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IN THIS ISSUE .....

EDITOR'S NOTE

When mediation ethical norms are developed, cultural differences are often taken as a major criteria. The cultural differences and human behavioural pattern are quite astonishing. Even in a small geographical area, we have experienced wide cultural differences among the parties. In some areas successful parties in a family mediation process gives publicity for the process of mediation and its advantages, thereby becoming brand ambassadors for mediation. But in some areas they tend to keep it a secret. The IMI Ethical committee is creating mediators ethical standards. To create standards considering wide cultural shift would be a truly difficult task.

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ARBITRABILITY OF DISPUTES IN INDIA: STILL GRAPPLING IN THE DARK?

PANKHURI AGARWAL

'Arbitrability' is the capability of a dispute being adjudicated by an arbitral tribunal. The author examines the scope of arbitrability and the contractual limitations of arbitration, based on the philosophical and legal underpinnings of this concept as understood in India, with the aid of various judgments and current judicial trend. The author also analyse the feasibility of allowing matrimonial disputes to be arbitrated.

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INTRODUCTION

'Arbitrability' refers to the capability of a dispute (having regard to its nature) of being adjudicated by an arbitral tribunal (a private forum) even if the parties have agreed to refer it to arbitration.[1] Legal academia in India has given a short shift to the concept of arbitrability. This is true not just with respect to the philosophical and legal underpinnings of this idea but also with the consolidation of various judgments relating to the same. The present article is primarily divided into two parts – the first part will deal with the law governing arbitrability in India and the current judicial trend in that regard and also into factors which should be and should not be taken into consideration so as to determine the arbitrability of a dispute and the second part will analyse the feasibility of allowing matrimonial disputes relating to divorce, restitution of conjugal rights, judicial separation and child custody to be arbitrated.

JUDICIAL TREND ON ARBITRABILITY IN INDIA

The Arbitration and Conciliation Act, 1996 (*hereinafter*, 'the Act'), the legislation governing arbitration in India, does not specify any dispute as being non-arbitrable.[2] However, u/§ 34(2)(b)(i), it gives the Court the power to set aside a domestic award (that has been challenged) if it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. Also, u/§2(3) it provides that Part I shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration. Both these sections clearly suggest that arbitration

(Footnotes)

[1] Vinay Reddy & V. Nagaraj, *Arbitrability: The Indian Perspective*, J. Int'l Arb. 19 (2002); Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors., A.I.R. 2011 S.C. 2507.

[2] The Arbitration Act, 1940 also did not specify any dispute as being non-arbitrable.

cannot be used as a mechanism for resolving certain disputes. However, it is interesting to note that both of them use different phraseology; the former says 'subject matter of the dispute is *not capable of settlement* by arbitration *under* the law' and the latter 'law*...by virtue of which* certain *disputes* may not be *submitted to* arbitration. Thus, it is unclear whether the legislature intended both to refer to the same 'law(s)'. Enforcement of a foreign award may also be refused by the Court u/§ 48(2)(a) if it finds that subject-matter of the difference is not capable of settlement by arbitration under the law of India.

The Indian judiciary has, however, disallowed arbitration for resolution of certain categories of disputes. In *Chiranjilal*[3], the Supreme Court ruled that only a Probate court can adjudicate upon a probate of the will and not an arbitrator because it is a judgment *in rem* and binds not only the parties but the entire world. This 'judgment *in rem*' approach was also adopted in *Osprey Underwriting Agencies*[4], in which the Bombay High Court determined that the disputes in an admiralty suit are inarbitrable as the orders passed on them are *in rem*. Similarly, in *Mangilal Fateram*[5], the Nagpur High Court held that the disputes involved in an insolvency proceeding cannot be referred to arbitrators as they end in judgment *in rem*. In *Haryana Telecom*[6], the Supreme Court held that u/§8 of the Act, a winding up petition cannot be referred to arbitration because the power to order winding up of a company is conferred upon the Court under the Companies Act and that a winding up claim is not a claim for money but a claim that a company has become commercially insolvent. Although the Court failed to explicitly say so, it also seems to have relied upon the 'judgment *in rem*' in approach of inarbitrability.

(Footnotes)

[3] Chiranjilal Shrilal Goenka (Deceased) through Lrs. v. Jasjit Singh and Ors., (1993) 2 S.C.C. 507.
[4] Osprey Underwriting Agencies Ltd. and Ors. v. Oil & Natural Gas Corporation Ltd. and Ors., A.I.R. 1999 Bom 173.
[5] Mangilal Fateram Mahesari v. Devicharan Mangallal, A.I.R. 1949 Nag 110.
[6] Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd., A.I.R. 1999 S.C. 2354.

An eccentric philosophy professor gave a one question final exam after a semester dealing with a broad array of topics.

The class was already seated and ready to go when the professor picked up his chair, plopped it on his desk and wrote on the board: "Using everything we have learned this semester, prove that this chair does not exist."

Fingers flew, erasers erased, notebooks were filled in furious fashion. Some students wrote over 30 pages in one hour attempting to refute the existence of the chair. One member of the class however, was up and finished in less than a minute.

Weeks later when the grades were posted, the student who finished in one minute got an A.

The rest of the group wondered how he could have gotten an A when he had barely written anything at all.

This is what he wrote: "What chair?"

In *Sami Chetti*[7], the Madras High Court held that a guardianship matter cannot be referred to an arbitrator because arbitration is allowed where all parties interested agree that the matter between them shall be so referred and in a guardianship matter, the party most interested i.e. the minor cannot agree to the reference. In this case the decision was based on the contractual limitations of arbitration.

In the *Natraj Studios*[8], the Supreme Court held that disputes between landlord and tenant relating to recovery of rent or possession of the premises cannot be decided by an arbitrator by reason of §28 of Bombay Rent Control Act which gives the Court of Small Causes exclusive jurisdiction over such disputes and that of public policy as it is a welfare legislation. Similarly in *Central Warehousing*[9], the Bombay High Court held that as §41 of the Presidency Small Causes Courts Act invests exclusive jurisdiction in the Court of Small Causes to try disputes specified therein between the licensor and licensee or a landlord and tenant, it is a law by virtue of which those disputes, by necessary implication, cannot be submitted to arbitration within the meaning of §2(3) of the Act and thus, inspite of an arbitration agreement, the jurisdiction of the Small Causes court will not be ousted in those disputes even though the decision on them would be only *in personam* and not *in rem*. It is interesting to note that how the Court conveniently assumed §2(3) to even cover laws that by necessary implication exclude arbitration and not only those which expressly do so. There are other cases too that have adopted this line of reasoning for inarbitrability of certain disputes.[10]

In *Olympus Superstructures*[11], the Apex Court propounded that §34(2)(b)(i) of the Act is not attracted to a dispute relating to specific performance of a contract relating to immovable property. It said that although the Specific Relief Act confers the discretion to grant specific performance on the civil court, it does not prohibit such issues from being referred to arbitration and thus it cannot be said that only the civil court can exercise that discretion.

Recently, in *Booz Allen*[12], the issue of arbitrability was discussed in detail by the Supreme Court. The Court noted that "*generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration*" and gave few examples of non-arbitrable disputes that relate to actions *in rem*: testamentary matters (grant of probate, letters of administration and succession certificate), matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody, matters relating to guardianship, criminal offences, insolvency and winding up and lastly, eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes. It held that a mortgage suit for sale of mortgaged property is non-arbitrable because it is an action *in rem*, for enforcement of a right *in rem*.

In *Fingertips Solutions*[13], the Calcutta High Court held that an eviction proceeding is inarbitrable by wrongly relying upon *Booz Allen* judgment. It said "*The cumulative effect of the judgment of this court in case of Eastern Coils (P) Ltd. and the Supreme Court in case of Booz Allen. . .is that the eviction or a recovery proceeding under the special statute or where the express power is conferred upon the court which necessarily implies the exclusion of the private fora*". But *Booz Allen* had given the example of only those tenancy and eviction matters that are governed by *special* statutes (not a general statute like Transfer of Property Act) over which *only specified* courts (not an ordinary court) have been given jurisdiction, as inarbitrable. This also brings us to the questions as to whether in *Booz Allen*

(Footnotes)

[7] Sami Chetti v. Adaikkalam Chetti, A.I.R. 1924 Mad 484.
[8] Natraj Studios Pvt. Ltd. v. Navrang Studios & Anr., A.I.R. 1981 S.C. 537b.
[9] Central Warehousing Corporation v. Fortpoint Automotive Pvt. Ltd., 2010 (1) Bom C.R. 560.
[10] For example, Lucent Technologies Inc. v. ICICI Bank Limited & Ors., MANU/DE/2717/2009 where the Delhi High Court held that as Debt Recovery tribunal has exclusive jurisdiction with regard to recovery of debts by banks and financial institutions under the Recovery of Debts due to Banks & Financial Institutions Act, 1993, tan arbitrator cannot decided on such claims.
[11] Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan & Ors., A.I.R. 1999 S.C. 2102.
[12] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors., A.I.R. 2011 S.C. 2507.
[13] M/s. Fingertips Solutions Pvt. Ltd. v. Dhanashree Electronics Ltd., MANU/WB/0937/2011

the Court restricted the scope of inarbitrability to actions *in rem* or also included within it all disputes upon which only the specified courts are conferred jurisdiction by a special statute.

In *Ashok Kumar Malhotra*[14], the Punjab and Haryana High Court, by rightly relying on *Booz Allen*, held that an arbitrator can order dissolution of partnership because it is an order *in personam* as opposed to an order of winding up of a company which is an order *in rem* and §44 of the Partnership Act does not oust the jurisdiction of the arbitrator although it confers the power to dissolve on the Court.

After considering these various High Court and Supreme Court judgments, there is no doubt that all disputes which involve rights *in rem* or adjudication upon which would end in judgments *in rem* would be held to be inarbitrable by the Indian courts. It is also clear that merely because an express power (discretionary or not) has been conferred upon a 'court' by a statute, courts would mostly not hold that the jurisdiction of the arbitrator to exercise that power is ousted. But confusion still remains with regard to arbitrability of those disputes which do not fall in the '*in rem*' category, but upon which a special court or tribunal has been given exclusive jurisdiction by a special statute. This is so because, although in all cases (that I have come across), courts have held such a dispute to be inarbitrable, but they have not said in broad terms that such disputes in all cases would be inarbitrable.

In my opinion, any dispute must not be held to be inarbitrable solely for the reason that a special court or tribunal has been given exclusive jurisdiction over it by a special statute. This is so because, in absence of an express prohibition on arbitration, it would not be logical to interpret that by giving only a special court the jurisdiction and ousting the jurisdiction of all other 'courts', the legislature intended to oust the jurisdiction of the arbitrator also so as to deprive the parties from resolving those disputes out of the court by agreement. Also, is declaration of non-arbitrability, on the ground of a dispute involving adjudication upon rights *in rem* or resulting in a judgment *in rem*, well substantiated? Merely because a judgment binds the world at large, is arbitration not appropriate to resolve such disputes?[15] Shouldn't the boundaries of arbitrability be defined with reference to special characteristics of arbitration? Arbitration is a consensual dispute resolution mechanism and thus "*has a natural limitation to accommodate disputes that involve several parties. It has intrinsic difficulties to affect a circle of persons other than the contractual parties to an arbitration agreement*.[16] Thus, an arbitrator may not be able to provide for an effective

(Footnotes)

[14] Ashok Kumar Malhotra & Ors. v. Kasturi Lal Malhotra, MANU/PH/0136/2012.

[15] *See infra* the discussion on how matrimonial disputes are fit for arbitration even though a decision on these disputes is a judgment *in rem* and thus binds the world at large.

[16] Stavros Brekoulakis, *On Arbitrability: Persisting Misconceptions and New Areas of Concern*, Queen Mary University of London, School of Law Legal Studies Research Paper No. 20/2009.

resolution of such disputes while a court may be able to as its jurisdiction does not depend upon the consent of the parties.[17] Therefore, to determine arbitrability, the only question to be answered is whether the nature of a dispute is such that its resolution would significantly affect the interests of the public at large or of individuals who have not agreed to have the dispute resolved by arbitration.[18] If the answer is in the affirmative, only then the dispute should be inarbitrable. For example, a dispute of anti-competitiveness of an agreement not only involves the interests of the parties but that of the public at large as anti-trust laws are designed to promote competition in the market. Thus, not having consent of the public, the arbitrator cannot give a decision that will affect the economy of the country and thus the interests of the public.

ARBITRABILITY OF MATRIMONIAL DISPUTES

Arbitration of matrimonial disputes offers considerable benefits over court litigation, primarily those of privacy and confidentiality, choice of selecting a person with knowledge or experience in particular aspect of family law as the arbitrator, continuity of arbitrator, flexibility of procedure, speedy resolution and avoidance of court delays, hearing at convenient time and place and reducing the burden of courts[19].[20] The only arguable disadvantage may be the additional cost of the arbitrator.[21]

However, in India the position with regard to arbitrability of matrimonial disputes relating to divorce, restitution of conjugal rights, judicial separation and child custody is far from settled. In cases where inarbitrability of these disputes has been directly in issue, the High Courts have held them to be arbitrable. In *Rup Narain*[22] the jurisdiction of a civil court to refer a suit for restitution of conjugal rights to arbitration was challenged. The Oudh High Court held that "*even if it be deemed that to some extent the discretionary powers of the civil Court to grant or refuse to grant a decree for restitution of conjugal rights have been taken away from it when such a suit is referred to arbitration, we feel that we are not competent to hold that such suits for restitution of conjugal rights, in the absence of any provision to that effect, do not come within the ambit of para, 1, Schedule 2, Civil P.C.*" In *Nalla Ramudamma*[23], the questions arose whether the Court has power under §21 of the Indian Arbitration Act, 1940, to refer for the decision of arbitrators a matrimonial dispute. It was argued that the Court has no such power and for public policy reasons all such disputes must be decided by the Court itself. Madras High Court held that it had the power under the exceptionally wide terms of §21 and there is nothing to suggest that arbitrators are not competent to pass an award in matters arising out of a matrimonial dispute. In *Faqir Mohammad*[24], relying on the above two cases and also on *Kunti Devi*[25], the Allahabad High Court held that the 1940 Act is applicable to suits for dissolution of Muslim marriage as it is not excluded by the provisions of the Dissolution of Muslim Marriages Act VIII of 1939.

However, in another set of cases where arbitrability of matrimonial disputes was not a point of decision, the High Courts as well as the Supreme Court have made observations on inarbitrability of such disputes as part of *obiter dicta*. In *V.V. Pushpakaran*[26], the Kerala High Court, opined that "*A judgment, order or decree in exercise of the matrimonial jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character not as against any specified person but absolutely, could be rendered only by a competent court having jurisdiction and it is a decision in rem and not in personem alone. That*

(Footnotes)

[17] Brekoulakis, *Id.*
[18] *See* Stewart E. Stark, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 Cardozo L. Rev. 481, 492 (1881).
[19] In June 2010, the Centre released the number of divorce cases pending in the country's courts. Law and justice minister M. Veerappa Moily put the figure at 55,000: Vineeta Pandey, *55, 000 Couples Waiting for Divorce in India*, DNA (Daily News and Analysis), June 24, 2010, http://www.dnaindia.com/india/report_55000-couples-waiting-for-divorce-in-india_1400514.
[20] David Hodson, *England Needs Binding Family Law Arbitration* 5 (2002), *available at* http://www.davidhodson.com/assets/documents/arbitration.pdf.
[21] Hodson, *Id.*
[22] Rup Narain v. Mt. Nandarani & Anr., A.I.R. 1934 Oudh 494.
[23] Nalla Ramudamma v. Nalla Kaisi Naidu, A.I.R. 1945 Mad 269.
[24] Faqir Mohammad v. Amina, A.I.R. 1964 All 246.
[25] Mt. Kunti Devi v. Bhola Ram AIR 1941 Pesh 43.
[26] V.V. Pushpakaran v. P.K. Sarojini, A.I.R. 1992 Ker 9.

is a matter which cannot be referred to arbitration and decided by the arbitrators." Also, in *Booz Allen*, the Supreme Court mentioned matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody as one of the well recognised examples of inarbitrable disputes being an action *in rem*. In *Prem Aggarwal*[27], the Delhi High Court cited matrimonial dispute as an example of matters that are non-referable to arbitration as law has conferred jurisdiction to determine those matters exclusively to special tribunals by debarring any other Court, Tribunal or authority from exercising power over those matters.

Thus, we see that the courts have taken different positions on arbitrability of matrimonial disputes. Exclusive jurisdiction of family courts over these disputes is not an appropriate rationale for inarbitrability as has already been discussed above. Also, although it is agreed that a judgment on matters relating to divorce, restitution of conjugal rights or judicial separation is a judgment *in rem* as they decide upon the status of the parties, it is incomprehensible why such matters are incapable of being decided by an arbitrator. These matters[28] are purely between husband and a wife and a judgment on them does not affect the interest of any third party even if it is binding against the world at large. Thus, in my opinion, a dispute relating to divorce, restitution of conjugal rights or judicial separation can be as effectively be resolved by the arbitrator as by a family court if the husband and wife have agreed to refer it to arbitration. The arbitral award shall be enforced in the same manner as a decree of the Court as per § 36 of the Act.

Unlike disputes on divorce, restitution of conjugal rights and judicial separation, the child custody disputes involve the interests of not only the parties (the parents) but of the child as well. As a child is not a party to the arbitration agreement, it cannot be bound by the decision of the arbitrator. His interests remain unrepresented in the arbitration proceedings. Thus, notwithstanding the arbitral award, it would be open for the child to seek redress in court,[29] and therefore, arbitration is inappropriate for effective resolution of disputes of child custody.[30] In United States, arbitrability of child custody, has received inconsistent treatment.[31] Some courts[32] have refused to enforce agreements to

(Footnotes)

[28] Excluding those relating to child custody, which will be discussed in the next paragraph.

[29] Brekoulakis, *supra* note 16.

[30] Christina Fox, *Contracting For Arbitration In Custody Disputes: Parental Autonomy Vs. State Responsibility*, 12 Cardozo J. Conflict Resol. 547 (2011) (Court's involvement is necessary for protection of the interests of the child, who is not party to the arbitration agreement).

[31] Barbara E. Wilson, *Who's Watching out for the Children - Making Child Custody Determinable by Binding Arbitration - Dick v. Dick*, 1996 J. Disp. Resol. 225 (1996); In 2001, in Michigan, the Domestic Relations Arbitration Act was adopted that authorized arbitration of child custody disputes, subject to the finding of the court that the award is adverse to the best interests of the child: Mark A. Snover, *Recent Case Laws' Impact on Family Law Arbitration*, Michigan Bar J. 21, 21(2006).

[32] Fence v. Fence, 314 N.Y.S.2d 1016 (N.Y. City Fam. Ct. 1970); Glauber v. Glauber, 192 A.D.2d 94 (N.Y. App. Div. 1993); Biel v. Biel, 336 N.W.2d 404 (Wis. 1983).

arbitrate such disputes; some[33] have held the arbitrator's award on such disputes to be subject to *de novo* review by the court to the extent that it does not conflict with the best interests of the child and some[34] have gone to the extent of allowing binding arbitration for resolution of such disputes. In India, if courts allow child custody disputes to be arbitrated subject to judicial review, the only provision that the courts may invoke to review whether the award conflicts with the best interests of the child is §34(2)(b)(ii) of the Act. However, this provision allows a narrow review and thus might not be suitable because it allows the court to set aside the award only if, firstly, such application has been made[35], and, secondly, if it conflicts with the public policy of India. Moreover, it does not provide for modification of the award. Thus, even if the award is found to be in conflict with the best interests of the child and consequently in conflict with the public policy of India, the Court can only set it aside. If the award is set aside the arbitration proves worthless. Therefore, unless the legislature amends the Act specifically providing for a substantive judicial review of the award in child custody disputes, these disputes must remain inarbitrable.[36]

CONCLUSION

The scope of arbitrability must be determined by the contractual limitations of arbitration. The fact that a dispute would end in a judgment *in rem* or involves rights *in rem* has little relevance to the concept of arbitrability. Unless a dispute has been expressly excluded by the Legislature, it is inarbitrable only if it involves the interests of not only the parties but also that of non-parties or public at large. This is not because arbitrators as decision makers are incapable on deciding these issues but because arbitration, being a consensual dispute resolution mechanism, is inherently incapable of affecting the interests of those who have not given consent for these disputes to referred to arbitration. Therefore, matrimonial disputes relating to divorce, restitution of conjugal rights and judicial separation are arbitrable as they involve only the interests of the parties whereas those relating to child custody are not arbitrable as they involve interests of the child that is non-party to the arbitration agreement.

(Footnotes)

[33] Sheets v. Sheets, 22 A.D.2d 176 (N.Y. 1964); Faherty v. Faherty, 477 A.2d 1257 (N.J. 1984) Miller v. Miller, 620 A.2d 1161 (1993); Kovacs v. Kovacs, 633 A.2d 425 (1993).

[34] Dick v. Dick, 534 N.W.2d 185, 187 (Mich. Ct. App. 1995); Fawzy v. Fawzy, 199 N.J. 456 (2009) ("where no harm to the child is threatened, there is no justification for the infringement on the parents' choice to be bound by the arbitrator's decision").

[35] If the review is subject to an application of setting aside the award, in effect, private arbitrators would often be permitted to determine finally the questions of custody.

[36] Barbara E. Wilson, *Who's Watching out for the Children - Making Child Custody Determinable by Binding Arbitration - Dick v. Dick*, 1996 J. Disp. Resol. 225 (1996); In 2001, in Michigan, the Domestic Relations Arbitration Act was adopted that authorized arbitration of child custody disputes, subject to the finding of the court that the award is adverse to the best interests of the child: Mark A. Snover, *Recent Case Laws' Impact on Family Law Arbitration*, Michigan Bar J. 21, 21(2006).

CREATING LITIGANTS AWARENESS IN MEDIATION

ANKIT JAIN

The adversary system under Anglo-Saxon jurisprudence has some inherent problem. Court judgments may end lawsuits but they do not resolve the disputes and the inherent hurt marked by those decisions. ADR mechanisms not only facilitate speedier justice but also allow parties to have control over the eventual outcome. However instances of people resorting to mediation are rare and the main reason attributable is the lack of public awareness. The author explores options to transform and evolve mediation as a litigant's preferred and potent tool to settle disputes.

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"It is virtually impossible to survive litigation and remain solvent, but it is occasionally possible to endure it and remain sane. As a modern ordeal by torture, litigation excels. It is exorbitantly expensive, agonizingly slow and exquisitely designed to avoid any resemblance to fairness or justice, yet, in strange and devious ways, it does settle disputes – to everyone's dissatisfaction."[1]

The proliferation and pendency of litigation in Civil Courts for a variety of reasons has made it impracticable to dispose of cases within a reasonable time. The overburdened judicial system is not in a position to cope up with the heavy demands on it mostly for reasons beyond its control.[2]

Article 39A of the Constitution of India (enacted in 1976) enjoins that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Thus, easy access to justice to all sections of people and provision of legal aid for the poor and needy and dispensation of justice by an independent Judiciary within a reasonable time are the cherished goals of our Constitutional Republic and for that matter, of any progressive democracy.[3]

(Footnotes)

[1] J.S. Auerbach, "Welcome to Litigation", in New Republic, 17th January, 1981

[2] The Law Commission of India, Report no. 238, December 2011

[3] Ibid

The adversary system under Anglo-Saxon jurisprudence established in our country has some inherent problem. It results in citizens defining personal problems and social troubles in terms of legal rights and obligations. The infatuation over who is right from a legal standpoint results in the transformation of social conflicts into legal disputes and this often accentuates problems instead of resolving them. The court judgments, in this regard, may end lawsuits but they do not resolve the disputes and the inherent hurt marked by those decisions.[4]

Promotion and popularizing alternative methods of dispute settlement is therefore the need of the hour. Alternative dispute resolution mechanisms not only facilitate *speedier justice* but are also a process wherein the parties involved have control over the eventual outcome. This results in quick implementation of the decisions taken and eliminates continued litigation in the form of further appeals. It would not be out of place to quote Hon'ble Mr. Justice R.V. Raveendran, who observed: *"……the need of the hour is to reduce adversarial adjudicatory litigation and at the same time, give speedy, satisfactory and cost effective justice. That is where alternative dispute resolution processes with the active participation of the Bar, become relevant and urgent."*[5]

Mediation as a mode of ADR is the process where parties are encouraged to communicate, negotiate and settle their disputes with the assistance of a neutral facilitator i.e., mediator. Christopher W. Moore has defined mediation in the following words: "*Mediation is essentially a negotiation that includes a third party who is knowledgeable in effective negotiation procedures and can help people in conflict to co-ordinate their activities and to be more effective in their bargaining. Mediation is an extension of the negotiation process in that it involves extending the bargaining into a new format and using a mediator who contributes new variables and dynamics to the interaction of the disputants."*[6]

The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are "charged with the duty of mediating in and promoting the settlement of Industrial disputes." Detailed procedures were prescribed for conciliation proceedings under the Act. In 1999, the Indian Parliament passed the CPC Amendment Act of 1999 inserting Sec.89 in the Code of Civil Procedure 1908, providing for reference of cases pending in the Courts to ADR which included mediation. The Amendment was brought into force with effect from 1st July, 2002.

(Footnotes)

[4] Justice M.M Kumar, „Relevance of mediation to justice delivery in India'

[5] Section 89 CPC: Need For An Urgent Relook, by Justice R.V. Raveendran, (2007) 4 SCC J-23

[6] Christopher W. Moore, „The Mediation process: Practical Strategies for Resolving Conflict

PROMOTING STUDENT AUTHORS

With a view to promote and support students in developing the qualities of legal research and presentation, IIAM is providing opportunity to law students to publish original, innovative and thought provoking articles on arbitration, mediation, conciliation, dispute resolution and similar topics and critiques on judgments relating to the same topics. Selected articles will be published in the "Indian Arbitrator". From amongst the submitted articles, every year one student author will receive the "Best Young Author" certificate from IIAM.

The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are "charged with the duty of mediating in and promoting the settlement of Industrial disputes." Detailed procedures were prescribed for conciliation proceedings under the Act. In 1999, the Indian Parliament passed the CPC Amendment Act of 1999 inserting Sec.89 in the Code of Civil Procedure 1908, providing for reference of cases pending in the Courts to ADR which included mediation. The Amendment was brought into force with effect from 1st July, 2002.

However, even today, instances of people resorting to mediation as a mode for settlement of their disputes are rare and the main reason attributable to this inadvertence is the lack of public/ litigant's awareness about mediation and its efficiency, cost effectiveness and expediency as a process.

As David Stanton, TD, Chairman of the Joint Committee[7], has rightly observed: *"Society needs to be informed of the potential benefits of mediation in dispute resolution and that it is not always necessary for disputes to be resolved through litigation."*

The following are some of the alternatives which can be resorted to so as to transform and evolve mediation as a litigant's preferred and potent tool to settle disputes.

1. Institutionalizing Mediation

At present, there is no statutory enactment like the Arbitration and Conciliation Act, 1996 and Legal Services Authority Act, 1987 to institutionalize the various aspects of mediation. The scheme of such an Act should be to integrate mediation with the existing alternate modes rather than replacing them.

Institutionalizing mediation would create awareness among litigants as regards mediation being a better and a cost effective remedy with inbuilt infrastructure and mechanisms.

2. The Legal Service Authorities

The state legal service authorities and the district legal services authorities have to play an important role in generation of awareness among the litigants about the benefits of mediation. They can organize workshops, conduct awareness programs and may involve NGO's to point out to the general public as to how mediation serves their cause better and how the nominal winner is often the real loser – in fees, expenses, and waste of time.

3. The Bench

The Judiciary has played a proactive role in promoting mediation as a mode for settlement of disputes. The High Courts have helped to establish mediation centres at both the high court and the district court levels equipped with basic infrastructure and conducive atmosphere. The Apex Court has also recognized the importance and effectiveness of mediation and has gone further to rephrase mediation as being the "APPROPRIATE DISPUTE RESOLUTION (ADR)".

In *Sanjeev Kumar & Others Vs. State of U.P. & Others*[8] the Hon'ble Court has directed that: "*when a complainant approaches the police station or the concerned lower courts, with complaints about harassment, or violence against the wife, by the husband and in-laws, except in cases of extremely grave nature or in cases of serious violence and injuries, and where there are possibilities of repeated violence against the wife, the Courts or the police should first*

(Footnotes)

[7] Joint Committee on the Mediation Bill 2012, Ireland

[8] CRIMINAL MISC. WRIT PETITION No. 3322 of 2010

make an effort to try and bring about a reconciliation between the parties, by directing the parties to appear before the mediation centres in the Courts, wherever they exist, or to the mediation cells with the police. If reconciliation is not possible, and the matter appears to be serious, or there is a probability of recurrence of violence, only in those cases should the police take immediate steps for arresting the accused in pursuance of the FIR."

The negative tendency of parties to engage in litigation in case of family and matrimonial disputes was adversely commented upon by the Supreme Court in *Kansraj v. State of Punjab*[9], "*such en masse involvement of a large number of family members takes place because in the aftermath of the incident, tempers are extremely high, the parties do not have a cool mind, and the aggrieved party at that stage only wants to seek recompense, by sending the other party to jail. It is only with the passage of sometime usually with the help of mediators, that wisdom may dawn and the complaining party may consider the advisability of exploring other options such as either to resolve their differences and to come together, or to mutually agree to part on acceptable terms.*"

Thus, the Courts through such directions and pronouncements have helped in creating awareness towards mediation being an effective remedy to settle claims.

(Footnotes)
[9] AIR 2000 SC 2324

TOWARDS THE LIGHT

A man saw a small humming bird flittering around his garage. It was trapped in the garage. Three hours later the sun was down and it was dark outside. The bird was still flittering around the garage. He turned out the light in the garage and a light was turned on outside the door. The bird remained.

The man searched on the internet on how to get birds out of a garage. The main suggestion was to put a small light outside and turn out all of the lights in the garage. This was exactly was he did. The bird still would not come out.

The man knew that the hummingbird had to be tired, hungry and dehydrated. Food, water and rest awaited it outside but it just wouldn't go.

The man got a broom and tried to chase it outside but it just flew high into the ceiling. Once it even flew under the open doors and he tried to force it out but it just flew from side to side desperately trying to get back into the garage. The bird thought that the man was trying to hurt it. Finally the bird died – exhausted, frustrated, lonely and hungry.

This is true to many of us. Freedom and salvation is there, it just has to be realized. The force trying to push us to freedom and safety is often misunderstood as a hostile force. We have to realise the direction of freedom.

4. The Bar and the Burden

There is oft-heard debate between activists and advocates on one hand, and mediators on the other. Both see themselves as pursuing "justice", but advocates charge that mediators sacrifice justice for peace by down-playing social structural or justice issues, while mediators charge that advocates sacrifice peace for justice by intentionally escalating conflicts to win converts to their own cause.

This dichotomy is a false one, John Paul Lederach asserts[10]. Drawing from diagram in *Making Peace* by Adam Curle, Lederach suggests that advocacy and activism is the approach of choice in situations where power is unbalanced and the awareness of the conflict is relatively low. Advocacy helps to raise awareness (on both sides) and to balance power. Once this is done, then mediators can take over to enable the parties to negotiate successfully to obtain both peace and justice simultaneously.

Abraham Lincoln's 1850 notes for a lecture to his law students contained the following: "Discourage litigation. Persuade your neighbors to compromise whenever they can. Point out to them how the nominal winner is often the real loser – in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."

Thus Lawyers can play a very prominent role in promoting awareness regarding mediation thereby saving his client's time and money in appropriate cases.

5. Drawing models from other jurisdictions

Innovative models can be drawn from corollaries in other jurisdictions and can be implemented in India with an Indian touch so as to promote mediation. For instance, Nepal has recently come up with mass mediation concept so as to protect people from harassment and torture in case of minor offences. Similarly, USA and Ireland have come up with mediation Bills whereby they have devised and proposed various methods so as to establish mediation as a most preferred and efficacious tool for the settlement of disputes.

Thus as has been rightly said that: "An effective judicial system requires not only that just results be reached but that they be reached swiftly." But the currently available infrastructure of courts in India is not adequate to settle the growing litigation within reasonable time. Despite the continual efforts, a common man may sometimes find himself entrapped in litigation for as long as a life time, and sometimes litigation carries on even on to the next generation. In the process, he may dry up his resources, apart from suffering harassment. Thus, there is a chain reaction of litigation process and civil cases may even give rise to criminal cases. *Speedy disposal of cases and delivery of quality justice is an enduring agenda for all who are concerned with administration of justice.*

This can be achieved by promoting mediation and at the same time spreading awareness among the litigants about its efficacy, cost effectiveness and expediency for settlement of disputes.

(Footnotes)

[1] (See Lederach, 1989)

If you cannot Solve it, It's Not a Problem,
It's Just the Reality
~ Barbara Coloroso ~

NEWS & EVENTS

GOVERNMENT OF INDIA TO DRAFT MODEL TREATY ON MNC MEDIATION

A spate of international arbitration notices served by foreign companies has prompted the Indian government to draft a new model treaty that will make it harder for foreign investors to approach international courts. The reworked treaty will stipulate that the foreign investor will not be able to challenge the legality of an unfavourable verdict from the Supreme Court. Further, the investor would have to exhaust remedies under local laws before seeking international arbitration under bilateral investment protection agreements (BIPA). “Studies and empirical facts suggest that the existing investor-State dispute settlement mechanism globally has not been satisfactory. Therefore, it’s not just India but other countries as well which are having a re-look at their investment agreements to safeguard interests,” said Ram Upendra Das, senior fellow, Research and Information System for Developing Countries.

The new draft would be the template for negotiations on all future BIPAs. Most BIPAs were signed years ago and do not have provisions to address situations arising due to changes in the regulatory environment. BIPAs are agreements that seek to promote bilateral investment flows by assuring fair and equitable treatment to investments on post-establishment basis through reciprocal provisions such as national treatment, most favoured nation treatment and mechanism for dispute resolution.

GOVERNMENT OFFICERS CANNOT ACCEPT FEES FOR ARBITRATION

The Government of India has clarified that IAS officers or other member of the government service cannot accept fees for any arbitration work done for a public body or a private person without sanction of the government. Fresh guidelines in this regard has also been notified by the central government recently after a joint meeting of the department of personnel and training (DOPT) and National Highway Authority of India (NHAI). The above information was provided by the Union Ministry of Road Transport and the Highways before the Punjab and Haryana High Court in the wake of a Public Interest Litigation (PIL) demanding action against a Punjab IAS officer for fixing arbitration charges for conducting arbitration in various cases of disputes between private parties and NHAI.

ARBITRATOR APPOINTED FOR BORDER DISPUTE

The International Tribunal for the Law of the Sea (ITLOS) has appointed Jean-Pierre Cot as Arbitrator to settle the maritime border dispute between Bangladesh and India. The president of the Tribunal appointed him to the Arbitral Court following consultations with the two parties.

COMMERCIAL MEDIATION TRAINING PROGRAM

Indian Institute of Arbitration & Mediation (IIAM) has announced Commercial Mediation Training Program, which will be conducted during October and November 2013. The program will be for 5 days – 40 hours. The training program combines the theory of ADR through highly interactive, skill-based courses in negotiation and mediation. The program will enhance the understanding and ability to negotiate and resolve conflicts, as well as provide a solid foundation in ADR processes and to serve as ADR practitioners and neutrals. Through discussion, simulations, exercises and role-plays, the program will focus on the structure and goals of the mediation process and the skills and techniques mediators use to aid parties in overcoming barriers to dispute resolution. The training also gives emphasis on the code and ethical standards of mediation. As per IIAM Mediator Accreditation System, based on the International Mediation Institute, The Hague (IMI) standards, a candidate having successfully completed Mediation Training Program will be categorized as Grade B Mediator. For more details mail to dir@arbitrationindia.com

CERTIFICATE IN DISPUTE MANAGEMENT (CDM)

CDM is a distance learning course of IIAM, valid for six months from the date of enrolment. You can enroll at any time of year and you study entirely at your own pace, submitting your assignments when you are ready. Your tutor will be available to mark your assignments and give feedback on your progress for a period of six months from the date of enrolment.

You will be sent four 'reading and study assignments' with your course materials, and these form an essential part of your distance learning course. They are designed to help you to work through the course manual and understand the concepts. The course will provide a good basic knowledge of ADR – Negotiation, Mediation & Arbitration – in theory and practice. On successfully completing the assignments included in the course a certificate will be awarded. For more details on CDM, mail to training@arbitrationindia.com

"Who is wise?
He who learns from everyone.
Who is strong?
He who subdues his evil inclination.
Who is rich?
He who is happy with his lot.
Who is honorable?
He who honors others."

~ The Talmudic sage Simon ben Zoma ~