established that for a judicial authority to refer a case to arbitration, firstly, the entire dispute must be something the parties agreed to arbitrate, and secondly, it should involve only the people bound by the agreement and not otherwise.

Despite scrutinising the reasoning behind upholding the doctrine, it was upheld independently by Justice Surya Kant in an opinion concurring with Justice Ramana. The doctrine was upheld by reliance upon fundamental principles of contract law. These principles include implied agency, implied consent, guarantors, and third-party beneficiaries, rather than a strict interpretation of Section 8[30] of the A&C Act. These principles were implemented to ensure that the true intent behind entering into complex commercial transactions can be highlighted. It was emphasised by Justice Surya Kant that the doctrine's application is justified based on the conduct of the non-signatory. Their involvement in contractual performance and negotiation was relied upon to understand intent. Reliance on other principles like "*single economic unit*" were avoided as their establishment in law is challenging. However, for better

[24] M. Saunders et al, 'Group of Companies Doctrine and Arbitration: The "Modern Approach" to Consent' (*Ashurst* 15 Dec 2024) <https://www.ashurst.com/en/insights/group-of-companies-doctrine-and-arbitration-the-modern-approach-to-consent/>.
[25] Arbitration and Conciliation Act 1996, s 8.
[26] Arbitration and Conciliation Act 1996, s 45.
[27] Cox & Kings (n 3).
[28] Arbitration and Conciliation Act 1996, s 8.
[29] Arbitration and Conciliation Act 1996, s 45.
[30] Arbitration and Conciliation Act 1996, s 8.

deliberation and defining the contours of the GOC doctrine, the decision was referred to a larger five-judge bench led by Justice Chandrachud.

It was elucidated by the five-judge bench that consent and mutual intention are imperative for entering into arbitration, and the need to retain the GOC doctrine was affirmed. Furthermore, the instrumentality of the doctrine in the determination of the intent of parties involved in complex transactions was reaffirmed. The GOC doctrine in the Indian context was defined by Justice Chandrachud, who authored the majority opinion, as "*an agglomeration of privately held and publicly traded firms operating in different lines of business, each incorporated as a separate legal entity, but collectively under the entrepreneurial, financial, and strategic control of a common authority, typically a family, and linked by trust-based relationships forged around a similar persona, ethnicity, or community*".[31]

The doctrine was also identified as a "*factual element*" that should be reconsidered by the tribunal while analysing the consent between parties.[32] It also reiterated that basic contract law principles should not be violated in the application of the doctrine. The judgment also distinguishes between piercing the corporate veil and the doctrine, stating that while the former disregards the concept of separate legal entities, the doctrine respects it while recognising the mutual intention of separate legal entities to arbitrate jointly. The insights provided by Justice Ramana were reaffirmed, and the existence of the doctrine was held to be independent of the A&C Act provisions and rather based on the mutual intention of parties to an agreement. Justice Narsimha, in his concurring opinion, agreed with the majority on most of the aspects. However, he further opined that the GOC doctrine would be subsumed under Section 7(4)[33] of the A&C Act, which stipulates when an arbitration agreement can be claimed to be in writing, including exchanged communications or unchallenged statements of claim as indicators of a written arbitration agreement.

To summarise, the SC upheld the doctrine on its merits independently and emphasised implied consent as the fundamental for binding non-signatories to an arbitration agreement. The Indian position on the doctrine comes to light in this decision. Justice Surya Kant highlighted the prominence of family-run business entities in India, which

[31] *Cox & Kings* (n 3) para 62.
[32] *Cox & Kings* (n 3) para 69.
[33] Arbitration and Conciliation Act 1996, s 8.

involves family members occupying multiple roles within the same larger group, thus, sharing the dictate that runs the business, justifying the relevance of the doctrine in Indian jurisprudence apart from the reasons considered internationally. The evolution of the GOC doctrine in India has been intricate, with *Cox & Kings* significantly altering its application.[34] However, various challenges and legal paradoxes associated with the doctrine persist unaddressed in India.

IV. THE PARADOX OF MUTUAL INTENT IN INDIA: UNCERTAINTY IN DOCTRINE APPLICATION

The GOC doctrine, as outlined originally in the *Dow Chemical*[35] relies on three primary prongs: a tight group structure, contractual involvement, and mutual intent. Mutual intent is a foundational element for the determination of an arbitration agreement's enforceability, and it requires a nuanced evaluation on a case-to-case basis. This complexity is highlighted by *Cox & Kings*, wherein mutual intent has been examined as a key factor.[36] In this case, the mere involvement in a contract is seen as a determinant of mutual intent, leading to the first paradox.

When contractual involvement is considered an indicator of mutual intent, the need for the intricate establishment of mutual intent on a case-to-case basis is eliminated. This tends to overshadow the requirement to assess the aspect of mutual intent as an independent prong thoroughly. This issue is well illustrated in cases like *Cheran Properties*,[37] wherein the first two prongs, tight group structure, and contractual involvement, seem to imply mutual intent. In this case, Sporting Pastime India Ltd. ('**SPIL**'), a subsidiary of Kasturi & Sons Ltd. ('**KSL**'), agreed with K.C. Palanisamy ('**KCL**') to sell shares amounting to 90% of SPIL's capital to the nominees of KCP, including Cheran Properties Ltd. KCL, however, failed to fulfil its obligations as required under the agreement, which led to the invocation of the arbitration clause of the same agreement. Ruling in KSL's favour, the arbitral tribunal directed the return of shares to KSL. Furthermore, KSL sought to enforce the same via the National Company Law Tribunal ('**NCLT**'). Cheran Properties, claiming that the arbitration agreement is not binding on them, objected to the same.

[34] Cox & Kings (n 3).
[35] Dow Chemical (n 1).
[36] Cox & Kings (n 3).
[37] Cheran Properties (n 19).

The paradox of determining mutual intent can be observed in how the court concluded the presence of mutual intent in this case. While the court did rely on the *Chloro Controls*[38] while stipulating that circumstances are to be relied upon for demonstration of mutual intent,[39] however, the court considered the contractual performance and involvement of the appellant as an indicator of mutual intent. The awareness about the share purchase agreement and participation in the transaction by Cheran Properties was relied upon by the court.[40] Reliance was also placed upon a letter where the Share Purchase Agreement was referred to.[41] Moreover, even the authorities referred to by the court in its judgment were used to interpret the negotiation and performance as an indication of intent directly for binding the non-signatory to the contract terms.[42]

The doctrine can thus, be said to have been erroneously applied due to this paradox, and this has thereby resulted in a significant deviation from the original intention of the judges in the *Dow Chemical*[43] which is caused by this oversimplification, wherein, mutual intent required a more intricate assessment. The complex nature of mutual intent and its instrumentality in joining the ends of justice requires such an intricate assessment and the mere involvement in the performance or negotiation of a contract does not necessarily indicate its full presence.

The second paradox relating to another angle of mutual intent is with regard to the separability of an arbitration clause. An arbitration clause, despite being a part of a contract, functions as an independent contract.[44] This clause remains valid even if the main contract is found to be void or its performance is terminated.[45] This is clearly stipulated in Section 16 of the A&C Act,[46] based on the **"***kompetenz-kompetenz*" principle as enshrined in the United Nations Commission on International Trade Law ('**UNCITRAL**') Model Law.[47] The paradox that arises here is that even if a non-

[38] Chloro Controls (n 2).
[39] *Cheran Properties* (n 19) para 22.
[40] ibid, para 24.
[41] ibid, para 23.
[42] ibid, para 28.
[43] Dow Chemical (n 1).
[44] National Agricultural Coop Marketing Federation India Ltd v Gains Trading Ltd (2007) SCC OnLine SC 800
[45] Today Homes & Infrastructure (P) Ltd v Ludhiana Improvement Trust (2023) SCC Online SC 495.
[46] Arbitration and Conciliation Act 1996, s 8.
[47] Clyde Croft et al., *A Guide to the UNCITRAL Arbitration Rules* (Cambridge University Press, 2013) 249 https://assets.cambridge.org/97805211/95720/frontmatter/9780521195720_frontmatter.pdf last accessed 8 Aug 2024.

signatory agrees to assist or perform the contract, the mutual consent implied cannot be considered to be consent for a separate agreement altogether; that is, the arbitration agreement. There have been instances, such as in the *Duro Felguera v. Gangavaram Port Limited* case,[48] wherein a two-judge bench of the Hon'ble SC refused to direct five different contracts for joint arbitration despite the sister concerns of one party to the original arbitration agreement. This case involved awarding contracts for bulk material handling systems. The initial contract was divided into five separate contracts with separate arbitration clauses for each of them. Four of these five contracts were given to the Indian subsidiary of Duro Felguera, whereas one was given to the parent company itself. The other party, Gangavaram Port, sought to consolidate the arbitration with regard to all five contracts under a single tribunal. However, the court held that contracts, having separate clauses, must be arbitrated separately on the basis of several factors.

Firstly, the court considered the explicitly splitting of the original tender into five separate contracts by the parties, each with its own arbitration clause as intent to arbitrate separately.[49] While analysing mutual consent, this interpretation by the Court becomes directly relevant. While the GOC Doctrine allows the extension of the arbitration clause to non-signatories, in this case, the presence of separate arbitration agreements clearly rules out the very possibility of a mutual intent for a joint arbitration. The contracts were split to clearly delineate liabilities, obligations, etc., underscoring the intent to arbitrate separately.[50]A parent company, for instance, assisting its subsidiary in contractual performance or negotiation that is bound by a contract with an arbitration clause also resembles a situation wherein the liabilities arising out of the contract are delineated. Therefore, allowing the extension of the arbitration clause over the subsidiary would give rise to similar concerns as raised in *Duro Felguera v. Gangavaram Port Limited.*[51] The distinct nature of the corporate guarantee and the arbitration mechanism behind it further led to the court ruling against the merging of this arbitration clause with the rest of the four for a joint proceeding.[52] Lastly, the Court relied on Section 7(5) of the A&C Act,[53] which talks

[48] Duro Felguera v Gangavaram Port Limited (2017) 9 SCC 729.
[49] ibid, para 24.
[50] ibid.
[51] ibid.
[52] ibid, para 25.
[53] Arbitration and Conciliation Act 1996, s 7(5).

about binding parties to arbitration agreements referenced in external documents if intended by the parties. The court underscored the lack of any intent of the parties to be bound by external arbitration agreements, ruling against a joint arbitration proceeding.[54]

Hence, the decision made by the parties to arbitrate separate arbitration agreements separately under their individual contracts was respected. The overall analysis in this case by the court also highlights the value of express consent in arbitration, Therefore, the paradox gets furthered; if separate arbitration agreements are construed as intent to arbitrate separately then the complete absence of an arbitration agreement cannot be construed as mutual intent to arbitrate either. This paradox can also be observed in the *Cheran Properties* , wherein the Court did not view the arbitration agreement as a severable agreement altogether while stipulating that contractual involvement with acceptance of general agreement terms implies the acceptance of the arbitration clause as well.[55] These paradoxes lead to the misapplication of the doctrine, thus, creating a conundrum, further affecting business prospects in India by adversely impacting the commercial actions and liabilities of businesses in India.[56]

V. THE PARADOX OF SUBSIDIARIES: CORPORATE VEIL V. GROUP OF COMPANIES DOCTRINE

The legal paradox is furthered by the corporate veil and alter ego principles. These doctrines are recognised in India in cases such as *Iridium India Telecom v. Motorola Inc.*[57] where criminal intent/wrongdoings of a company were attributed to the group managing and controlling its affairs. This is also known as the doctrine of attribution and imputation. Alter ego has been further applied in cases such as *Sunil Bharti Mittal v. CBI*,[58] wherein allegations in the 2G spectrum scandal involved the approval of additional spectrum by the Ministry of Telecommunications, which resulted in the loss of government revenues. A special judge, adjudicating upon the matter, issued court summons to three telecom executives by application of the "*alter ego*" doctrine, holding them vicariously liable for the actions of their companies. This principle

[54] *Duro Felguera* (n 48) para 33.
[55] *Cheran Properties* (n 19) para 24.
[56] Cheran Properties (n 19); Magic Eye Developers Pvt Ltd v Green Edge Infra Private Limited (2020) SCC OnLine Del 597.
[57] Iridium India Telecom Limited v Motorola Inc (2003) SCC OnLine Bom 760.
[58] Sunil Bharti Mittal v CBI (2015) 4 SCC 609.

evolved in England to plug the loophole of vicarious liability in principal-agent relationships, which solely covers civil wrongs.[59] In international jurisprudence, the group of companies' doctrine has also been differentiated from that of the alter ego on the grounds of fraud. The parent companies have been held liable for fraud perpetrated via subsidiaries.[60]

The difference between the alter ego/corporate veil and the GOC doctrine has been established in *Cheran Properties*.[61] The former ignores company separation and party intentions for fairness. Whereas the latter helps navigate the true parties to an arbitration agreement without changing a company's legal status. Therefore, alter ego and corporate veil cannot be the grounds for enforcing this doctrine, which is well recognised.

Having subsidiaries is a standard industry practice. They are created for various needs, including corporate structuring, developing new products and services, regulatory compliance, taxing, expanding into new markets, etc.[62] It is also a common practice to limit liability in light of the involved in creating a new venture.[63] The corporate veil principle exists to address these concerns in malpractice and fraud cases and its application is done with proper assessment of standards. The GOC doctrine somewhat lowers this standard to make a parent company liable in less severe cases, particularly wherein the parent company attempts to limit its liability. The *Cox & Kings* decision has certainly upheld the validity of the doctrine from a contract law lens and has also differentiated between the doctrine and the uplifting of the corporate veil.[64]

The difference between the parent and the subsidiary as two separate entities was clearly made by the SC in the *Vodafone International Holdings BV v. Union of India* case.[65] It has further been identified that subsidiaries have a great deal of autonomy in the country concerned except where subsidiaries are created or used as a sham, which can be evaluated by lifting the corporate veil.[66] It also gave an instance of one-

[59] Babu Eedi D, 'Doctrine of Attribution in Corporate Criminal Liability' (*Lakshmikumaran & Sridharan*, 17 Sept 2013) https://www.lakshmisri.com/insights/articles/doctrine-of-attribution-in-corporate-criminal-liability/ accessed June 9, 2024.
[60] Bridas S.A.P.I.C. v Government of Turkmenistan 447 F.3d 411 (5th Cir. 2006) (US).
[61] Cheran Properties (n 19).
[62] Cox & Kings (n 3).
[63] Cathy S Krendt & James R Krendl, 'Piercing the Corporate Veil: Focusing the Inquiry' (1978) 55 DLJ 1.
[64] Cox & Kings (n 3).
[65] Vodafone International Holdings BV v Union of India (2012) 6 SCC 613.
[66] ibid.

man companies where the man holds 99% of shares and the wife holds 1%; in such cases, the company is considered the man's alter ego.[67] This addresses the family-run enterprises concern raised by Justice Surya Kant in *Cox & Kings*.[68] Furthermore, the US SC reiterated the general corporate law principle that a parent company was not liable in general cases for the acts of its subsidiaries in *United States v. Bestfoods*.[69] The concerns of malpractice, as discussed, are already taken care of by lifting the corporate veil. Therefore, this creates a paradox, which is the utter disregard for separate legal entities, and the standard industry practice of creating subsidiaries to limit liability by compelling non-signatories to arbitrate, despite the on-paper view taken in the *Cox & Kings* decision, which calls for upholding basic contract law principles, including separate legal identities.

This decision also highlights the manner in which the GOC doctrine respects different legal identities, that is, by allowing signatories and non-signatories to arbitrate jointly on the basis of the mutual intent of parties to an agreement. However, as previously highlighted, the application of this doctrine becomes erroneous in the Indian context as a paradox with regard to proper analysis of mutual intent as a determinant of the arbitration agreement's ambit. This paradox not only creates legal uncertainty for enterprises with subsidiaries as predicting which action of their subsidiaries will drag them into arbitration. Furthermore, this also disregards the choice that one might have to litigate over arbitrate as this choice is usually determined within the contractual terms itself. The imposition of an arbitration agreement upon a non-signatory by virtue of the GOC doctrine overrides this very choice.

VI. INDIA'S ECONOMIC ASPIRATIONS: RECONSIDERING THE GROUP OF COMPANIES DOCTRINE

India strives to attract foreign direct investment ('**FDI**') by raising foreign equity caps for insurance and defence and has also jumped up 14 places to be 63rd on the World Bank's Doing Business Study 2020. Moreover, India has also undertaken simplification of multiple taxes into a unified Goods and Service Tax.[70] It has further

[67] ibid.
[68] Cox & Kings (n 3).
[69] United States v Bestfoods 524 U.S. 51 (1998).
[70] Invest India, 'Business-Friendly Reforms: India's Path to Prosperity' (*Invest India,* 16 March 2024) <https://www.investindia.gov.in/team-india-blogs/business-friendly-reforms-indias-path-prosperity> accessed 10 June 2024.

streamlined the business registration process by introducing the SPICe form, including simplified registration for Employee State Insurance Corporation ('**ESIC**') and Employee Provident Fund Organisation ('**EPFO**').[71] Digitalisation is also underway by way of online interfaces, decriminalisation of minor defaults, and the use of a single PAN for all regulatory clearances.[72] Furthermore, India also aspires to self-reliance, as highlighted in the government's Atmanirbhar Bharat Campaign, which ultimately requires ease of doing business on Indian soil.[73]

Several cases and instances can be observed wherein the application and interpretation of the GOC doctrine in its present form in India is likely to dampen economic prospects. Often, the courts have relied upon vague considerations and realities to bind non-signatories such as a single economic group, common email IDs, centralised controls, offices, etc.[74] Furthermore, oversimplification and overuse of this doctrine have also led to HCs indulging in inadequate analysis of the parties' mutual intent before applying this doctrine.[75] Such instances lead to legal unpredictability for companies with direct economic consequences of the same. This can further lead to hesitation amongst multinationals as well with regard to joint ventures with Indian companies. Corporate structuring and financial transactions can also be impacted if subjected to unreasonable scrutiny, as discussed previously. Thus, it can be said that the GOC doctrine in its present form is antithetical to India's aspirations. The SC in *Cox & Kings* considered the economic realities and convenience as stronger ideas backing the doctrine than the law by itself.[76] However, it is imperative that the reality of India's economic aspirations and global best practices are also taken into account. Perhaps the doctrine requires some further evolution to suit Indian economic interests.

VII. STRIKING THE BALANCE: THE PATH BETWEEN OUTRIGHT REJECTION & ERRONEOUS APPLICATION

[71] ibid.
[72] ibid.
[73] Press Information Bureau, Ministry of Commerce & Industry, Government of India, 'Collaboration with Foreign Companies under Atmanirbhar Bharat' (*Press Information Bureau* Ministry of Commerce & Industry, Government of India, 8 Dec 2021) https://pib.gov.in/Pressreleaseshare.aspx?PRID=1779401 accessed 8 Dec 2021
[74] SEI Adhavan Power Private Ltd v Jinneng Clean Energy Tech Ltd (2018) SCC OnLine Mad 13299.
[75] *Magic Eye* (n 56).
[76] Cox & Kings (n 3).

Different jurisdictions across the globe have taken different stances on the applicability of the doctrine. For reasons previously discussed, the doctrine is relevant to the Indian context if it evolves to suit contemporary requirements. And while the United Kingdom has completely rejected the application of this doctrine, the United States has taken a more balanced approach.[77]

While it allows a non-signatory to invoke an arbitration clause only in accordance with the standard contractual agency.[78] It binds the non-signatory 'agent' when it is involved in any wrongdoing with the contract itself.[79] It allows the binding of signatories by reference; however, it is subject to the establishment of a two-pronged test. Firstly, the agreement requires such terms which explicitly allow the binding of non-signatories.[80] Secondly, the terms of the arbitration clause also need to be broad enough to encompass the dispute at hand.[81] When two parties negotiate an agreement, including an arbitration clause, both parties can have absolute clarity on the ambit of the arbitration agreement. In cases of high-risk transactions, parties can choose to negotiate the exclusion or inclusion of non-signatories, like subsidiaries or parents, if the situation arises. To illustrate the same in the context of a parent-subsidiary relation, a newly established independent subsidiary of a large international conglomerate in a certain country that enters into a contract with a local company of the specific country can have the inclusion of non-signatories, such as the parent company, within the scope of an arbitration agreement during negotiation. Such terms can be typically agreed upon in high-risk collaborations, ensuring that disputes, like those involving financial liability, fall under the arbitration agreement's ambit. This is a more balanced approach to the GOC doctrine as it does not do away with the doctrine in practicality by allowing the impleading of non-signatories while continuing to offer a company some certainty and control to limit its liability. A company can work with its subsidiary to prepare such terms that do not allow binding non-signatories or selectively keep certain types of disputes out of its purview to limit liability. This ensures that the mere involvement of the non-signatory in the negotiations leading up to the drafting and finalisation of the underlying contract does not make it binding on

[77] Peterson Farms Inc v C & M Farming Ltd [2004] APP LR 02/04.
[78] Paracor Finance Inc v General Electric Capital Corp 96 F.3d 1151 (9th Cir. 1996).
[79] ibid.
[80] ibid.
[81] ibid.

the non-signatory. Companies can take this opportunity to negotiate the contracts entered into by their signatories wherever they require limiting liability, such as high-risk ventures, as previously illustrated. This also ensures greater autonomy to subsidiaries, almost making their existence at par with an independent entity. Such an approach further resolves the problem of erroneous application. A non-signatory company can assist with the performance of the very contract where it has negotiated such terms that do not allow it to be binding on a non-signatory. However, this approach also holds the non-signatory liable in case of wrongdoing with the contract.[82] Such an approach upholds the standard industry practice, allowing companies to limit liability by creating subsidiaries while also upholding equity considerations and good faith in cases of wrongdoings. In more grave cases pertaining to fraud and malpractice, India can always resort to uplifting the corporate veil and determining the alter ego. This practice has been followed by India[83] and US[84] alike. While Motorola was prosecuted under the alter ego doctrine, where the corporate veil was pierced, and it was held liable for cheating and conspiracy,[85] The government of Turkmenistan was held liable for wrongful termination of an agreement despite not being a direct signatory of the concerned joint venture agreement.[86]

Thus, India should also adopt a similar approach in furtherance of the contract law principle of privity and the principle of the arbitration clause being separable. This will go a long way in aligning with India's economic goals and realities and create a more conducive atmosphere for ease of business. Adopting such a nuanced approach ensures that the GOC doctrine is upheld, and it does not hinder the business environment needed to fulfil India’s economic aspirations by placing undue liabilities on companies for the actions of their subsidiaries. It also helps avoid being at a crossroads with basic corporate and contract law principles and ensures greater certainty in India’s business and legal atmosphere.

[82] ibid.
[83] Iridium India Telecom (n 57).
[84] *Bridas* (n 60).
[85] Iridium India Telecom (n 57).
[86] *Bridas* (n 60).

ASSESSING THE ARBITRABILITY OF ANTI-TRUST DISPUTES

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The rise of arbitration in dispute resolution has sparked debate on its suitability for antitrust cases. While arbitration offers confidentiality and efficiency, concerns about regulatory oversight challenge its role in competition law. This paper examines Indian judicial precedents and statutory provisions to assess arbitration's feasibility in antitrust disputes. The Vidya Drolia test (2021) indicates some private claims may be arbitrable, but the Competition Act, 2002 grants exclusive jurisdiction to the CCI and NCLT, barring arbitration in public interest cases. Comparing U.S. and European perspectives, the U.S. Supreme Court in Mitsubishi Motors (1985) introduced judicial review of arbitral awards in antitrust cases. The European Court of Justice in Eco Swiss (1999) acknowledged arbitration's role while ensuring legal compliance. As India embraces ADR, this paper advocates for reforms allowing arbitration in private antitrust claims with CCI oversight. A balanced approach can improve dispute resolution while maintaining regulatory integrity, aligning India with global practices.

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I. INTRODUCTION

In today's world, where global trade and commercial conflicts are constantly escalating, the utilisation of alternate dispute resolution ('**ADR**') has become a

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widespread mechanism,[1] wherein arbitration has taken the centre stage for dispute resolution.[2] Majority of countries permit settlement of disputes via arbitration,[3] with the awards of the arbitral tribunal being binding in nature.[4] Arbitration has become an important method of dispute resolution instead of court proceedings,[5] with one of the foremost merits for opting for arbitration being the veil of confidentiality and private nature that comes with it.[6] This veil of secrecy and the intricate private nature of the resolution process invoke the age-old debate, i.e., whether these mechanisms can be utilised to resolve disputes intricate of public law nuances.[7] The arbitrability of antitrust disputes therefore becomes fundamental to examine in a situation where the opposing parties possess an already existing contractual relationship, and the said contract contains a mandate to refer any potential disputes to arbitration.[8] Therefore, the pertinent issue that remains to be examined is whether an arbitral tribunal can preside over competition law disputes. Thus, this paper seeks to shed light on this critical issue. This article first seeks to address the issue as to whether competition law disputes are arbitrable in the Indian context. In doing so, this discourse will evaluate the notion of arbitrability and the various tests pertaining to it. Further, the paper highlights the position of comparative jurisdictions of American and European Union ('**EU**') courts on the notion of arbitration in anti-trust disputes, and how the concept has evolved over time in their jurisdictions. The paper finally enumerates the potential advantages for allowing arbitration of competition law disputes and concludes that the legislature must undertake cohesive amendments to ensure arbitrability of competition law disputes.

II. ARBITRABILITY OF COMPETITION LAW DISPUTES IN INDIA

[1] Marna Lourens, 'The Issue of Arbitrability in the Context of International Commercial Arbitration' (Part I) (1999) 11 SAMLJ 363, 363.
[2] Francisco Orrego Vicuiia, 'Arbitration in a new International Alternative Dispute Resolution System' (2001) 18 ICSID 2.
[3] Alexandra Theobald, 'Mandatory Antitrust Law and Multiparty International Arbitration' (2016) 37 UPJL 1059.
[4] Phillippe Fouchard et al, Fouchard Gaillard Goldman on International Commercial Arbitration (1st edn, Kluwer Law International, 1999), 9-10.
[5] Steven C. Nelson, 'Alternatives to litigation of international disputes' (1989) IC, 187.
[6] Andrew Tweeddale, 'Confidentiality in Arbitration and the Public Interest Exception' (2005), 21 AI, 59.
[7] Robert B. von Mehren, 'From Vynior's Case to Mitsubishi: The Future of Arbitration and Public Law' (1986), 12 BJIL, 583.
[8] Tanya Choudhary, 'Arbitrability of Competition Law Disputes in India - Where are we now and where do we go from here?' (2016) 4 IJAL, 69.

The primary consideration in arbitrability of competition law disputes is whether the same can be adjudicated by private arbitral tribunals or is it reserved for the public fora. To understand this, it is pertinent to first examine the concept of arbitrability. Universally, there does not exist any cogent definition of as to what the 'arbitrability' of any conflict.[9] Even the Arbitration and Conciliation Act, 1996 ('**A&C Act**') does not provide a cohesive definition of the concept of arbitrability, the act merely provides that parties are free to resolve their dispute via the mechanism of arbitration in the presence of a valid agreement.[10] Thus, a perusal of judicial precedents becomes pertinent. Courts have understood arbitrability as the capacity of a dispute to form the subject-matter of a proceeding before a tribunal.[11] In this regard, the apex court in the landmark case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited, 2011* held that rights *in rem* are only amenable to judicial adjudication whilst rights *in personam* are amenable to arbitration proceedings as well.[12] This notion was further elaborated in the judgement of *Kingfisher Airlines v. Prithvi Malhotra Instructor, 2013*,[13] wherein the court categorically held that *in personam* rights shall also not come under the purview of arbitration tribunals if they are kept for the public fora due to a concern of public policy. Some instances of the disputes reserved for the public for are criminal offences,[14] labour matters,[15] testamentary disputes,[16] mortgage issues,[17] specific matters of tenancy under specific legislations,[18] admiralty conflicts,[19] and insolvency matters.[20] The test whether the subject-matter of a dispute is arbitrable in nature so established in *Booz Allen* was recently settled in the seminal judgment of *Vidya Drolia v. Durga Trading Corporation, 2021* ('***Vidya Drolia***').[21] In the said judgment a three-judge bench of the apex court laid down four-fold test to determine which disputes are non-arbitrable, when an arbitration agreement is present : *firstly*, disputes involving actions in rem, not subordinate rights *in personam*,

[9] U.N. Comm'n on Int'll Trade L., Rep. on its 32d Sess., Supp. No. 17 (June 1999) UN Doc A/54/17.
[10] *Booz Allen and Hamilton Inc v SBI Home Finance Limited* (2011) 5 SCC 532.
[11] Abhisar Vidyarthi, 'Arbitration, Competition Law and Second Look Doctrine: An Indian Perspective' (2019) 6 RFMLR, 53.
[12] *Booz Allen* (n 10).
[13] *Kingfisher Airlines v Prithvi Malhotra Instructor* (2013) (7) Bom. C.R. 738.
[14] *State of Orissa v Ujjal Kumar Burdhan* (2012) 4 SCC 547.
[15] *Natraj Studios (P) Ltd v Navrang Studios* (1981) 1 SCC 523.
[16] *Chiranjilal Shrilal Goenka v Jasjit Singh* (1993) 2 SCC 507.
[17] *Booz Allen* (n 10).
[18] *Fingertips Solutions (P) Ltd v. Dhanashree Electronics Ltd* 2011 SCC OnLine Cal 4974.
[19] *Osprey Underwriting Agencies Ltd v ONGC Ltd* 1998 SCC OnLine Bom 88.
[20] *Haryana Telecom Ltd v Sterlite Industries (India) Ltd* (1999) 5 SCC 688.
[21] *Vidya Drolia v Durga Trading Corporation* (2021) 2 SCC 1.

secondly, disputes affecting third party rights requiring centralised adjudication, *thirdly* disputes relating to inalienable sovereign and public interest functions, and *fourthly,* subject-matter being expressly or by implication non-arbitrable as per mandatory statutes.[22]

Herein, the Apex Court reaffirmed that subordinate rights *in personam* which arise from acts *in rem* are also under the purview of arbitration. The court overruled *Himangni Enterprises v Kamaljeet Singh Ahluwalia*,[23] by holding that landlord-tenant disputes, under the Transfer of Property Act,[24] are amenable to arbitration in India.[25] The court also gave regard to the doctrine of *kompetenz-kompetenz*, i.e., the arbitral tribunal is itself equipped to primarily adjudicate on the issues of non-arbitrability and by extension their jurisdiction.[26] Thus, to evaluate the arbitrability of competition law disputes, it is fundamental to examine three questions: *first*, whether the domain of competition law disputes only considers *in rem* disputes or includes *in personam* conflicts as well and whether this adjudication has an *erga omnes* impact; *second*, whether the cause of action fundamentally deals with a sovereign function of the state; *third*, whether competition law disputes *ipso facto* are either expressly or impliedly barred for arbitration as per the Act by any specific legislation.

In relation to the first question, a perusal of the Competition Act, 2002[27] provides that competition law disputes consider the element of both public and private disputes. Under Section 19[28] of the act, parties which are empowered to file a claim before the Competition Commission of India (‘**Commission**’) including ‘any person, consumer or association to file information’. Notably, due to usage of the phrase ‘any person’, the legislative intent is conducive to the notion that personal injury is not a *sine qua non* to bring a case before the Commission. Such a wide power is provided in lieu of the nature of the dispute, which is of extreme public importance because competition

[22] ibid.
[23] *Himangni Enterprises v Kamaljeet Singh Ahluwalia* (2017) 10 SCC 706.
[24] Transfer of Property Act 1882.
[25] Abhisar Vidyarthi, ‘Applying Vidya Drolia’s “Four-fold Arbitrability Test” To Anti-trust Disputes in India’ (*Kluwer Arbitration Blog*, Sept 26, 2023, 9:50 A.M), <https://arbitrationblog.kluwerarbitration.com/2021/02/10/applying-vidya-drolias-four-fold-arbitrability-test-to-antitrust-disputes-in-india/>.
[26] Ranjani Ramesh and Atif, ‘Vidya Drolia v. Durga Trading Corporation | An Explainer’ (Mondaq, Sept 26, 2023, 10:50 A.M) <https://www.mondaq.com/india/arbitration--dispute-resolution/1233904/vidya-drolia-v-durga-trading-corporation-%7C-an-explainer>.
[27] Competition Act 2002, s 19.
[28] ibid.

law disputes not only relate to the adversely affected party but also exerts a negative impact on the market as a whole.[29] However, Section 53N[30] of the Act categorically enables third parties affected by the anti-competitive activities to approach the competent authorities and claim compensation for the adverse impact on the party. Herein, the parties only procure monetary compensation or civil claims which is wholly between the parties and involves no penal consequence.[31] This clearly highlights that such a dispute is indicative of an inter-party dispute only with no bearing on public interest, thereby making these disputes *in personam* in nature. Whilst there exists no Indian jurisprudence on splitting of claims of a private monetary claim from the public element suit in antitrust matters, reference must be given to the Canadian Supreme Court's judgement in the case of *Murphy v. Amway, 2015,*[32] wherein the court held that a claim for private monetary damages by an impacted party under Section 36[33] of the concerned Canadian statute can be amenable to arbitration whilst the in rem disputes can be adjudicated by the competent tribunal, thereby providing that a specific legislation can include the scope of both *in rem* and *in personam* rights. This decision is paramount for our consideration as the Commission has time and again referred to comparative jurisdictions on adjudicating over novel issues. Transposing the same to India, whilst the *in-rem* nature of competition law disputes is reflective via the legislative drafting of Section 19, on the other hand Section 53N does leave adequate scope for enforcement of subsidiary *in-personam* rights arising out of in rem disputes. Thus, the first test of arbitrability stands fulfilled for disputes originating out of Section 53N claims.

With regard to the second evaluation, it is prima facie evident that private competition law disputes comprising between two private individuals does not fall under the ambit of sovereign function of the state[34]. On the contrary, the Act itself makes an exception for the sovereign and inalienable functions of the state from its purview of the meaning of an enterprise as mentioned in Section 2(h).[35] Herein the Central

[29] n 15.
[30] Competition Act 2002, s 53N.
[31] *Murphy v Amway et al* (2013) 443 N.R. 356 (FCA).
[32] ibid.
[33] Competition Act 1986, s 36 (Canada).
[34] Kanishka Bhukya, 'Harmonizing Arbitration and Competition Law Disputes: Pursuing Consistency In Adjudication' (*Aria Blog*, 26 Sept 2023, 9:30 A.M) <https://aria.law.columbia.edu/harmonizing-arbitration-and-competition-law-disputes/?cn-reloaded=1>.
[35] Competition Act 2002, s 2(h).

Government is even empowered to exempt private enterprises from the purview of Competition Act, 2002 if they are engaged in that activity for public interest.[36] Thus, the second requirement of arbitrability, i.e. the dispute not being an unalienable or sovereign function of the state, also stands fulfilled. On the consideration of the third evaluation, i.e., whether the jurisdiction of arbitral tribunal are excluded and such disputes reserved for public fora in public interest, Section 61[37] of the Competition Act, 2002 provides the Commission and the National Company Law Tribunal ('**NCLT**') with exclusive jurisdiction to hear such disputes and identifies the apex court as the final appellate authority.[38] Whilst one may argue that by virtue of Section 5 of the A&C Act which provides for the jurisdiction of a court in the existence of an arbitration agreement, [39] the effect of Section 61 of the Competition Act, 2002 which confers the sole jurisdiction of competition law matters to the Commission is nullified. However, such an understanding would be incongruent,[40] because the section must be read in conjunction with Section 2(3)[41] of the Arbitration Act when deciding the competence of arbitral tribunal to adjudicate a dispute, which clearly indicates that an arbitration agreement does not exclude the jurisdiction of the Commission. Therefore, no valid arguments relating to Section 5 of the A&C Act can be raised against the merits of Section 61 of the Competition Act, 2002.[42] Further, on this notion, the Delhi High Court ('**HC**') in the seminal judgment of *Union of India v. Competition Commission of India*,[43] noted that the presence of an arbitration agreement does not preclude the jurisdiction of the Commission. The court highlighted that the scope of proceedings, and the focus of investigation before an arbitral tribunal is substantially different from that of the Commission, and that the tribunal might not be vested with adequate powers to assess such an issue of abuse of market dominance.[44] Additionally, former CJ Chandrachud's dictum in *A. Ayyasamy v. A. Paramasivam and Ors.*,[45] categorically provides that in instances where the jurisdiction of the civil court is also barred by a special legislation and the jurisdiction

[36] Competition Act 2002, s 54.
[37] Competition Act 2002, s 61.
[38] Competition Act 2002, s 53T.
[39] Arbitration and Conciliation Act 1996, s 5.
[40] Kanishka Bhukya (n 34).
[41] Arbitration and Conciliation Act 1996, s 2 cl 3.
[42] *Central Warehousing Corporation v Frontpint Automotive Pvt Ltd* 2009 SCC OnLine Bom 2023.
[43] *Union of India v Competition Commission of India* (2012) 115 AIC 454 (Del).
[44] ibid.
[45] *A. Ayyasamy v A. Paramasivam and Others* (2016) 10 SCC 386.

of those disputes are given to a specific court or tribunal for a public policy perspective, such a dispute would not be amenable to the arbitration proceedings. In this case, Section 61 of the Competition Act, 2002 categorically ousts the jurisdiction of civil courts thereby making the jurisdiction of arbitral tribunal incongruent. Another argument that vouches that the jurisdiction of competition law disputes is reserved for the Commission is the nature of inquiry required in a competition law dispute. The Commission is vested with wide investigative powers to assess market dominance and adverse impact by procuring evidence, witnesses, etc. whilst the investigative powers of an Arbitral Tribunal are rather restricted in comparison with the Commission. The legislative intent of providing the Commission such wide powers can be a coherent indicator of exclusive jurisdiction of the Commission in public interest. This argument is also fostered by the notion that inquiries conducted are in rem in nature and not *in personam* like that of a tribunal as highlighted in the case of *Samir Aggarwal v. Commission of India and Ors.*[46] Further this was reiterated by an order of Commission against Tata Motors[47] passed on 4th May, 2021 wherein the Commission noted that it undertakes inquisitorial functions in public function rather than merely functioning as an adjudicatory body.

Thus, it can be noted that while competition law does indeed provide scope for both public and private disputes. Further, these disputes do not arise out of unalienable sovereign functions of the state. However, the jurisdiction of all these disputes currently in the landscape of Competition Act, 2002 is categorically restricted for the Commission and the jurisdiction of any such Arbitral Tribunal is excluded in public interest. Therefore, in accordance with law today, competition law disputes do not satisfy the test of *Vidya Drolia* and *Booz Allen*, failing the test of arbitrability for competition law disputes. After evaluating the current landscape of arbitrability of anti-trust disputes in India, it is fundamental to examine the same from more mature anti-trust disputes, of American and European Jurisprudence.

III. POSITION OF AMERICAN JURISPRUDENCE

Originally in the American landscape it has been held that antitrust claims cannot be arbitrated as they are of extreme importance for public interest and court would be a

[46] *Samir Agrawal v CCI* (2021) 3 SCC 136 2020.
[47] *Neha Gupta v Tata Motors Ltd* 2021 SCC OnLine CCI 25.

more suitable authority rather than an arbitrator to deal and decide the matter.[48] Further, it has also been asserted that the legal knowledge requirement for competition law matters were very sophisticated, and arbitrators are not accustomed to that.[49] The case of *AMERICAN SAFETY EQUITY CORPORATION V. J.P. MCGUIRE* was one of the initial case laws pertaining to arbitrability of competition law matters.[50] The federal court declared that a trademark license agreement dispute cannot be arbitrated as the interest of general public is in jeopardy. Further, it also stated that the third-party rights can be affected as arbitrators do not have resources like courts to gather evidence against antitrust disputes.[51] As per the American safety doctrine, the issues of public interest and complexity of antitrust laws made arbitration in antitrust law matters unlikely. The case of *Applied Digital Technology Inc. v. Continental Casualty Co., 1977* held that antitrust law issues are not arbitrable in nature.[52] Further, *Cobb v. Lewis, 1984* held that antitrust matters are generally considered to be non-arbitrable except when arbitration agreement is reached after the dispute has initiated.[53]

The historic case of *Mitsubishi Motors v. Soler, 1985*[54] changed the global position on arbitrability of competition law matters as it led to recognition of arbitration in antitrust disputes with the assumption that both the parties' consent to arbitration proceedings.[55] In this case, Mitsubishi entered into an agreement with Soler to sell automobiles. When the respondent did not reach the agreed sales volume, the contract was breached. Mitsubishi alleged that the petitioner engaged in actions of market division which goes against the Sherman Antitrust Act, 1890. This matter contended to competition law, and it was argued that arbitration is an unsuitable avenue. Nonetheless, the US Supreme Court ('**SC**') held that the agreement between the two parties was sufficiently broad enough to consist of all statutory provisions, including competition law matters. Further, the Second Look Doctrine was established wherein

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[48] Andrew L. Foster and Peter E. Greene, *EU and US Antitrust Arbitration: A Handbook for Practitioners* (1st edn, Kluwer Law International, 2011) 1297.
[49] Alexandra Theobald, 'Mandatory Antitrust Law and Multiparty International Arbitration' (2016) 37 UPJIL 1059.
[50] Alexis Mourre, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, (1st edn, Kluwer Law International 2011) 5.
[51] ibid.
[52] *Applied Digital Technology Inc v Continental Casualty Co* (1977) 576 F 2d 116.
[53] *Cobb v Lewis* (1984) 753 F.2d 1080.
[54] *Mitsubishi Motors v Soler* (1985) 473 U.S. 614.
[55] Richard C Levin, "On Arbitration of Competition/Antitrust Disputes: A Tribute to Mitsubishi" (2018) 73 DRJ 39.

national courts can assess the arbitrator's decision to ensure that the award was in compliance with antitrust laws.[56] This provided courts the right to review the decision and ensure that it does not go against the public policy of the country. Through this judgment the court highlighted that the parties have the freedom to resolve the disputes in their contracts however they wish to.[57] The principle of the Mitsubishi corporation has been affirmed in various of judgments in the US.[58] The court's reasoning for allowing arbitration was that the parties are not sacrificing their rights, rather they are just agreeing to resolution in arbitration method rather than getting courtroom proceeding. It gets them the advantage of a faster resolution and a more relaxed setting. Further, as for the complex issues in antitrust laws argument, the arbitrators appointed should be experts on the matter. After the establishment of the landmark judgment of the US SC in the *Mitsubishi* case, many courts started ruling in the favour of arbitrability of antitrust matters.[59] Courts maintained this trajectory in cases *GKG Caribe Inc. v. Nokia Mobira, Inc., 1989*,[60] *Gemco Latino-America, Inc. v. Seiko Time Corp*;[61] the American Safety doctrine was declined, and arbitration was endorsed in domestic antitrust disputes. Furthermore, the worldwide position on arbitration in antitrust matters also shifted and courts became more open to introducing arbitration in competition law matters.

IV. POSITION OF EUROPEAN JURISPRUDENCE

Whether or not competition law disputes are amenable to arbitration has been an age-old debate in European jurisprudence.[62] *Eco Swiss China Time v Benetton Int'l* (‘***Eco Swiss***’)[63] was a monumental case in the EU, being the first one in EU to recognise arbitrability of antitrust matters. Originally, the domain of dispute resolution for competition law disputes were restricted for courts because of public policy concerns,

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[56] Abhisar Vidyarthi, “Arbitration, Competition Law and Second Look Doctrine: An Indian Perspective” (2019) 6 RFMLR 53.
[57] Richard C Levin, “On Arbitration of Competition/Antitrust Disputes: A Tribute to Mitsubishi” (2018) 73 DRJ 39.
[58] *Kotam Elecs Inc v JBL Consumer Prod. Inc* (1996) 93 F.3d 724; *Seacoast Motors of Salisbury Inc v Daimler-Chrysler Motors Corp* (2001) 271 F.3d 6; *JLM Industries, Inc et al v Stolt-Nielsen SA et al* (2004) US App. LEXIS 22253.
[59] *Nghiem v NEC Electronics Inc* (1994) 25 F.3d 1437; *Syscomm Int'l Corp v Synoptics Communications Inc* (1994) 856 F. Supp. 135; *Western International Media Corporation v Johnson* (1991) 754 F. Supp. 871.
[60] *GKG Caribe Inc v Nokia Mobira Inc* (1989) 725 F. Supp. 109.
[61] *Gemco Latinoamerica Inc v Seiko Time Corporation* (1985) 671 F. Supp. 972.
[62] Assimakis Komninos, *Arbitration and EU Competition Law* (SSRN, 2009).
[63] *Eco Swiss China Time Ltd v Benetton International NV* C-126/97 [1999] E.C.R. I-3055.

not because of inadequate powers of a tribunal to undertake the requisite investigation, private nature of the proceedings, complexities in a competition law proceeding or that the process of ADR would be exploited for corporations for illegally settling such disputes.[64] Furthermore, one of the biggest impediments was the lack of right to appeal on merits from an arbitral award.[65] Lastly, the EU originally held a concentration of jurisdiction of matters relating to competition law disputes, i.e., only EU was allowed to administer these disputes with no domestic court having jurisdiction over them.[66] However after the proliferation of the Mitsubishi Motors Corporation case, the position in the EU undertook a paradigm shift post the landmark judgment of *Eco Swiss*.[67] Herein, the European Court of Justice for the first time held that competition law disputes can be amenable to arbitration proceedings because Regulation 1/2003[68] decentralised the monopoly over these disputes and thereby the arbitration tribunals also procured the necessary jurisdiction. Since then, it has become a cornerstone principle that competition law disputes are amenable to arbitration proceedings as again affirmed by *E.T. Plus S.A. v. Welter*.[69]

V. SHOULD WE MAKE A CASE FOR CHANGE?

The fundamental deliberation whether anti-trust disputes should be amenable to arbitration is rooted on the need to hold such proceedings in a public forum before a conventional court due to the adverse impact on the market itself in the quest for public interest. In our jurisdiction, the standard jurisprudence of excluding competition law disputes from the purview of arbitration rests on this perspective only. Although, as highlighted earlier via the examples of comparative jurisdictions such an argument is an incongruent consideration in the current world[70] and with the prominence of ADR mechanisms the public policy argument does not seem strong now.[71] To address the issue of private resolution of disputes in contravention with the

[64] ibid.
[65] Tanya Choudhary, 'Arbitrability of Competition Law Disputes in India - Where are we now and where do we go from here?' (2016) 4 IJAL 69.
[66] Reg. No. 17 of 6 February 1962 - First Regulation Implementing Articles 85 and 86 of the Treaty, JO [1962] L 13/204.
[67] *Eco Swiss China Time Ltd v Benetton International NV* C-126/97 [1999] E.C.R. I-3055.
[68] Council Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.
[69] *ET Plus SA v Welter* [2005] 1 Lloyd's Rep 251.
[70] *GKG Caribe Inc v Nokia-Mobira Inc* (1989) 725 F Supp 109.
[71] Flere Pavle, "Impact on EC Competition Law on Arbitration Proceedings" (2016) 3 SLR 155.

public policy, the courts can very well adopt the second look doctrine established in the *Mitsubishi* case, where even though the US Supreme Court ruled in the favour of the arbitrator to apply anti-trust laws but also vested the courts a power to examine this disputes as a second look at the enforcement stage.[72] Such a position has also been fostered in EU's anti-trust proceedings as well.[73] Further, the doubts over investigative restrictions of an arbitral tribunal can be mitigated via the operation of Section 27[74] of the A&C Act which empowers the arbitral tribunal to procure the assistance of a court in procuring evidence. Based on this, the Commission can also function as the *parens patriae* and the *amicus curiae* to these proceedings as the European commission does so in their arbitration proceedings to mitigate the conundrum of public policy.[75] However, cogent caution must be undertaken herein with respect to the heavy cost and time required in adopting this procedure which may exert more pressure on an already burden justice system of the courts. Additionally there are strong arguments relating to efficiency and speedy disposal of private disputes with reducing the burden on Commission through the means of arbitration.[76] The curtailment of arbitration from these proceedings the State's policy to promote arbitration as a cogent dispute resolution mechanism in light of the recent advancements in the field via the proliferation of online dispute resolution[77] and the establishment of the All India Arbitration Bar Association.[78] Further, this non-inclusion also hampers India's duty to respect international arbitral awards of different jurisdictions which may provide the scope for arbitration in anti-trust disputes, making admissibility of these awards impossible in the Indian landscape.[79] The way to resolve the current lacunae is via an amendment to the current law relating to

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[72] Radieati di Brozolo, 'Antitrust: A Paradigm of the Relations Between Mandatory Rules and Arbitration — A Fresh Look at the "Second Look" (2004) 1 IALR, 23.
[73] Abhisar Vidyarthi, "Arbitration, Competition Law and Second Look Doctrine: An Indian Perspective" (2019) 6 RFMLR 53.
[74] Assimakis Komninos, *Arbitration and EU Competition Law* (SSRN, 2009).
[75] Kanishka Bhukya (n 34).
[76] Carl W. Hittinger and Terry Smith, 'Arbitrating Antitrust: Are Things Getting More Complicated?' (*ALM* 28 Sept 2023, 9:30 A.M) < https://www.law.com/thelegalintelligencer/almID/1202541387095/>.
[77] Niti Ayog, 'Designing the Future of Dispute Resolution: The ODR Policy Plan for India' (*Niti Ayog*, 29 Sept 2023, 9:30 A.M) <https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf>.
[78] R. Venkataramani, The Attorney General for India Announces the creation of All India Arbitration Bar, India International Arbitration Centre (25 Sept 2023).
[79] Niti Ayog, 'Designing the Future of Dispute Resolution: The ODR Policy Plan for India' (*Niti Ayog*, 29 Sept 2023, 9:30 A.M) <https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf>.

competition law and removing the implied restrictions on arbitration proceedings in the interest of decentralisation as envisaged in the EU framework in 2003. This amendment would be reflected by first amending Section 61 of the Competition Act with carving out an exception for undertaking arbitration in private competition law disputes. This change has still not been reflected due to an inherent displeasure of the legislature of considering Arbitration as a cogent mechanism to settle private disputes of public nature, albeit as already showcased above that both of these frontiers can cogently be differentiated, providing the avenue for arbitration for private disputes *per se*. With the omission of this implied bar on the jurisdiction of arbitral tribunal, these disputes would also fulfil the test of arbitrability as envisaged in *Vidya Drolia* and *Booz Allen*. Thus, it can be deduced that the vehement need of inclusion of arbitration in competition law proceedings, and the same would also pander to furtherance of the interests originally envisaged in the Competition Act, 2002 and A&C Act.

VI. CONCLUSION

In conclusion, in this paper we have envisaged to highlight the current landscape of arbitrability of anti-trust disputes in India. To study the same, this paper first highlights the concept of arbitrability of a dispute first established in the landmark judgement of *Booz Allen* and then expanded in the recent 'four-fold' test of *Vidya Drolia*. Whilst in rem disputes of competition law matters should be reserved for the adjudication before the Commission, however subordinate *in personam* rights that arise via the virtue of Section 53N of the Competition Act, i.e., private complaints for compensation can be amenable to adjudication before an arbitral tribunal. However, the current legal framework of arbitration in India as established in *Vidya Drolia* does not permit arbitration in competition law disputes, this discourse has highlighted that the numerous benefits of permitting the same, in the form of efficiency, expertise, reduced burden on the Commission, better cohesion with international standards and overall efficacy of dispute resolution, etc. For this, the paper argues that the legislature should undertake cohesive amendments to the Competition Act, 2002 and allow scope for inclusion of arbitration in private anti-trust disputes that may arise via Section 53N of the act. This discourse also rebuts various apprehension that the courts have maintained against allowing arbitration of anti-trust disputes. Drawing from the

recourse in more mature competition law jurisdictions of the United States and the EU, the courts can undertake the approach of a second look doctrine of the *Mitsubishi* case, or the Commission can also perform the dual role of *parens patriae* and *amicus curiae* in these arbitration proceedings to assist the tribunal is effectively adjudicating the disputes. Thus, this paper effectively endeavours to bridge a gap in the discourse between arbitration and competition law disputes and argues the arbitrability of competition law disputes must be efficaciously allowed in the interest of justice.

~ IN REMEMBRANCE ~

Ishaan, Kushagra, Reet and Ribhu– our dear friends, were taken away from us on a fateful morning in May last year. Mr. Ishaan Sood was a member of the Centre from 2022-23. Mr. Ribhu Sehgal was a member of the Centre from 2022-24.

A NOTE FROM THE CENTRE

I hold it true, whate'er befall;

I feel it when I sorrow most;

'Tis better to have loved and lost

Than never to have loved at all.

–Tennyson

Law, for all its virtues, serves as a vehicle for justice; yet no justice can be done to a life through mere words on a page. There can only be an attempt to make sense of a situation so absurd.

The time we spent working with Ishaan, drew a portrait of a man who was kind, gentle and fair. A vital member of the team, his passion for the law was matched only by his own kindness, and he carried the two together, with a grace that uplifted everyone around him. A symbol of strength and purpose, Ishaan's presence was a source of quiet resilience, and his encouragement propelled many forwards. To work alongside him was to witness excellence - not as an abstract ideal, but as a lived reality defined by integrity, empathy, and an unyielding commitment to growth.

Ribhu, a man of quiet reflection and engaging warmth; his remarkable intellect marked him as someone who understood what truly mattered and cared with unwavering depth. His wit was sharp, his standards were high, and his presence (equal parts exasperating and endearing) was undeniable. He liked to call himself an egoist, someone above the trivialities of human emotion. And yet, somehow, he was also the one staying up late helping the managing editor with emails, argue passionately (and unnecessarily) over Oxford commas, and grumbling about deadlines while trying to meet all of them. What he lacked in punctuality, he made up for in sheer charm, always

bringing infectious energy to offline competitions. He reminded us that true success lies not only in accomplishments, but rather, in the camaraderie we nurture. He has always carried an approachable spirit that turned our limited time together into moments of shared laughter. Ribhu continues to inspire us by balancing thought with compassion and focusing on what truly matters.

We hope our friends are resting in peace, and though they are no longer with us, the light they shared endures. Their memory is a source of strength, and their legacy continues to inspire us all.

A NOTE FROM ROHAN

On 19th May 2024, I tried to remember two of my friends. I came up with a message that I would put up for everyone at CADR, an institution to which both my friends belonged, a place where many besides me cherish them.

For some reason that wasn't apparent to me then, I never sent this message. Afterall, how can you remember something that you have not even begun to forget?

My private eulogy read thus:

> *"I cannot help but try to put words to this feeling that we cannot help but feel. Apart from being an irreparable loss, this tragedy is injustice. Four lives full of limitless potential cut short, like the later chapters from an amazing book torn off.*
>
> *I would like to spend a moment in remembrance of the two people who helped make the Centre and the college what it is for me - Ribhu and Ishaan. I am certain my sentiments will resonate, if not reverberate, within all of you.*
>
> *Ribhu was to me, since the day he joined us, a trove of the most inane yet exciting ideas that became some of the most fun things I've worked on here. Without my realising it, he quickly became my go-to guy to implement the inane ideas I had of my own. And just as quickly, and again without my realising it, he became a friend. I will cherish his warmth and tongue-in-cheek humour, for despite what he claimed, he wasn't an egoist. He was only a friend.*
>
> *To anyone who worked with Ishaan last year, his abundant charm and sincerity were even more striking than his understated ability to put you at*

ease. To anyone who has spent time with him outside the Centre, his ability to coax you into having a good time was even more striking than his proclivity to make things fun. I was fortunate enough to have been a part of both, and to have called him a friend. Having known them both, it is no wonder that they were the best of friends."

All these months later, my colleagues at CADR have allowed me to put my feelings and memories to paper again. This time, I find myself wanting to remember.

I remember Ribhu's love for cars and video games. His glee at beating you (read: me) in FIFA. His ability to get under your skin, and from there, to make his way to your heart.

I remember Ishaan's enviable patience, which reflected not only in his giving me countless razors when I kept forgetting to buy, but also in having the best poker face while raising the stakes. His quiet yet obvious discipline and talents. His ever-disarming demeanour.

I wish I didn't have to remember.

I will miss them both.


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