

ARBITRATING MATRIMONIAL DISPUTES IN INDIA

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As the name suggests, matrimonial arbitrations deal with matrimonial disputes like divorce, separation, restitution, custody etc., and such disputes could have arisen before or after a divorce. When both spouses agree to submit to arbitration, the decision or award of the arbitrator becomes final and binding, and the parties are bound to obey it. Parties often draw out elaborate arbitration agreements indicating their willingness to arbitrate, in case of a dispute, and the agreement includes among other things, the name of the arbitrator, powers of the arbitrator, and the dispute referred to arbitration¹. In India, matrimonial disputes are not arbitrable. In *Booz Allen and Hamilton Vs. SBI Home Finance Limited and others*², the Supreme Court laid down the scope of arbitrable issues. The Court noted that matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody are non-arbitrable.

This article will provide a comparative perspective of matrimonial arbitrations. The first part will discuss matrimonial arbitrations in India. The second part will discuss the matrimonial arbitration laws of three other countries i.e. United Kingdom, the United States of America, and Australia. The third part will discuss the advantages and the disadvantages of matrimonial arbitrations. The fourth and concluding part will evaluate the scope of matrimonial arbitrations, and will propose a workable solution for the arbitration of matrimonial disputes in India.

¹ Joan Kessler, Allan Koritzinsky & Stephen Schlissel, Why arbitrate family disputes? Heinonline.org (2017), <http://heinonline.org/HOL/Page?handle=hein.journals/jaaml14&collection=journals&id=345&startid=&end=364> (last visited Oct 3, 2018).

²Booz Allen and Hamilton Vs. SBI Home Finance Limited and others, (2011) 5 SCC 532.

MATRIMONIAL ARBITRATIONS IN INDIA

Section 89 of the *Code of Civil Procedure, 1908*³ allows settlement of disputes outside the Court through arbitration, conciliation, judicial settlement, and mediation. Interpreting Section 89 and Order 10 Rule 1A of the Code⁴, the Court held in *Afcons Infrastructure Limited and Another*⁵, that it is the duty of the Court to inform the parties that they can choose alternate methods of dispute resolution. The Court also held that all cases of civil nature are suitable for arbitration, and categorically stated that all cases arising from strained or soured relationships, including matrimonial disputes, maintenance, custody etc. are suitable for Alternate Dispute Resolution (ADR) processes⁶.

The *Family Courts Act, 1984*⁷ is a specific legislation creating separate Family Courts for the adjudication of family matters. The Preamble to the Act specifies that its primary aim is “conciliation” of disputes. Generally, most family disputes involve a stage of mediation, or conciliation⁸.

India has a separate tribunal called Arbitration Tribunal for resolving disputes through arbitration⁹. The Tribunal has the power to arbitrate civil and criminal issues, unless the jurisdiction is specifically barred¹⁰. In the *Booz-Allan and Hamilton*¹¹ case, the Supreme Court positively excluded criminal matters from being arbitrated. Statutes governing arbitration and matrimonial disputes do not state that matrimonial disputes cannot be arbitrated¹². This was clarified in the case of *Booz-Allen and Hamilton*¹³, where the Supreme Court held that matrimonial disputes cannot be arbitrated. Distinguishing between *rights in rem* and *rights in*

³ The Code of Civil Procedure, 1908, Act No. 5 of 1908.

⁴ *Ibid.*

⁵ *Afcons Infrastructure Limited v. Cherian Varkey Construction Co. Pvt. Ltd.*, (2010) 8 SCC 24.

⁶ *It is important to note that the Court mentioned matrimonial disputes under the umbrella of ADR, and not arbitration.*

⁷ The Family Courts Act 1984, Act 66 of 1984.

⁸ Barnik Ghosh, Conciliation for settling family disputes - Lakshmisri Lakshmisri.com, <https://www.lakshmisri.com/News-and-Publications/Publications/Articles/Corporate/conciliation-for-settling-family-disputes> (last visited Oct 3, 2018).

⁹ Sumeet Kachwaha & Dharmendra Rautray, *Arbitrations in India: An overview* (2009), <https://ipba.org/media/fck/files/Arbitration%20in%20India.pdf> (last visited Oct 3, 2018).

¹⁰ *Ibid.*

¹¹ *Supra*, note 2.

¹² *See Arbitration and Conciliation Act, 1996 and The Family Courts Act, 1984.*

¹³ *Supra*, note 2.

personam, the Court stated that matrimonial disputes including divorce, custody etc., are *rights in rem* and hence cannot be arbitrated. *Rights in rem* are rights exercisable against the world. Matrimonial disputes create rights and titles against the world at large, ergo ought to be adjudicated in a Court of law. In the *Afcons case*¹⁴, the Court specified that Courts belong to the public *fora* while Arbitration Tribunals are a part of the private *fora*. As Tribunals belong to the private *fora*, they can only deal with civil matters between parties that create *rights in personam* and not *rights in rem*. This logic has solidified the case against matrimonial arbitrations in India.

MATRIMONIAL ARBITRATIONS IN OTHER JURISDICTIONS

The United Kingdom has arbitration laws very similar to India, but allows for limited matrimonial arbitrations. The United States, on the other hand, allows for the arbitration of disputes arising out of divorce petitions, however the laws vary depending on the State jurisdiction. In contrast, Australia has extensive and detailed laws for matrimonial arbitration, but does not completely allow the arbitration of family disputes.

United Kingdom

The United Kingdom does not allow complete arbitration of matrimonial disputes. The Institute of Family Law Arbitrators, in 2012, initiated family law arbitrations in the UK¹⁵. This only allows couples to arbitrate disputes, but does not allow them to obtain a divorce decree, or decide child custody issues. The arbitrations are primarily limited to financial disputes arising out of separation, or divorce¹⁶. Property and inheritance issues tied to matrimonial disputes are also arbitrable in the same manner¹⁷.

¹⁴ *Supra*, note 5.

¹⁵ *See*, Justin Creed, Guide to arbitration and divorce Wriighthassall.co.uk (2017), <https://www.wriighthassall.co.uk/knowledge/legal-guides/2016/01/12/guide-arbitration-and-divorce/> (last visited Oct 3, 2018).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

Parties enter into binding arbitration agreements. When a dispute arises, the parties can refer the case to the arbitral tribunal. The award given by the arbitral tribunal is generally binding. However, the President of the Family Division has confirmed that some arbitral awards must be confirmed by financial orders¹⁸. Parties are encouraged to apply to the Family Court to turn the award into a financial order, and simple registrations would not be sufficient.¹⁹

The United States of America

American law allows for the arbitration of matrimonial disputes arising out of divorces. The American Arbitration Association (AAA) and the American Academy of Matrimonial Lawyers (AAML) have adopted rules for arbitration of matrimonial disputes²⁰. In cases involving matrimonial property disputes, the award of the arbitrator is binding. This is so, because property rights can be realized through contracts. In cases involving spousal support, maintenance, and alimony, the awards by arbitrators are binding because they too are contracts to determine property rights. Such awards have limited scope of appeal or review²¹.

However, in cases involving child custody, child support, visitation etc., the Courts in the United States have been unwilling to hold arbitral awards as final. In *Kelm v. Kelm*²², the Supreme Court of Ohio held:

“We believe that the best interest of a child and the interest of a spouse can be protected as well by the arbitration process as by a trial court. However, if the arbitration process fails in any respect to protect the interest of a child or spouse, trial courts have the authority to use, and we encourage them to do so, their contempt powers to ensure that the process is accomplished in an expeditious, efficient, and reasonable manner.”

¹⁸ Justin Creed, Guide to arbitration and divorce Wriighthassall.co.uk (2017), <https://www.wriighthassall.co.uk/knowledge/legal-guides/2016/01/12/guide-arbitration-and-divorce/> (last visited Oct 8, 2017).

¹⁹ *Ibid.*

²⁰ Joan Kessler, Allan Koritzinsky & Stephen Schlissel, Why arbitrate family disputes? Heinonline.org (2017), <http://heinonline.org/HOL/Page?handle=hein.journals/jaaml14&collection=journals&id=345&startid=&end=364> (last visited Oct 3, 2018).

²¹ *Ibid.*

²² *Kelm v. Kelm*, 68 Ohio St. 3d 26 (Sup. Ct. 1993).

In such cases, the arbitral award can be challenged as being against the best interests of the child, and the Court will take this seriously, as it assumes its *parens patriae* role to determine the validity of the award²³.

The laws on matrimonial arbitrations are different in different States across the United States. In Washington, matrimonial arbitrations are voluntary and disputes ranging from divorce to custody to maintenance and property can be arbitrated, and are governed by the Washington Arbitration Act²⁴. Similarly, New York also allows for arbitration of matrimonial disputes²⁵. In fact, it is the only jurisdiction to have continuously exercised arbitration *vis-a-vis* matrimonial disputes²⁶. The findings of the arbitrator are subject to judicial review, especially so when children are involved²⁷.

Australia

The Family Law Amendment Act of 2000²⁸ introduced changes to matrimonial arbitrations in Australia. By virtue of this, there could be no arbitration unless both the parties consent. There may also be cases where the Court suggests arbitration, but the parties may or may not arbitrate²⁹. Furthermore, parties can arbitrate under the Family Law Act, only in disputes concerning property or spousal maintenance³⁰. The award of the Arbitrator is binding in such cases. Only certain arbitrators are allowed to arbitrate, and register the award under the Family Law Act. The Office of the Federal Attorney General has laid down intricate rules regarding the appointment and selection of arbitrators in matrimonial cases³¹.

²³ Nancy Ann Holman & Jane Noland, Agreement and Arbitration: Relief to Over-Litigation in Domestic Relations Disputes in Washington Heinonline.org (1975), <http://heinonline.org/HOL/Page?handle=hein.journals/willr12&collection=journals&id=533&startid=&end=50> (last visited Oct 3, 2018).

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ The Family Law Amendment Act, No. 143 of 2000.

²⁹ John Wade, Arbitration of Matrimonial Property Disputes Heinonline.org (1999), <http://heinonline.org/HOL/Page?handle=hein.journals/bondlr11&collection=journals&id=474&startid=&end=524> (last visited Oct 3, 2018).

³⁰ *Ibid.*

³¹ *Ibid.*

ADVANTAGES AND DISADVANTAGES OF MATRIMONIAL ARBITRATION

While the Indian Courts have said that matrimonial disputes cannot be arbitrated, there are other jurisdictions that somewhat permit for such arbitrations. Based on the matrimonial arbitration accounts in the U.S., U.K., and Australia, this part will map the advantages and disadvantages of matrimonial arbitrations.

Advantages of matrimonial arbitrations

The primary advantage of arbitration is privacy and confidentiality³². The arbitral award and the proceedings are away from the public eye. The proceedings are privy only to the parties involved and the arbitrator. This is particularly appealing when the parties involved are not willing to openly argue their private matters. Arbitration thus offers an advantage to the parties by excluding curious meddlers, relatives, media, and business competitions, from being privy to the arbitral proceedings³³. Certain matters such as alcoholism, mental illness, violence, and sexual encounters can be kept more private through arbitration³⁴.

Another advantage is the flexibility and party autonomy³⁵. Parties have the autonomy to choose the arbitrator and also the place of arbitration. This will allow the parties to pace the hearings at their own convenience, and will not have to depend on an unknown judge for the adjudication of their dispute.

Arbitrations also enable speedy proceedings³⁶. The arbitration proceedings take much less time, and are not bound by strict rules of evidence and civil procedure. The parties can also decide the direction the proceedings would take³⁷. The option of choosing an appropriate arbitrator

³² *Supra*, note 29.

³³ *Supra*, note 29.

³⁴ *Supra*, note 29.

³⁵ Joan Kessler, Allan Koritzinsky & Stephen Schlissel, Why arbitrate family disputes? Heinonline.org (2017), <http://heinonline.org/HOL/Page?handle=hein.journals/jaaml14&collection=journals&id=345&startid=&end=364> (last visited Oct 3, 2018).

³⁶ *Ibid*.

³⁷ John Wade, Arbitration of Matrimonial Property Disputes Heinonline.org (1999), <http://heinonline.org/HOL/Page?handle=hein.journals/bondlr11&collection=journals&id=474&startid=&end=524> (last visited Oct 3, 2018).

further ensures speedy resolution³⁸, and thereby saves time, and arguably money.

Disadvantages of matrimonial arbitrations

One disadvantage of matrimonial arbitrations is the expense. Parties would have to shell out obscene amounts of money, on lawyers and arbitrators³⁹. Furthermore, the award of the arbitrator is mostly binding and is liable for appeal only in exceptional cases⁴⁰.

Another disadvantage is that arbitrators are not bound by rules of evidence⁴¹. However, this can be remedied by the parties pre-determining the rules that the arbitrator will abide by⁴². Arbitrations are in pursuance of a contract; parties thus have the freedom to determine the limits of the arbitrator's discretion⁴³.

SHOULD INDIA ALLOW MATRIMONIAL ARBITRATIONS?

There are about seven popular religious groups in India, each having their own customs and practices⁴⁴, and their own matrimonial laws governing them⁴⁵. India does not follow a uniform civil code, but most religions consider marriages to be sacrosanct⁴⁶. When a couple applies for a divorce, the first step taken by the Courts is saving the marriage. The Family Courts Act⁴⁷ states in the Preamble that its aim is to to mediate and reconcile. This might perhaps be the reason why the Courts have been skeptical about matrimonial arbitrations. The “private” role of the tribunal, as compared to the “public” role of the Courts, has played a major part in deterring matrimonial arbitrations.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Joan Kessler, Allan Koritzinsky & Stephen Schlissel, Why arbitrate family disputes? Heinonline.org (2017), <http://heinonline.org/HOL/Page?handle=hein.journals/jaaml14&collection=journals&id=345&startid=&end=364> (last visited Oct 3, 2018).

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Paras Diwan, Family Law, <http://14.139.60.114:8080/jspui/bitstream/123456789/738/23/Family%20Law.pdf> (last visited Oct 3, 2018).

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ The Family Courts Act 1984, Act 66 of 1984.

Matrimonial arbitrations have several advantages and disadvantages. It has been observed that litigation increases the opportunity for parents to use their children as bait, in the legal dispute⁴⁸. The adversarial process has been found to exacerbate the harmful effects of divorce on children⁴⁹. This is contrary to the “best interest of the child” principle that the Court seeks to follow. In light of the above, it seems prudent to allow a voluntary system of matrimonial arbitration, wherein the parties can arbitrate disputes that have been inconclusively adjudicated in Courts. This allows speedy results, and also saves the Courts’ time⁵⁰. Moreover, if parties are able and willing to approach arbitrators to resolve matrimonial or divorce related disputes, then there seems to be no reason for preventing the same. With the intensification of privacy rights⁵¹, arbitrations seem to be a good and preferable way to maintain discretion⁵². Although Courts allow private in-camera proceedings, it’s a tedious administrative process which is largely discretionary⁵³.

A common characteristic of the American, British and Australian laws, is that matrimonial arbitrations are allowed, but with certain exceptions and limitations. Perhaps a similar model could be incorporated in India. Another alternative is a unique matrimonial arbitration legislation, which could be introduced to guide matrimonial-dispute arbitrators. This would take away the skepticism of the Courts towards matrimonial arbitrations, and can offer an impartial medium for the arbitration of matrimonial disputes. McGuane’s Model Marital Arbitration Act⁵⁴ demonstrates what such a legislation could look like. This Model Act was drawn with regard to the American society; nonetheless it can be used as a guide for other jurisdictions as well. Some elements of the Model Act such as a contract stating the intent to

⁴⁸ Joan Kessler, Allan Koritzinsky & Stephen Schlissel, Why arbitrate family disputes? Heinonline.org (2017), <http://heinonline.org/HOL/Page?handle=hein.journals/jaaml14&collection=journals&id=345&startid=&end=364> (last visited Oct 3, 2018).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

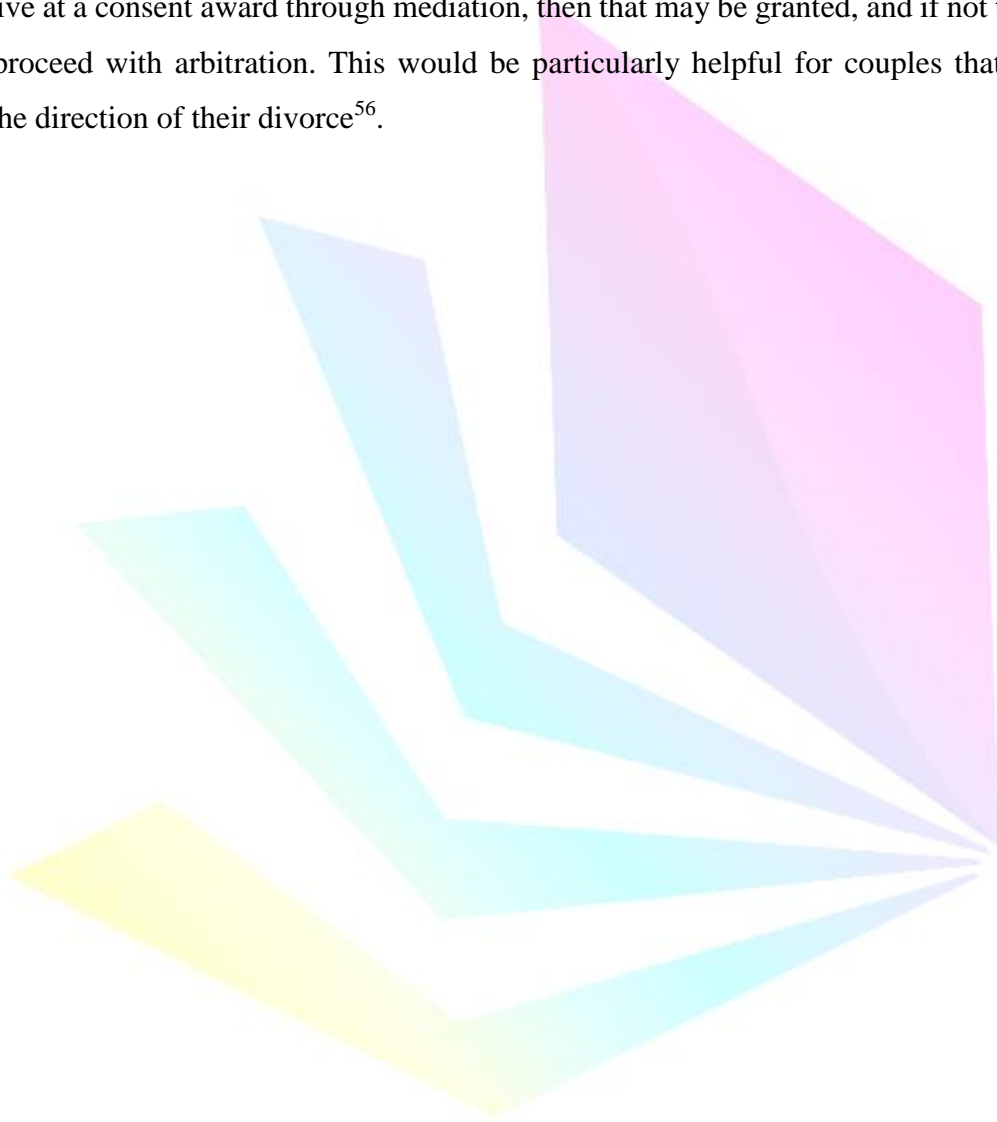
⁵¹ *See*, Justice K.S. Puttaswamy and Anr. V. Union of India, W.P. (Civil) No. 494 of 2012.

⁵² *See*, Sadaf Modak, India will play pivotal role in arbitration in future, says CJI Dipak Misra The Indian Express (2017), <https://indianexpress.com/article/cities/mumbai/india-will-play-pivotal-role-in-arbitration-in-future-says-cji-dipak-misra-4923000/> (last visited Oct 3, 2018).

⁵³ *See*, Dr. Chandrika M.P., Open Justice v/s In Camera Indian Scenario Ijoil.com, <http://www.ijoil.com/wp-content/uploads/2015/04/open-justice-vs-in-camera-Indian-Scenario.pdf> (last visited Oct 3, 2018).

⁵⁴ Frank McGuane, Model Marital Arbitration Act: A Proposal (1997), <http://heinonline.org/HOL/Page?handle=hein.journals/jaaml14&collection=journals&id=405&startid=&end=430> (last visited Oct 3, 2018).

arbitrate and the parties' right to choose an arbitrator, are generic and easily be incorporated in the Indian jurisdiction. The Act can also specify the spectrum of marital issues that can be arbitrated. This could include custody, visitation, child support, property matters, and debts. Furthermore, the procedure could incorporate an Arb-Med-Arb mechanism⁵⁵. This is a combined procedure of arbitration, followed by mediation, followed by arbitration. If parties can arrive at a consent award through mediation, then that may be granted, and if not then they could proceed with arbitration. This would be particularly helpful for couples that broadly know the direction of their divorce⁵⁶.



⁵⁵ Zulkifli Amin, Singapore International Arbitration Centre | Arb-Med-Arb Clause Siac.org.sg, <http://www.siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause> (last visited Oct 3, 2018).

⁵⁶ Justin Creed, Guide to arbitration and divorce Wriighthassall.co.uk (2017), <https://www.wriighthassall.co.uk/knowledge/legal-guides/2016/01/12/guide-arbitration-and-divorce/> (last visited Oct 3, 2018).