

Introduction to ADR Methods

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Introduction to ADR

Q. WHAT IS ADR?

“Alternative dispute resolution: A procedure for settling a dispute by means other than litigation, such as arbitration or mediation.”

CHARACTERISTICS OF ADR

- ☐ legally permitted process of dispute resolution other than litigation
- ☐ structured or unstructured process
- ☐ assistance of a neutral third-party
- ☐ process which harmonizes the relation between the parties by empowering them to resolve it on their own
- ☐ processes such as Mediation, Negotiation, Arbitration, Lok Adalats etc.
- ☐ ADR – Alternate Dispute Resolution or Appropriate Dispute Resolution?

EXAMPLES OF USE OF ADR IN INDIA

- ❖ Kulas and Srenis
- ❖ Panchayats
- ❖ Parishads

NEED AND ADVANTAGES OF ADR

NEED FOR ADR

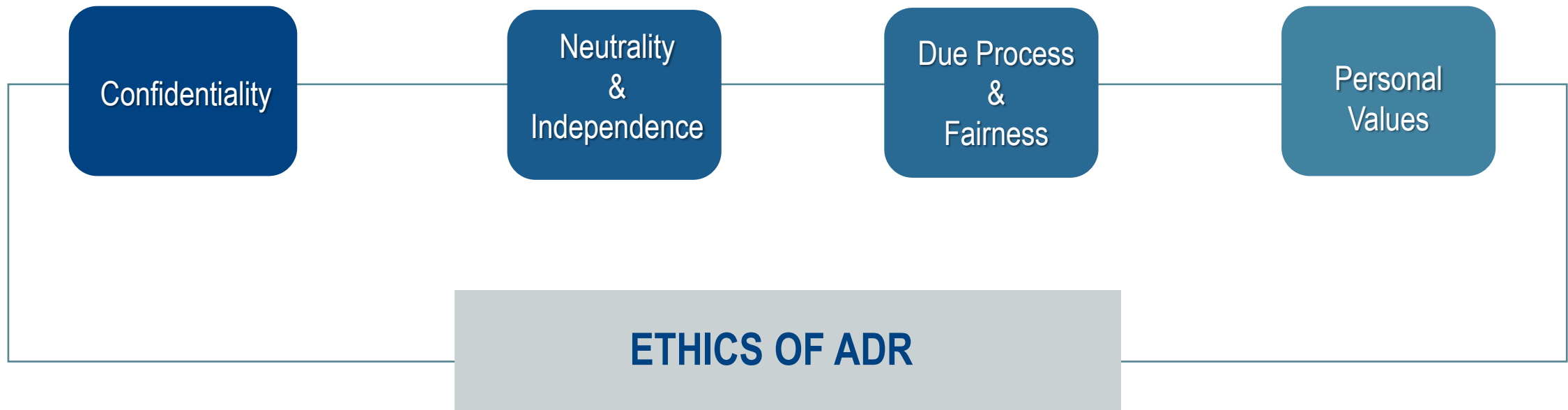
- ☐ Courts are overburdened – long delays, pendency
- ☐ Dispute Resolution through courts can be costly and lengthy
- ☐ Little to no confidentiality in litigation
- ☐ No party autonomy
- ☐ ADR can maintain continuous business relationship during and after the process

ADVANTAGES OF ADR

- ☐ Efficient
- ☐ Cost – effective
- ☐ Confidentiality
- ☐ Party Autonomy
- ☐ Reduced technicalities
- ☐ No fear of disclosure

DISADVANTAGES OF ADR

- ☐ Lack of Public Accountability
- ☐ No elaboration of judicial precedents
- ☐ Based on good faith
- ☐ Privatisation of justice
- ☐ Largely dependent on choosing good arbitrators/mediators



Statutory Recognition of ADR

Indian Constitution

- Article 14 : Right to Equality
- Article 21 : Right to Life
- Article 39A : Equal Justice & Free Legal Aid

Other Statutes

- Arbitration & Conciliation Act, 1996 : Whole Act (Arbitration, Conciliation)
- The Companies Act, 2013: s. 442 (Mediation)
- The Commercial Courts Act, 2015 : s. 12A (Mediation)
- CPC, 1908 : s. 89 (Mediation, Conciliation)
- The Industrial Disputes Act, 1947 : s. 10A (Arbitration, Negotiation)
- The Legal Services Authorities Act, 1987 : s. 7 (Lok Adalat)
- The Real Estate (Regulation & Development) Act, 2016 : s. 32(g) (Mediation)

Case Study: Afcons Infrastructure Ltd. v. Cherian Varkey Construction Company Pvt. Ltd. (Supreme Court, 2010)

The Supreme Court, while discussing S. 89 of CPC provided an illustrative list of the categories of cases suitable for ADR and those which are not suitable for ADR. However, the Supreme Court further clarified that the enumeration of 'suitable' and 'unsuitable' categorization of cases was not exhaustive or rigid.

Cases Suitable for ADR

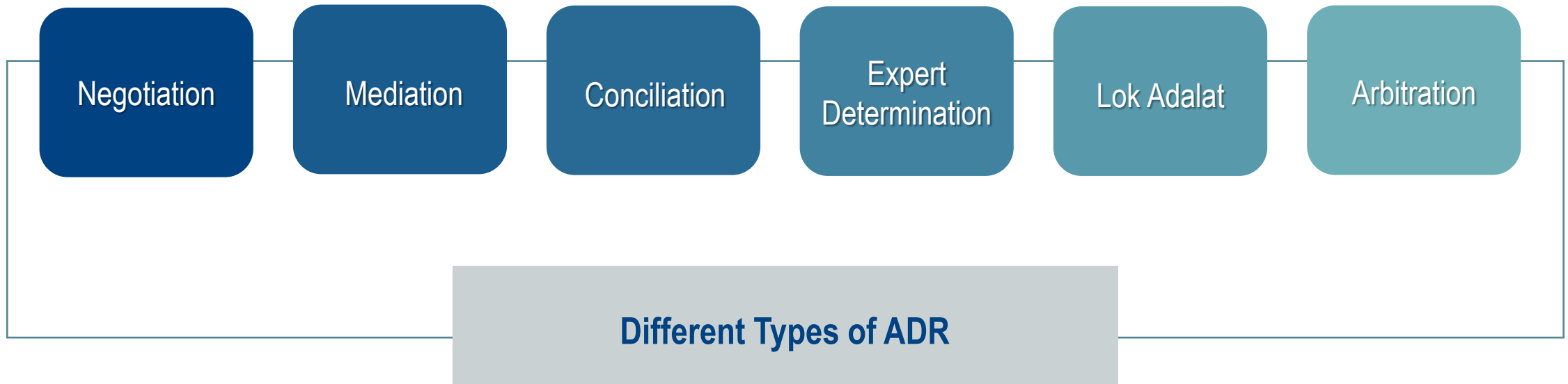
- Cases relating to trade, commerce and contracts – including those arising out of a contract
- Cases arising from strained relationships
- Cases where there is a need for continuation of the pre-existing relationship in spite of the disputes
- Cases relating to tortious liability

Cases Not Suitable for ADR

- Representative suits under Order 1 Rule 8 CPC which involves public interest or interest of numerous persons who are not parties before the court
- Disputes relating to election to public offices
- Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration
- Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.
- Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government
- Cases involving prosecution for criminal offences

Different Types of ADR

Key ADR Procedures



The process through which two or more parties who are in conflict attempt to reach agreement. It is the constructive, positive alternative to haggling or arguing; it is aimed at building an agreement rather than winning a battle.

Characteristics

- ☐ It is a process
- ☐ Multiplicity of parties
- ☐ Differences between the parties exist
- ☐ Parties attempt the resolution of differences
- ☐ Parties attempt to reach agreement
- ☐ Examples: discussions between management and trade unions, for example, on rates of pay; resolving protracted disagreement in a particular area of business / commercial relationship

Steps/Process



Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. The outcome of a mediation is a settlement agreement for the parties to implement.

Characteristics

- ☐ It is a voluntary and non-binding negotiation process
- ☐ Occurs outside the courtroom to resolve a dispute
- ☐ A third, impartial and neutral party manages the interaction between the disputing parties
- ☐ The parties decide the terms of settlement
- ☐ Mediator only facilitates the process
- ☐ The parties may refer the dispute to mediation at any stage of the dispute:
 - Before arbitration
 - After arbitration
 - Before initiating court proceedings
 - During the court proceedings
 - At appeal stage of court proceedings right up to the Supreme Court of India



- ❑ Singapore Convention on Mediation: uniform and efficient framework for international settlement agreements resulting from mediation. It applies to international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute.
- ❑ Although India became a signatory to the Singapore Convention on 7 August 2019, it is yet to be ratified.
- ❑ India passed its own Mediation Bill in August 2023, and it is currently awaiting Presidential Assent.
- ❑ Salient Features of the Mediation Bill:
 - seeks to codify, institutionalize, and promote the process of mediation
 - establishes the Mediation Council of India
 - provides for the registration of mediators
 - provides for online and community mediation
 - makes pre-litigation mediation voluntary in nature
 - provides for creation of a 'Mediation Service Provider' or MSP, to conduct mediation procedures, accreditation, maintenance of panels
 - provides an indicative list of subject matters not fit for mediation, including disputes involving allegations of fraud, forgery, claims involving minors, persons suffering from intellectual disabilities and mental illness, disputes affecting the rights of third party which is not part of the mediation proceeding, tax disputes and disputes under the Competition Act

A process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved; esp., a relatively unstructured method of dispute resolution in which a third party facilitates communication between parties in an attempt to help them settle their differences.

Characteristics

- ☐ It is a voluntary and non-binding negotiation process
- ☐ Occurs outside the courtroom to resolve a dispute
- ☐ A third, impartial and neutral party manages the interaction between the disputing parties
- ☐ The parties decide the terms of settlement.
- ☐ Conciliator actively participates in the settlement
- ☐ Conciliation is suitable when parties want to reach an agreement on some technical and legal issues and/or want advice on the facts of the dispute

Mediation v Conciliation

Mediator assists the parties to reach an agreement for resolving the dispute and he does not express his opinion on merits of the dispute, whereas a Conciliator may express an opinion about the merits of the disputes.

Expert Determination is a non-binding and flexible ADR process in which the parties agree to appoint an independent third party, who is expert in a particular field, to adjudicate on a dispute within the field of his expertise. The parties may settle the dispute based on Expert Determination. The decision of the expert is not binding on the parties but it opens the doors for an amicable settlement.

Characteristics

- ☐ Expert determination is consensual
- ☐ The parties choose the expert(s) with relevant expertise
- ☐ Expert determination is neutral and flexible
- ☐ Expert determination is a confidential procedure
- ☐ The determination of an expert is binding, unless the parties agree otherwise
- ☐ Expert determination is a flexible procedure

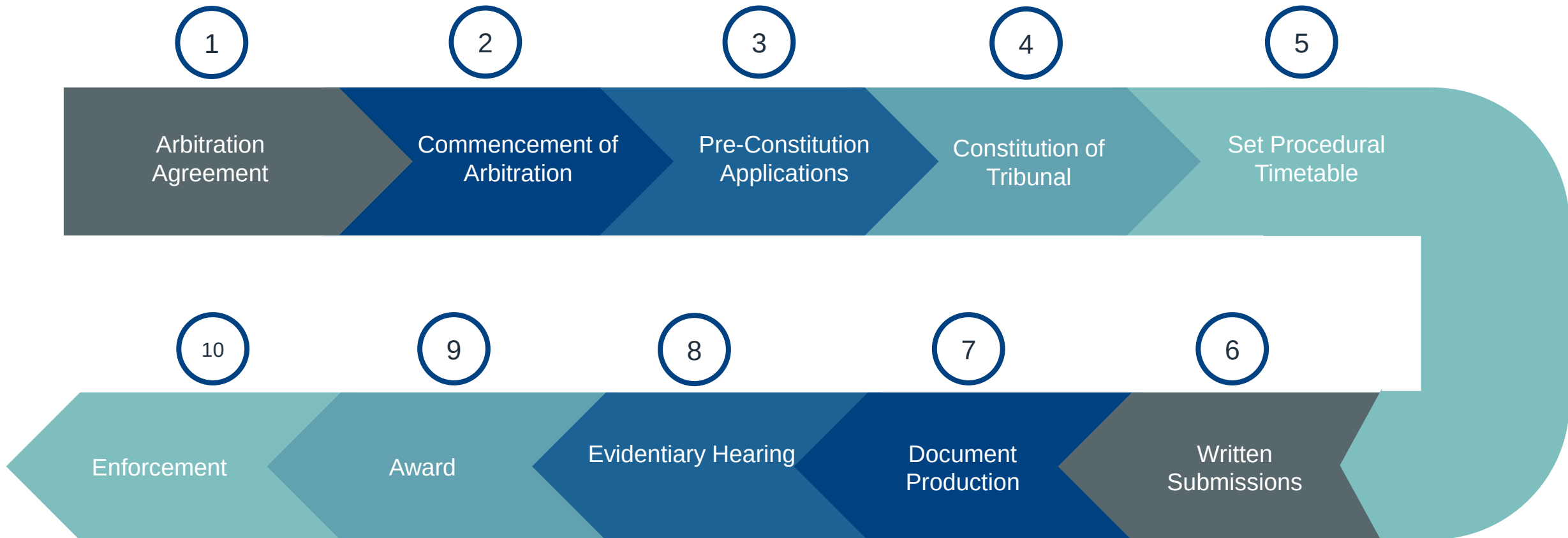
- ☐ Lok Adalat - or “People’s Court” - is a unique system developed in India.
- ☐ A forum where there is an effort at bringing about settlement of disputes between the parties is made through a conciliatory and persuasive means.
- ☐ Lok Adalat has been given the powers of civil courts under the Code Civil Procedure.
- ☐ Lok Adalat has statutory recognition under the Legal Services Authorities Act, 1987 and an award made by the Lok Adalat is deemed to be a decree of civil court.
- ☐ Parties may refer any dispute during pre-litigation stage or while it is pending before the court of law to Lok Adalat for amicable settlement.
- ☐ A dispute may be referred to the Lok Adalat by State Legal Services Authority or District Legal Services Authority upon the receipt of any application.

A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding

Characteristics

- ☐ Arbitration is a voluntary and consensual process.
- ☐ Arbitration offers dispute resolution in a neutral forum.
- ☐ The parties to an arbitration have considerable choice in determining how, where, by whom, and in what language their dispute is resolved.
- ☐ Arbitration is particularly advantageous for commercial parties because of the privacy and confidentiality that it can offer.
- ☐ Most arbitration do not allow for the award to be challenged except in very limited circumstances.
- ☐ An arbitration award is relatively readily enforceable in foreign jurisdictions where foreign assets of a counterparty might be based via the New York Convention.
- ☐ Arbitration is simpler than litigation because it is less formal than litigation.

Arbitration Lifecycle



INSTITUTIONAL v AD HOC

Institutional Arbitration

- Specialised, proven rules developed and updated to account for industry developments
- Specialist staff assisting with management
- Model clauses provided by institutions ensure that there is a valid arbitration agreement
- Administering institution can assist with non-participating parties (e.g., appointments)
- Standard terms of appointment for arbitrators
- Financial management
- Scrutiny of draft awards (from some institutions)

v.

Ad Hoc Arbitration

- Parties establish their own procedure
- Provides a very flexible process driven by the Parties themselves
- Commonly proceed under UNCITRAL Rules
- No oversight of institutional case management or control over timelines
- Reliance on *lex arbitri* for default appointment of tribunal
- Tribunals fix their own terms of appointment directly with the parties

The Arbitration & Conciliation Act, 1996 governs the arbitration regime in India

- ❑ Part I – Deals with domestic arbitrations predominantly (Sections 2 to 43)
- ❑ Part II – Deals with enforcement of foreign awards (Sections 44 to 60)
- ❑ Part III – Deals with Conciliation (Sections 61 to 81)
- ❑ Part IV – Deals with supplementary provisions (Sections 82 to 86)

Prominent Sections of the Act

- ❑ Section 7 – Definition of an arbitration agreement
- ❑ Section 8 – Power to refer courts to arbitration
- ❑ Section 9 – Interim measures by the Court
- ❑ Section 11 – Appointment of arbitrators
- ❑ Section 17 – Interim measures by an arbitral tribunal
- ❑ Section 34 – Application for setting aside arbitral awards
- ❑ Section 36 – Enforcement of arbitral awards
- ❑ Section 37 – Appealable Orders
- ❑ Section 49 – Enforcement of foreign awards

Case Study: Vidya Drolia & Others v. Durga Trading Corporation (Supreme Court, 2019)

- ❑ The Supreme Court in Vidya Drolia held, disputes are not arbitrable when the cause of action and/or subject matter of the dispute:
 1. relates to actions in rem, that do not pertain to subordinate rights *in personam* that arise from rights *in rem*;
 2. affects third party rights, have *erga omnes* effect, require centralized adjudication, and mutual adjudication would not be appropriate;
 3. relates to the inalienable sovereign and public interest functions of the State; and
 4. is expressly or by necessary implication non-arbitrable under a specific statute.

- ❑ The Court has also re-emphasized that certain specific classes or categories of disputes are non-arbitrable. These are provided as follows:
 - Insolvency or intra-company disputes
 - Matters relating to grant and issue of patents and registration of trademarks
 - Criminal cases
 - Matrimonial disputes
 - Probate and testamentary matters.

Reforms in the 2019 Amendment

- ☐ Designation and grading of arbitral institutions
- ☐ Establishing the Arbitration Council of India – yet to be notified
- ☐ Timely conduct of proceedings : s. 23(4)
- ☐ Confidentiality : s. 42A
- ☐ Qualification of arbitrators: Eight Schedule (now omitted in the 2021 amendments)

Reforms in the 2021 Amendment

- ☐ Amendment to s. 36 : courts can allow unconditional stay for the awards if satisfied that a prima facie case is made out that the arbitration agreement or the main contract on which the award is based is induced by fraud or corruption
- ☐ Omission of the Eight Schedule

2023 Amendment : What can we expect?

General criteria to consider:

- ☐ Have the parties agreed on a particular method of resolution in their existing contracts?
- ☐ How complex are the issues?
- ☐ Is there a need for confidentiality?
- ☐ Time / cost constraints
- ☐ Need for quick resolution
- ☐ Need to maintain commercial relationship following dispute resolution
- ☐ Need for neutral opinion
- ☐ Need to maintain control over process

Thank You



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