

MEDIATION AND ARBITRATION IN CHILD CUSTODY DISPUTES

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Mediation

History of Mediation

Historical perspective: In a global sense, mediation dates back to ancient Greece and Roman civilisation, when village elders mediated local disputes. China, Japan, and other Asian countries have also employed mediation to resolve conflicts. Mediation has grown in popularity in the United States and Europe over the last few decades, thanks to judicial system improvements. Since ancient times, India has had 'Panchayat systems' in which respected and trustworthy elders from villages resolved community problems. Business groups had 'Mahajans' who assisted in mediating and resolving business conflicts. The same tribes used 'Panch' or 'wise person' to settle conflicts. Such systems continue to be implemented in several parts of India. Mediation resembles these techniques.

Global Scenario: Democracy and human rights, free economies, globalisation, reduced cross-national borders, and technological advancements have prompted countries to reform new substantive laws such as civil rights, commercial legislation, trade agreements, cultural differences, refugees, resource issues, border disputes, and so on. This global integration necessitates the development of complicated regulatory frameworks to handle conflicts while taking into account legal system disparities. This can be accomplished successfully via a variety of alternative procedures such as arbitration and mediation. Mediation is increasingly becoming acknowledged as a peaceful approach to resolving disagreements in a win-win situation.

The conservative Indian worldview has changed in recent years as a result of less harsh legislative reforms. The Arbitration and Conciliation Act of 1996 was the first act to bring mediation into India's judicial system. Section 89 of the Code of Civil Procedure, 1908, was introduced to explore various techniques of dispute resolution. This part initially established the concept of 'Judicial Mediation'. In 2011, the Supreme Court of India ordered that mediation processes were confidential, and that the

mediator should only give the Court with an executed settlement agreement or a statement indicating mediation efforts were unsuccessful. In its 129th report, the Law Commission of India suggested making it mandatory for courts to submit conflicts to mediation for settlement.

This was addressed in the landmark case of *Afcons Infra Ltd. v. M/s Cherian Varkey Construction (2010)*.¹⁸⁵ In this case, the Supreme Court of India ruled that all instances involving trade commerce and contracts, consumer disputes, and even tortious liability could typically be mediated. Another major decision was *B.S. Krishnamurthy vs. B.S. Nagaraj*,¹⁸⁶ in which the Supreme Court urged family courts to use mediation to resolve matrimonial conflicts. The Supreme Court of India has always supported mediation. During proceedings in key instances such as the demolition of the Babri Masjid, the Chief Justice of India stepped in to facilitate mediation between parties."

The Supreme Court has assigned mediators to engage with Shaheen Bagh protesters and convince them to migrate to a different location. Recording the failure of the Delhi High

¹⁸⁵ *Afcons Infrastructure Ltd. and Ors. Vs Cherian Varkey Construction Co. (P) Ltd. and Ors (2010)8SCC24*

¹⁸⁶ *B.S. Krishna Murthy and Ors. Vs B.S. Nagaraj and Ors. AIR2011SC794*

Court and the Supreme Court to settle a matrimonial dispute, a bitter fight for child custody, on a more general note, the SC Bench said "All endeavours must be made to resolve matrimonial disputes in the first instance through the process of mediation, which is one of the most effective modes of alternative mechanisms. The Mediation on Conciliation Project Committee of the Supreme Court of India has developed the 'Mediation Training Manual of India', which contains 14 chapters that teach us about mediation. Chapter VI discusses mediation ethics, whereas Chapter VII discusses the role of mediators and so forth. The Supreme Court has formed a team to develop draft legislation to lend legal legitimacy to conflicts resolved through mediation, which will subsequently be given to the Government as a recommendation from the Supreme Court. The Panel, headed by mediator Niranjana Bhatt, has roped in international specialists Hiro Aragaki and Joel Lee.

Mediation in Modern Family Law: Mediation in family law, notably in child custody matters, became popular in the late twentieth century. As legal practitioners and courts became more conscious of the emotional and financial strains caused by combative litigation, they explored alternate dispute resolution alternatives. The adversarial nature of traditional court proceedings frequently worsened disagreements between separating or divorced parents, resulting in protracted battles that harmed children. Mediation originated as a strategy to promote cooperation and reduce antagonism. During the 1960s and 1970s, family law professionals, psychologists, and social workers promoted mediation as a way to safeguard the emotional well-being of children involved in custody battles. Early mediation procedures were generally informal, with volunteer involvement and guided negotiations assisted by neutral mediators. As its success became clear, formal mediation programs were developed, including ideas from the legal, psychiatric, and social work disciplines. In the 1980s and 1990s, many jurisdictions began to

incorporate formal mediation programs within their family court systems. Laws were enacted to encourage or require mediation in custody and visitation disputes before proceeding to litigation. Courts recognised that mediation not only lessened the strain on the legal system, but also resulted in more sustainable custody agreements, since parents who reached their own agreements were more inclined to follow through on them.¹⁸⁷

The Evolution of Mediation Practices: As mediation in child custody cases gained popularity, its approaches developed to improve efficiency and efficacy. Training and certification programs were designed to guarantee that mediators were equipped to deal with complex family dynamics. Mediators were frequently needed to have degrees in law, psychology, or social work, allowing them to handle both the legal and emotional components of custody disputes. In addition to traditional in-person mediation, online mediation services have evolved, giving parents more access and convenience. Virtual mediation sessions have been possible thanks to technological advancements, which have reduced logistical constraints and expanded mediation services to faraway families. Furthermore, courts have increasingly recognised the value of child-inclusive mediation, which incorporates children's views and preferences into custody arrangements. This method guarantees that decisions coincide with the best interests of the child, supporting mediation's core goal—to establish a cooperative, child-focused resolution that minimises conflict and promotes long-term stability.¹⁸⁸

¹⁸⁷ Cleak H, Schofield M and Bickerdike A, "Efficacy of Family Mediation and the Role of Family Violence: Study Protocol" (2014) 14 BMC Public Health <<https://pmc.ncbi.nlm.nih.gov/articles/PMC3899401/>>

¹⁸⁸ Mappingadr, "Mediation in Family Law Disputes in India | MappingADR" (MappingADR, April 17, 2024) <<https://jgu.edu.in/mappingADR/mediation-in-family-law-disputes-in-india/>>

The Mediation Procedure in Child Custody Disputes

Child custody fights can be emotionally intense and complicated. Mediation provides a systematic yet flexible approach to assisting parents in navigating these problems while prioritising their child's best interests. Mediation promotes cooperation and reduces conflict, resulting in a healthy co-parenting relationship. The mediation method for child custody issues is described in detail below,¹⁸⁹

1. The mediation process starts with an initial session, in which the mediator lays the groundwork for effective negotiations. This stage consists of numerous important components:

- The mediator discusses the objectives, procedures, and benefits of mediation, ensuring both parents understand what to expect.
- Establishing Ground Rules: Guidelines for polite communication and behaviour promote a positive atmosphere.
- Confidentiality Agreements: Both parents may sign agreements to keep communications secret and prevent them from being used as evidence in court.
- The mediator defines their role as a neutral facilitator, guiding parents to reach mutual agreements rather than making decisions.
- Addressing Concerns: Any urgent concerns or enquiries from either parent are addressed before moving on to the next step.¹⁹⁰

2. Information Gathering: The mediator obtains important information from both parents in order to understand the family dynamics and the child's needs. This step often includes:

- Parental Backgrounds: Each parent shares information on their relationship with the child, parenting approaches, and abilities to create a stable environment,
- Living Conditions: Parents address their living arrangement, home setting, and proximity to their child's school and support network.
- Financial Stability: Although child support is often calculated independently, a parent's financial stability may be taken into account when negotiating custody arrangements.
- Custody planning takes into account the child's age, health, education, extracurricular activities, and emotional well-being to ensure optimal growth.
- Review previous agreements or court orders to inform the discussion.¹⁹¹

3. Discussion and Negotiation: After the mediator has obtained the relevant information, the parents hold discussions to determine custody arrangements. The mediator keeps the discourse constructive and focused on the child's best interests. This period includes:

- Encourage open communication between both parents about custody and visitation concerns and expectations.
- Mediator assists parents in identifying common ground to build on throughout negotiations.
- Mediator facilitates dispute resolution by balancing the needs of both parents and child.
- Discussing custody options, including joint, sole, and shared parenting, to find the best fit.
- Parenting Time and Schedules: Discuss visitation patterns, holiday plans, and transition plans to establish a consistent routine for the child.

¹⁸⁹ "How Can Mediation Be Used to Resolve Child Custody Disputes?" (*How Can Mediation Be Used to Resolve Child Custody Disputes?*) <<https://www.mkfmlaw.com/blog/how-can-mediation-be-used-to-resolve-child-custody-disputes/>>

¹⁹⁰ Le S and Le S, "Child Custody Mediation: How to Win" (*Family Lawyers*, June 22, 2024) <<https://familylawyers.vn/building-a-strong-case-gathering-evidence-for-child-custody-mediation/>>

¹⁹¹ "Child Custody Mediation" (*Justia*, February 28, 2025) <<https://www.justia.com/family/child-custody-and-support/child-custody/child-custody-mediation/>>

- Conflict Resolution Strategies: Parents are given techniques to resolve issues amicably, reducing the need for court intervention.

4. Drafting an Agreement: Once parents reach an agreement, the mediator helps them prepare a Memorandum of Understanding (MOU) or a Parenting Plan, which includes:

- Custody Terms: Determines if legal and physical custody will be shared or awarded to one parent. Provides clear guidelines for parenting time, including weekday and weekend visits, holidays, vacations, and special occasions.
- Parental Responsibilities: Explains each parent's role in decision-making for schooling, healthcare, religious upbringing, and extracurricular activities.
- Communication Guidelines: Specify how parents should communicate about their child's needs and scheduling changes.
- Dispute Resolution Mechanisms: This includes mechanisms for addressing future issues, such as attending additional mediation sessions before seeking court involvement.¹⁹²

5. Legal Review & Finalisation: Before the agreement becomes legally binding, parents should carefully review the contract. This phase contains:

- Independent Legal Review: Parents can consult with their attorneys to safeguard their rights and interests.
- Revisions and adjustments can be made depending on legal advice or additional conversations.
- Court Submission and Approval: After finalisation, the agreement is reviewed by a judge to verify it is in the best interests of the child. Once accepted, the

agreement becomes legally binding custody arrangement.¹⁹³

The Role and Standards of the Mediator

"We are all mediators, translators" – *Jacque Derrida*

A mediator serves as a neutral facilitator in child custody cases, helping parents develop arrangements that prioritize their children's needs through:

- Open Communication: Open communication is essential for successful mediation. Ground rules provide for organized discussion, and conversation becomes productive and respectful. Mediators defuse hot words to reveal underlying interests, reducing conflict intensification. Active listening skills are used to reduce emotional charge and enhance understanding among parents. Mediators empower parents with the tools to communicate constructively beyond mediation by exemplifying effective communication skills.
- Maintaining neutrality: Neutrality of the mediator is the core in building trust and ensuring a balanced process. Mediators use neutral language in recognizing underlying conflicts without bias. Process fairness is more than individual outcomes and encourages an impartial attitude. Equal participation is facilitated, where both parents are provided voice in the conversation. To promote creation of balance, mediators do not lean towards either parent, thereby maintaining child-centered decision-making and not personal preference.
- Educating Parents: Mediators serve an educational function in explaining legal language and describing custody arrangements. They offer perspectives

¹⁹² "Mediation of Child Custody Disputes | Office of Justice Programs"
<<https://www.ojp.gov/ncjrs/virtual-library/abstracts/mediation-child-custody-disputes>>

¹⁹³ VIA Mediation Centre, "Child Custody Disputes: The Role and Impact of Mediation | VIA Mediation Centre"
<<https://viamediationcentre.org/readnews/MTU4Mw==/Child-Custody-Disputes-The-Role-and-Impact-of-Mediation>>

on child growth research and how they relate to adjustment after breakup. Court process and most critical parenting plan aspects are provided so that you can make an informed decision. Mediators also address how child support works and provide examples of effective co-parenting, giving parents productive co-working abilities.

- **Promoting Children's Best Interests:** Throughout, the emphasis is upon child-centered practice, and evidence-based research supports relationship decision-making. The mediators enable parents to identify their own and their children's needs and assist them in the appropriate level of participation for age and individual requirement. Relationship continuity is established, and transitional planning is enabled to reduce dislocation to the child's life.
- **Qualifications and Training:** Mediators are recruited from diverse backgrounds, such as lawyers, mental health professionals, committed mediators, and court staff. Training typically consists of 40-60 hours of formal certification in child-focused practices, family relationships, domestic violence screening, and cultural sensitivity. Mediators maintain practice standards to national and state certification standards, professional association membership, regular supervision, and regular professional development.
- **Ethical concern:** Open policies of confidentiality, safe record-keeping, informed consent, and compliance with mandatory reporting legislation are all required for ethical practice in mediation. Individual screening, procedural safeguarding, caucus sessions, and equal access to information all serve to balance power. Safety screens employ evidence-based methods of identifying coercive control and make alternative processes as

necessary. Understanding their limitations, mediators understand cases such as substance abuse, mental illness, serious power differences, or threat to safety which might need to be resolved by the court.¹⁹⁴

- **Structured Approach:** Mediators employ a structured method, with a full intake interview and explicit agenda to start. An incremental approach moves discussions from simple to more complex topics, with a focus on gradual building. Records are updated incrementally, with deadlines and action steps assigned. Meeting summaries and written agreements foster clarity and accountability.
- **Advanced Facilitation:** High-level facilitation strategies, such as reality testing and interest-based bargaining, aid parents in making well-informed choices. Future-oriented framing and perspective-taking tasks encourage collaborative problem solving. Mediation employs brainstorming, decision matrices, and shuttle diplomacy to determine viable options and efficiently resolve conflict.
- **Child-inclusive Practices:** Child-inclusive mediation involves age-appropriate consultation and structured feedback so that children's voices are heard without causing unnecessary stress to them. Child-centered protocols avoid triangulation, which safeguards the emotional well-being of the child. Mediators use special techniques to blend children's opinions while maintaining parental authority over the final decision.
- **Document Development:** Mediators assist in the development of balanced parenting plans that incorporate visual schedules, communication systems, and organized models of decision making.

¹⁹⁴ Malta Mediation Centre, "Roles and Duties of Mediator - Malta Mediation Centre" (Malta Mediation Centre, June 25, 2024) <<https://mediation.mt/en/roles-and-duties-of-mediator/>>

Plans are created regarding particular topics such as vacations, holidays, and significant transitions to prevent future conflict.

- **Cultural Competence:** In light of variation in family rituals, mediators translate religious feelings and provide language interpretation as needed. They enforce compliance with legal requirements while upholding traditional values to retain the child's best interests.
- **Technology and Distance:** Mediators offer virtual communication and online visitation, and co-parents can be reached from anywhere. Social media boundaries are addressed, and co-parenting apps are recommended to ensure communication. Home technology use standards are kept uniform and avoid disagreement.¹⁹⁵
- **Complex Family Arrangements:** Blended families, stepparents, extended family members, and same-sex parenting arrangements call for specialized solutions. Mediators protect sibling relationships and navigate complex family dynamics to develop inclusive parenting plans that are in the child's best interests.
- **Special Needs Considerations:** Children with medical, behavioral, or emotional conditions require continuous support from multiple homes. Mediators provide medical decision-making, educational advocacy, and flexible parenting plans to ensure care stability and continuity.
- **Success Indicators:** Satisfaction of parents, reduced court appearance, and improved co-parenting ability are all indicators of the success of mediation. Successful enforcement of orders and good indicators of child's well-being establish the success of mediation. Reduced conflict and better parental

communication are both the indicators of success.

- **Ongoing Support:** Mediators provide referrals to educational programs, therapy resources, and community support services. Follow-up sessions and revision processes help parents adjust to changing circumstances. Coordination with peer support groups strengthens long-term co-parenting success.
- **Legal Integration:** Mediators collaborate with legal representatives to ensure agreements align with legal requirements. They clarify distinctions between mediation memoranda and enforceable court orders. A structured process for converting agreements into legal documents ensures compliance and long-term stability.

By adhering to these principles, mediators create structured, supportive environments where parents can work collaboratively to develop custody arrangements that prioritize the child's best interests while managing interpersonal challenges.¹⁹⁶

Case Studies Demonstrating Mediation Success in resolving Child Custody matters

K. Srinivas Rao vs. D.A. Deepa¹⁹⁷

The case pertains to a divorce petition brought by the husband before the Supreme Court on grounds of mental cruelty inflicted by his wife. The dispute started with a clash between the elders of the family, after which the wife's family expelled her from the marriage house. She then made a petition for restitution of conjugal rights, in the hopes of coercing her husband to take her back. The husband asked for divorce as a response. A string of serious charges ensued, adding to the controversy. The wife sued for dowry on her husband, accused her mother-in-law of forcing her into bed with her father-in-law, and that her brother threatened her

¹⁹⁵ VIA Mediation Centre, "Roles and Duties of a Mediator | VIA Mediation Centre" <<https://viamediationcentre.org/readnews/MjM1/Roles-and-Duties-of-a-Mediator>>

¹⁹⁶ Offices BM& SL PC, "What Are the Benefits of Mediating Child Custody Disputes?" (Mack & Santana Law Offices, P.C., June 5, 2023) <<https://www.macksantanalaw.com/blog/2023/june/what-are-the-benefits-of-mediating-child-custody/>>

¹⁹⁷ K. Srinivas Rao vs D.A. Deepa AIR2013SC2176

mother-in-law. Meanwhile, the husband is alleged to have beaten up his mother-in-law. The Family Court ruled that the wife's conduct was cruel and rejected her petition. The High Court, however, ruled that since the couple did not cohabit, their actions did not amount to cruelty. The High Court also sentenced the spouse to six months in jail on charges of dowry. Not happy with the ruling, the spouse appealed to the Supreme Court. The Supreme Court held that the wife's utterances against the mother-in-law were extremely insulting and gave rise to severe mental anguish for the husband. The Court acknowledged that, even though the wife desired reconciliation, her behavior induced deep anguish to the husband and his relatives and that was tantamount to mental cruelty. While cruelty alone is not grounds for divorce, the ten-year separation and intense enmity between the parties resulted in an irretrievable dissolution of the marriage, necessitating a divorce decision. The Court pointed out that the problem might have been avoided if the woman had been properly advised and informed that her behavior would not serve to salvage her marriage. It did note, however, that both parties had contributed to the conflict. The Court indicated that 10-15% of matrimonial cases referred for mediation resolve, and that if the parties had gone earlier to mediation, the problem would not have escalated. Referencing Section 9 of the Family Courts Act, the Supreme Court suggested making mediation compulsory in cases where a settlement is possible. Although dowry charges cannot be compounded, mediation can be used to assist parties in arriving at a compromise. The Court also requested lower courts to establish pre-mediation assistance centers to improve the mediation process, reduce litigation, and encourage peaceful resolution of conflict in divorce cases.

Perry Kansagra vs. Smriti Madan Kansagra¹⁹⁸

The case is a custody battle between Perry Kansagra, who is both British and Kenyan, and

Smriti Madan Kansagra, who is Indian. The two married in 2007 in New Delhi and subsequently went to Nairobi, Kenya. Their son Aditya Vikram Kansagra was born in New Delhi in 2009 and receives Kenyan and British passports. Smriti returned to Nairobi with Aditya after giving birth, but there were disputes, and she made a legal complaint in India in 2012, seeking an injunction to stop Perry from taking Aditya away. Perry responded by making a petition for guardianship, requesting legal custody. During the proceedings, visitation rights were allowed to Perry so that he could visit Aditya under supervision. The Family Court and High Court amended these arrangements later. Mediation was attempted but failed. Aditya formed close bonds with both parents and relatives from both sides based on a report of a court-appointed child counselor and mediator. Smriti objected to the reports being presented before the court on mediation confidentiality grounds. The High Court initially adjudicated that the reports of the counselor and mediator could be admitted since cases of child custody are subject to the principle of "*parens patriae*" under which the best interests of the child prevail over confidentiality in mediation. However, a review led by the High Court overruled the decision by ruling that reports of mediation are confidential and inadmissible before courts. Perry took his case to the Supreme Court, and it ruled in his favor. The Supreme Court held that although mediation confidentiality is essential, there is an exception in child custody cases. It reaffirmed that the courts must give paramount to the welfare of the child and take account of counselor reports reviewing the environment of the child and family relationships. The Supreme Court upheld the original High Court ruling allowing the use of counselor reports and reversed the High Court review ruling. The Court also declared that, although mediation is an in-camera process, observations regarding the well-being of the child is another intention and could not be excluded on technical grounds. It reiterated the principle that the best interests of

¹⁹⁸ *Perry Kansagra Vs Smriti Madan Kansagra* [2019]3SCR991

the child continue to be the only concern in custody battles.

B.S. Krishna Murthy and Ors. Vs. B.S. Nagaraj and Ors.¹⁹⁹

The dispute between two brothers, B.S. Krishna Murthy and B.S. Nagaraj, that is before the Supreme Court of India is at stake. Rather than hear the case first and then order settlement, the Court emphasized settling the disputes such as this by means of mediation. The court refers to Mahatma Gandhi's autobiography, *My Experiments with Truth*, to draw an example where Gandhi settled a commercial dispute successfully. The Court referred to the opinions of Gandhi regarding the adverse effects of lengthy litigation, which has a tendency to result in financial destruction and strained relationships. Gandhi's experience had revealed that arbitration and mediation could enable both sides to reach amicable settlements without damage to relationships and finances. As per the philosophy of Gandhi, what the Supreme Court subscribed to and emphasized was that attorneys should convince clients to opt for mediation, especially in family and business relationships. The Court explained that cases hang around for decades or years and continue to drain the two parties financially and emotionally. Section 89 of the Code of Civil Procedure (CPC) was cited, which requires courts to consider alternative dispute resolution processes, such as mediation, before proceeding with litigation. As per this procedure, the Supreme Court referred the case to the Bangalore Mediation Centre and requested both parties to make a report on February 21, 2011. The case was initiated only after the report was submitted by the mediation centre. The verdict is categorically in favor of family and commercial conflicts being mediated, with a reaffirmation that litigation is to be the last course of action. It also underscores the importance of lawyers leading their clients to amicable settlement of differences rather than endless court cases.

Arbitration

Legal Enforceability of Arbitral Awards

Arbitrability of Matrimonial Disputes: Arbitration of matrimonial disputes has several benefits over court litigation, such as privacy and confidentiality, the choice of an arbitrator with knowledge or experience in a particular branch of family law, continuity of arbitrators, flexibility of procedure, quick determination and avoidance of court delays, hearings at a convenient time and place, and reduction of court burden. The only debatable negative could be the arbitrator's added fee. However, in India, the stance on the arbitrability of matrimonial conflicts such as divorce, restitution of conjugal rights, judicial separation, and child custody is far from decided. In circumstances where the inarbitrability of certain conflicts has been directly challenged, the High Courts have held them to be arbitrable. In *Rup Narain*, the civil court's authority to refer a complaint for recovery of marital rights to arbitration was challenged. The High Court of Oudh concluded 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*,²⁰⁰ the question arose whether the Court has competence under §21 of the Indian Arbitration Act, 1940, to refer a marriage dispute for arbitrators' ruling. It was maintained that the Court lacks such authority and that, for public policy considerations, all such issues must be resolved by the Court. The Madras High Court held that arbitrators can make awards in marriage cases based on the wide scope of §21. However, in a separate group of instances where arbitrability of matrimonial conflicts was not a point of decision, the High Courts and the

¹⁹⁹ *B.S. Krishna Murthy and Ors. vs B.S. Nagaraj and Ors. AIR2011SC794*

²⁰⁰ *Nalla Ramudamma vs Nalla Kasi Naidu AIR 1945 Mad 269*

Supreme Court expressed observations on the inarbitrability of such disputes as part of obiter dictum. In *V.V. Pushpakaran*,²⁰¹ the Kerala High Court ruled that "a judgement, 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 is a matter that cannot be submitted to arbitration and decided by the arbitrators." Also, in *Booz Allen*,²⁰² the Supreme Court cited marriage conflicts involving divorce, judicial separation, restitution of conjugal rights, and child custody as well-known examples of inarbitrable situations requiring an action in rem. In *Prem Aggarwal*, the Delhi High Court cited matrimonial disputes as an example of matters that are non-referable to arbitration because the law has conferred jurisdiction to determine those matters exclusively to special tribunals, barring any other Court, Tribunal, or authority from exercising power over those matters. Thus, we can see that the courts have taken opposing views on the arbitrability of marriage issues. As previously stated, exclusive jurisdiction of family courts over these conflicts is insufficient to justify inarbitrability. Also, while it is agreed that a judgement relating to divorce, restitution of conjugal rights, or judicial separation is a judgement in rem because it determines the status of the parties, it is unclear why such things cannot be handled by an arbitrator. These are problems solely between husband and wife, and a decision on them has no bearing on the interests of any third party, even if it is binding on the entire world. Thus, if the husband and wife agree to bring a disagreement involving divorce, restitution of conjugal rights, or judicial separation to arbitration, the arbitrator can decide it as effectively as a family court. According to § 36

of the Act, arbitral awards are enforced similarly to court decrees. Unlike divorce, restitution of marital rights, and legal separation, child custody conflicts encompass the interests of both the parties (the parents) and the kid. A child is not a party to the arbitration agreement and therefore cannot be bound by the arbitrator's ruling. His interests are unrepresented in the arbitration process. Consequently, no matter what the arbitrator's decision, the child may approach the court for relief, proving that arbitration is not effective in settling disputes over child custody. In the United States, there are varying opinions regarding the arbitrability of child custody. A few courts have declined to enforce arbitration agreements with respect to such disputes; a few have indicated that the award of the arbitrator with regard to such disputes is to be reviewed de novo by the court to the extent that it would not violate the best interests of the child; and a few have even permitted binding arbitration of such disputes. In India, if courts allow child custody issues to be arbitrated subject to judicial review, only §34(2)(b)(ii) of the Act can be used to evaluate whether the award interferes with the child's best interests. However, this provision allows for a narrow review and hence may not be appropriate because it allows the court to set aside the award only if, first, such an application is made, and second, it contradicts with India's public policy. Furthermore, it does not allow for the alteration of the prize. Hence, even if the award is deemed to be contrary to the child's best interests, and hence contrary to Indian public policy, the Court can merely set it aside. If the award is set aside, the arbitration is rendered useless. As a result, until the legislature specifically alters the Act to provide for substantive court review of the award in child custody issues, these conflicts will remain inarbitrable.

The scope of arbitrability must be determined by the contractual constraints on arbitration. The fact that a disagreement results in a judgement in rem or includes rights *in rem* has

²⁰¹ *V.V. Pushpakaran vs P.K. Sarojini* AIR1992Ker9

²⁰² *Booz Allen and Hamilton Inc. vs SBI Home Finance Ltd. and Ors* AIR2011SC2507

minimal bearing on the concept of arbitrability. Unless expressly prohibited by the Legislature, a dispute is inarbitrable only if it involves the interests of both the parties and non-parties or the general public. This is not because arbitrators as decision makers are incapable of deciding these matters; rather, arbitration, as a consensual dispute resolution system, is intrinsically incapable of effecting the interests of individuals who have not granted consent for certain disputes to be brought 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 because they involve the interests of the child who is not a party to the arbitration agreement.²⁰³

Advantages and Disadvantages

- Effective and Versatile: Quicker resolution, simpler scheduling

The case will typically be resolved much more rapidly. A trial date in court may take years to obtain, while an arbitration date can typically be had within a matter of months. Additionally, trials need to be calendared on court calendars, which are often stacked up with hundreds, if not thousands, of cases in front of them. Arbitration hearings, by contrast, are readily scheduled according to the parties' and arbitrator's calendars.

- Less Complex: Streamlined rules of evidence and procedure

Litigation automatically creates a long process of filing papers and motions and attending court proceedings like motion hearings. The basic rules of evidence applied in court do not always have to be followed in arbitration procedures, which makes it a lot easier to introduce evidence. Discovery, the time-consuming and expensive process of responding to and taking interrogatories,

depositions, and requests for production of documents, can be significantly minimized in arbitration. Instead, most issues, such as who needs to be called as a witness and what documents need to be produced, are resolved with simple telephone calls to the arbitrator.²⁰⁴

- Privacy

As opposed to a trial, arbitration yields a private settlement, with the material that has been raised in the conflict and settlement kept secret. This would be attractive to high-profile public figures or business issue customers because all evidence, comment, and argument would be totally confidential. Conversely, in the courtroom, even when there are some withheld records, there is always a chance that some members of the general public will get access to confidential business information.

- Impartiality: Selecting the "Judge"

The arbitrator is typically selected jointly by both parties, thus he or she must be one both parties are confident will be objective and fair. Generally less costly. Arbitration is generally less costly than litigation, although this isn't always so. Arbitration takes much quicker than court action, and this result in lower attorney costs. Additionally, arbitration preparation is less expensive than jury trial preparation.

- Finality

There are limited avenues of appeal when the case is decided by binding arbitration. This provides the arbitration with finality that is not normally present with a trial judgment, which can be subject to appeals, new trials, and further appeals.²⁰⁵

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²⁰³ PANKHURI AGARWAL, "Arbitrability of Disputes in India: Still Grappling in the Dark?" August 2013 Volume 5, Issue 8, Indian Institute of Arbitration & Mediation, <<http://www.arbitrationindia.org/>>

²⁰⁴ Admin, "Advantages and Disadvantages of Arbitration over Court Proceedings" (Humphreys & Co. Solicitors, May 4, 2018) <<https://www.humphreys.co.uk/articles/advantages-and-disadvantages-of-arbitration-over-court-proceedings/>>

²⁰⁵ "The Advantages and Disadvantages of Arbitration | San Jose Corporate Lawyers" (SAC Attorneys LLP, February 26, 2025) <<https://www.sacattorneys.com/articles/the-advantages-and-disadvantages-of-arbitration/>>

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