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The Role of Arbitration Mechanisms in Criminal Cases

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Arbitration, a key component of Alternative Dispute Resolution (ADR), has gained widespread traction in civil and commercial domains for its efficiency, confidentiality, and autonomy. However, its role within the sphere of criminal law remains highly restricted and controversial. Criminal offences, being acts against the state and public order, are traditionally considered non-arbitrable. Despite this, the modern legal landscape has witnessed a gradual convergence of civil and criminal elements, particularly in cases involving commercial fraud, breach of trust, and misappropriation of funds. This paper explores the conceptual and legal boundaries of arbitrability in criminal matters, drawing upon Indian and international jurisprudence. It also examines the emerging role of restorative justice mechanisms such as Lok Adalats, plea bargaining, and victim-offender mediation as parallel systems of dispute resolution in specific criminal contexts. The paper concludes that while arbitration cannot supplant the core prosecutorial function of the state in serious criminal cases, ADR and restorative mechanisms hold significant promise for compoundable offences and rehabilitation-focused justice systems.

Keywords: arbitration, adr, lok adalat.

INTRODUCTION

Arbitration is widely regarded as a practical, efficient, and private means of resolving disputes, particularly in civil and commercial matters. It allows parties to avoid lengthy court battles and instead come to a mutual resolution with the help of a neutral arbitrator.¹ However, when it comes to criminal law, the idea of using arbitration becomes far more complex and controversial. Criminal offences are not just disputes between individuals; they're seen as wrongs against the entire society.² That's why criminal law is mainly handled by the state, which takes on the responsibility of investigating, prosecuting, and punishing offenders.³ Given this framework, it seems at first that arbitration, which relies on consent and private resolution, has little to no role in criminal matters.⁴ But today's legal world is more interconnected than ever. In many cases, particularly in financial or corporate disputes, we see a mix of civil and criminal elements, like fraud, breach of trust, or misuse of funds.⁵ These cases raise important questions: Should all such disputes be kept strictly within the courtroom? Or is there room for alternative approaches that could lead to faster, more restorative outcomes?

India's legal system, for example, has begun experimenting with such alternatives. Processes like Lok Adalats, plea bargaining, and victim-offender mediation have opened the door to more collaborative forms of justice, especially for less serious or compoundable offences. These models don't replace the role of the state in serious crimes, but they do show promise in making justice more accessible and less adversarial in appropriate situations. This paper explores these evolving trends. It looks at how arbitration and other dispute resolution methods intersect with criminal law, what the courts have said, and how different countries are approaching this issue.⁶ In doing so, it asks whether there's space for a more balanced approach, one that respects the seriousness of criminal offences but also recognises the value of resolution, reconciliation, and healing where possible.

¹ Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014)

² Andrew Ashworth, *Principles of Criminal Law* (7th edn, OXFORD UNIVERSITY PRESS 2013)

³ Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (2nd edn, Routledge 2011)

⁴ *Booz Allen and Hamilton Inc v SBI Home Finance Ltd* (2011) 5 SCC 532

⁵ *N Radhakrishnan v Maestro Engineers* (2010) 1 SCC 72

⁶ Criminal Law (Amendment) Act 2005

ARBITRATION AND CRIMINAL LAW: AN OVERVIEW

Arbitration, as a dispute resolution mechanism, is typically grounded in contractual consent and is commonly employed in civil and commercial disputes.⁷ It relies on the principles of party autonomy and private adjudication, where disputing parties agree to submit their differences to a neutral arbitrator or arbitral tribunal.⁸ This framework, however, stands in contrast to the foundational principles of criminal law, which perceive crimes as offences against the state or society rather than just private parties.⁹ The state assumes the responsibility of prosecution, and public interest becomes paramount in the adjudication process.

Allowing arbitration in cases with criminal overtones raises several intricate problems that affect victim rights, judicial effectiveness, and public trust in the legal system. Arbitration may have advantages such as speed and cost-effectiveness, but its use in criminal cases raises questions about accountability, fairness, and the possibility of compromising the integrity of the legal system. With quicker hearings and fewer formalities, arbitration may be a more effective method of resolving disputes than going to court. This effectiveness may lessen the load on overworked courts, especially in situations where speed is essential. But permitting arbitration in all situations, even those with criminal overtones, might result in fewer court cases.

Since arbitration is a private procedure, it may restrict the rights of victims who require judicial support and public accountability. Arbitration may be utilised in criminal cases to evade prosecution or to sway the outcome in favour of one party. Lack of Transparency and Accountability: Because arbitration is private, it may be less transparent and accountable, which could lead to less examination of the resolution procedure. This is especially important in situations where there may be possible criminal activity.

One of the key legal thresholds in determining the applicability of arbitration is the doctrine of arbitrability. This doctrine differentiates between rights in personam, which pertain to private claims between individuals and are generally arbitrable, and rights in rem, which affect the public at large and are non-arbitrable. Criminal offences fall into the latter category,

⁷ Partasides (n 1)

⁸ Alan Redferz et al., *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004)

⁹ Andrew Ashworth, *Principles of Criminal Law* (7th edn, OUP 2013)

involving issues of public policy, law enforcement, and social justice, making them unsuitable for private resolution through arbitration.

Courts in various jurisdictions have consistently reinforced this distinction. In *Booz Allen and Hamilton Inc. v SBI Home Finance Ltd*¹⁰ *Booz Allen and Hamilton Inc.*, an international consulting firm, had agreed with SBI Home Finance Ltd. and other financial institutions to offer consultancy services regarding the restructuring of their business model.

The agreement had a specific clause that any disputes arising from it would be settled through arbitration. Eventually, a dispute arose when SBI Home Finance Ltd. did not fulfil its financial obligations under the agreement. Booz Allen filed a civil suit in the Bombay High Court seeking enforcement of their contractual rights.

In response, the defendants applied Section 8 of the Arbitration and Conciliation Act, 1996, asking the court to refer the matter to arbitration, as per the clause in the agreement. The trial court allowed the application and directed that the dispute be referred to arbitration. Booz Allen challenged this order before the Supreme Court. The Supreme Court of India held that matters involving rights in rem, including criminal offences, are non-arbitrable as they impact society at large. Similarly, English courts have affirmed that criminal matters cannot be resolved through arbitration, given their inherent public interest and the non-waivable nature of state prosecution.¹¹

Nevertheless, arbitration may occasionally intersect with criminal elements in commercial disputes. For instance, a civil dispute may involve allegations of fraud or misappropriation, which, while containing criminal implications, may still be subjected to arbitration if they pertain to the performance or execution of a contract.¹² Indian jurisprudence, notably in *Ayyaswamy v A Paramasivam*, *Ayyaswamy* (the appellant) and *Paramasivam* (the respondent) were brothers who jointly owned a hotel business.

The business was being operated under a partnership deed that included an arbitration clause, a standard provision that said any disputes between the partners should be resolved through arbitration. At some point, a dispute arose between the two brothers regarding the

¹⁰ *Booz-Allen & Hamilton Inc v SBI Home Finance Ltd. & Ors* (2011) 5 SCALE 147

¹¹ *R v Gough* [1993] AC 646 (HL)

¹² *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552

management and financial dealings of the hotel. Ayyaswamy alleged that Paramasivam had committed fraudulent acts, misused funds, and fabricated records. So, instead of going to arbitration, he filed a civil suit in court. Paramasivam, on the other hand, invoked the arbitration clause and requested the court to refer the matter to arbitration under Section 8 of the Arbitration and Conciliation Act 1996. The Supreme Court clarified that not all allegations of fraud automatically make a dispute non-arbitrable. The Court held that the allegations made by Ayyaswamy were not serious enough to prevent arbitration. The alleged fraud did not involve complex legal questions or wide public ramifications. Therefore, the dispute was referred to arbitration.

Such judicial interpretations reflect a gradual but cautious opening toward allowing arbitration to proceed where criminal elements are incidental rather than central to the dispute. Yet, the overarching position remains that core criminal offences involving penal consequences, such as murder, rape, and corruption, cannot be adjudicated through arbitration.

NON-ARBITRABILITY OF CRIMINAL OFFENSES

The concept of non-arbitrability is central to understanding the limitations of arbitration in the criminal law context. Arbitrability determines which disputes are eligible for resolution through arbitration and which are reserved for adjudication by the courts due to their nature or public interest considerations.¹³ In most legal systems, criminal matters are classified as non-arbitrable because they involve rights in rem—offences against the state and society as a whole, rather than merely private disputes between individuals.

The Indian Supreme Court has consistently emphasised this distinction. In *Booz Allen and Hamilton Inc v SBI Home Finance Ltd*,¹⁴ the Court held that only disputes concerning rights in personam are amenable to arbitration, while those involving rights in rem, such as criminal prosecutions, are beyond the arbitral domain.¹⁵

¹³ Born (n 2)

¹⁴ *Booz-Allen & Hamilton Inc v SBI Home Finance Ltd. & Ors* (2011) 5 SCALE 147

¹⁵ *Ibid*

Similarly, in *N Radhakrishnan v Maestro Engineers*, the Court observed that allegations of serious fraud and criminal wrongdoing could not be adjudicated by a private forum like an arbitral tribunal, given their wider implications and the necessity for judicial scrutiny.¹⁶

This view aligns with international arbitration standards. For example, English and European courts have held that criminal liability entails punitive consequences imposed by the state and cannot be delegated to private adjudicators.¹⁷ Arbitration lacks the coercive power of criminal courts, such as the ability to impose criminal sanctions, conduct custodial sentencing, or ensure the procedural protections required under criminal law.¹⁸ As a result, arbitration proceedings would be inherently deficient in delivering justice in criminal matters, undermining both due process and public confidence.

Nevertheless, some criminal law elements may arise incidentally in arbitral proceedings, particularly in complex commercial cases where allegations of fraud, forgery, or breach of trust are involved. Courts have attempted to address this by distinguishing between mere allegations of fraud, which may be dealt with by arbitrators, and serious allegations that permeate the contract or are criminal, requiring judicial adjudication.¹⁹

In *Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Ltd*, the Supreme Court reiterated that where the dispute is primarily civil, arbitration can proceed even if criminal proceedings are separately initiated.²⁰

Despite these nuanced positions, the core position remains that criminal offenses especially non-compoundable ones such as murder, rape, terrorism, or corruption cannot be subjected to arbitration under any legal system committed to public justice and rule of law.²¹ Arbitration, being consensual and remedial, cannot substitute the state's prosecutorial authority or ensure the punitive deterrence necessary in criminal justice.

INTERSECTION OF ARBITRATION AND CRIMINAL ELEMENTS

While criminal matters are largely non-arbitrable, practical complexities often arise where civil or commercial disputes bear criminal overtones. In such cases, arbitration and criminal

¹⁶ *N Radhakrishnan v Maestro Engineers* (2010) 1 SCC 72

¹⁷ *Westacre Investments Inc v Jugoinport SDPR Holding Co Ltd* [2000] QB 288 (CA)

¹⁸ Andrew Ashworth, *Sentencing and Criminal Justice* (6th edn, Butterworths 2000)

¹⁹ *Ayyaswamy v A Paramasivam* (2016) 10 SCC 386

²⁰ *Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Ltd* (2020) 4 SCC 1

²¹ Law Commission of India, *Report No 246 on Amendments to the Arbitration and Conciliation Act 1996* (2014)

law may intersect, especially where contractual disagreements are accompanied by allegations of fraud, misrepresentation, criminal breach of trust, or cheating.²² These overlaps prompt critical legal questions: whether such disputes can be resolved by arbitrators and whether the pendency of criminal proceedings bars arbitration.

Indian jurisprudence has gradually evolved a nuanced approach to such scenarios. In *Ayyasamy v A. Paramasivam*, the Supreme Court distinguished between ‘mere allegations of fraud’ and ‘serious allegations of fraud’ which permeate the contract.²³ The former, if incidental to the performance of the contract, do not render a dispute non-arbitrable. However, if the criminal allegations form the very foundation of the dispute or impact public interest, then judicial intervention is warranted, and arbitration must yield to the criminal process.

Similarly, in *Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Ltd*, the Court held that the existence of parallel criminal proceedings does not by itself make a dispute non-arbitrable.²⁴ As long as the subject matter of the arbitration remains within the realm of civil law, such as misappropriation of investment funds or breach of contractual terms, the arbitral tribunal may proceed. The Court emphasised that the mere initiation of criminal proceedings should not frustrate the arbitration process or be used as a tactical delay mechanism.²⁵

However, courts have also acknowledged the potential prejudice that concurrent proceedings may pose. In *Rupali Devi v State of Uttar Pradesh*, it was held that criminal prosecution and civil proceedings can run concurrently if they pertain to different aspects of the same dispute.²⁶ Nonetheless, arbitral tribunals must exercise caution in dealing with facts also under criminal scrutiny, especially when findings in arbitration could potentially influence ongoing trials or contradict judicial findings.

Moreover, questions of arbitrator impartiality and the limits of arbitral authority come to the fore when criminal elements are involved. Arbitral tribunals lack the investigative tools, coercive powers, and procedural safeguards of criminal courts.²⁷ When we say that arbitral tribunals lack the investigative tools, coercive powers, and procedural safeguards of criminal

²² Born (n 2)

²³ *Ayyasamy v A. Paramasivam* (2016) 10 SCC 386

²⁴ *Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Ltd* (2020) 4 SCC 1

²⁵ *Ibid*

²⁶ *Rupali Devi v State of Uttar Pradesh* (2019) 5 SCC 384

²⁷ Mads Andenas and Duncan Fairgrieve, *Arbitration and Criminal Law: Crossroads and Challenges* (OUP 2009)

courts, we're not just using legal jargon; we're pointing to a real and important difference in how these two systems works.

Lack of Investigative Powers: A criminal court has the backing of the State. It can order a police investigation, summon evidence, and get access to phone records, financial documents, or even carry out a raid if needed. For example, if a person is accused of fraud, the police can go to their house, seize their laptop, or question people under oath. But an arbitral tribunal is a private forum. It doesn't have its investigative wing. If one party is hiding evidence, the arbitrator can't send the police to search their office. They can ask for documents, but if the other party refuses, the tribunal is stuck unless it goes to a court for help, which delays everything.

No Coercive Powers: Criminal courts can compel people to appear, even if they don't want to. They can issue a summons or warrant. If someone disobeys, the court can hold them in contempt or even arrest them. On the other hand, arbitrators don't have that muscle. They rely on both parties cooperating voluntarily. If a witness refuses to testify or a party doesn't show up, the tribunal can't force them; it has to go back to a civil court to enforce attendance, which takes time and may still not work effectively.

No Power to Punish Crimes: This is crucial: only a criminal court can send someone to jail or impose criminal penalties like fines or probation. Suppose someone forged documents or embezzled money, an arbitrator can award compensation or terminate a contract, but they can't convict anyone or impose a custodial sentence. So even if serious misconduct like corruption or fraud is discovered during arbitration, the criminal consequences must still be pursued separately in a criminal court.

Lack of Procedural Safeguards: Criminal courts follow strict rules to ensure a fair trial, like presumption of innocence, beyond a reasonable doubt, cross-examination, and legal aid. These are built into the system to protect rights, especially when a person's liberty is at stake. Arbitration, in contrast, is more flexible and informal. While that's great for business disputes (like delays in delivery or non-payment), it's not suitable for cases involving criminal liability, where someone's reputation or freedom is on the line. Arbitration is like settling a contract dispute between two private parties fast, privately, and efficiently, but limited. Criminal courts are like a state-backed truth-finding mission, slower, but with powerful tools

and constitutional safeguards. So, while both systems serve important purposes, they are built for very different kinds of conflicts. Arbitration is excellent for resolving business disagreements, but when criminal wrongdoing is involved, only a criminal court has the teeth to dig deep, uncover the truth, and punish the guilty.

As such, arbitrators must refrain from pronouncing on criminal liability or imposing sanctions that would otherwise require state authority. In some instances, arbitral awards have been challenged or set aside under Section 34 of the Indian Arbitration and Conciliation Act 1996 because the dispute was non-arbitrable due to embedded criminal allegations.²⁸ These decisions underscore the judiciary's supervisory role in ensuring that arbitration does not transgress into areas meant for public prosecution or state adjudication.

RESTORATIVE JUSTICE AND ADR IN CRIMINAL MATTERS

Restorative justice represents a transformative approach to criminal law, emphasising the repair of harm caused by crime through inclusive processes involving victims, offenders, and the community.²⁹ Unlike retributive justice, which focuses on punishment and deterrence, restorative justice seeks accountability, reconciliation, and the reintegration of offenders into society.³⁰ Alternative Dispute Resolution (ADR) mechanisms, such as mediation, conciliation, and Lok Adalats, play a pivotal role in operationalising this model, especially in the resolution of compoundable and less serious criminal offences.

In India, the Lok Adalat system, established under the Legal Services Authorities Act 1987, offers an institutionalised form of ADR that has been effective in resolving disputes, including minor criminal cases, through mutual consent.³¹ These forums are empowered to settle compoundable offences under the Indian Penal Code (IPC), such as defamation, hurt, or criminal trespass, provided both parties agree.³² The decisions or awards of Lok Adalats have the status of a civil court decree and are binding on the parties, with no provision for appeal.³³

²⁸ *Bangalore Water Supply & Sewerage Board v Suguna Constructions* (2021) 9 SCC 129

²⁹ Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (2nd edn, Routledge 2011)

³⁰ Howard Zehr, *The Little Book of Restorative Justice* (Good Books 2002)

³¹ Legal Services Authorities Act 1987, s 19

³² The Indian Penal Code 1860, s 320

³³ Legal Services Authorities Act 1987, s 21

Similarly, the introduction of plea bargaining through the Criminal Law (Amendment) Act 2005 added another ADR-type mechanism within the criminal justice system.³⁴ This process allows the accused in certain criminal cases, typically those punishable with imprisonment of less than seven years, to voluntarily plead guilty in exchange for a reduced sentence or other negotiated outcomes.³⁵ The aim is to expedite justice, reduce the burden on courts, and provide closure to victims through agreed compensation or other remedies.

Mediation, though less commonly used in criminal proceedings, has gained ground in resolving family and domestic disputes, particularly in matrimonial matters under Section 498A IPC.³⁶ Courts have actively encouraged mediation centres to settle such cases, emphasising the need to preserve familial harmony and avoid the adversarial consequences of prolonged criminal litigation.

Restorative justice and ADR are also recognised internationally. The United Nations Economic and Social Council's Resolution 2002/12 encourages member states to adopt restorative processes within their criminal justice frameworks, recognising their potential to humanise the legal process and promote healing.³⁷ Many European countries, such as Norway and Finland, have institutionalised restorative programs that include victim-offender mediation and community conferencing for juvenile and first-time offenders.³⁸

Despite these advancements, the applicability of ADR in serious, non-compoundable criminal offences remains limited. Public interest, deterrence, and the gravity of certain crimes demand adjudication through formal judicial proceedings. However, the success of restorative and ADR models in appropriate cases demonstrates their potential to complement the criminal justice system, fostering resolution, satisfaction, and reintegration rather than mere punishment.

CHALLENGES AND CONSIDERATIONS

Integrating arbitration into the criminal justice system poses several challenges: Criminal law serves to uphold public order and societal values, and allowing arbitration in criminal

³⁴ Criminal Law (Amendment) Act 2005

³⁵ Code of Criminal Procedure 1973, s 265A

³⁶ *K. Srinivas Rao v D.A. Deepa* (2013) 5 SCC 226

³⁷ UN Economic and Social Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (2002)

³⁸ Lode Walgrave, *Restorative Justice, Self-interest and Responsible Citizenship* (Willan Publishing 2008)

matters could undermine the state's role in enforcing laws and ensuring justice. Arbitration may not adequately safeguard the rights of victims, particularly in serious offences, where state intervention ensures appropriate remedies and protection.

An instance where arbitration and criminal proceedings ran in parallel:

1. N. Radhakrishnan v Maestro Engineers (2010) -

Core Idea: Civil fraud in arbitration vs criminal fraud in courts - In this case, the claimant had alleged fraud and serious misconduct in a partnership. He tried to avoid arbitration by saying the dispute involved fraud and should only be heard by a court. However, the Supreme Court ruled that since serious allegations of fraud were involved, the case was better suited for court and not arbitration. But what followed in later cases (like Ayyaswamy) was a shift, where courts allowed arbitration and criminal proceedings to coexist, so long as the fraud was not complex or public. This evolution shows how the initial rejection of arbitration in fraud cases slowly gave way to allowing both processes to run separately.

2. Swiss Timing Ltd. v Organising Committee, Commonwealth Games (2014)³⁹ -

Core Idea: Criminal investigation does not bar Arbitration - In this case, there was a contract between Swiss Timing Ltd. and the Commonwealth Games Organising Committee, which later came under scrutiny due to allegations of corruption. Even though criminal proceedings were ongoing for alleged financial irregularities, the Supreme Court held that arbitration could proceed because the contractual dispute was distinct from the criminal investigation. This case is a prime example where the Court drew a line between contractual breaches (civil) and criminal misconduct, allowing both to move forward independently.

3. K.K. Modi v K.N. Modi (1998)⁴⁰ -

Core Idea: Civil disputes in arbitration; separate criminal matters in court. In this family business dispute, there were allegations of forgery and fraud, but the core issue was about the management and control of the family company — a civil dispute. While criminal complaints were filed, the arbitration on business issues continued, and the court did not see

³⁹ *Swiss Timing Ltd v Organising Committee Commonwealth* (2014) 6 SCC 677

⁴⁰ *K.K. Modi v K.N. Modi* (1998) 2 ICC 1

any conflict. This reinforced the idea that a civil arbitration does not get stalled just because a criminal complaint exists, unless the entire civil dispute depends solely on the criminal charges.

4. Ayyaswamy v A. Paramasivam (2016)⁴¹ -

Core Idea: Routine fraud claims don't block Arbitration - As discussed earlier, in this case involving family business dealings, one party tried to avoid arbitration by alleging fraud. The Supreme Court allowed the arbitration to continue, stating that just because a criminal allegation exists doesn't mean arbitration must stop. This case supports the co-existence of criminal and arbitral processes, as long as they don't overlap significantly in subject matter.

CONCLUSION

The role of arbitration in criminal cases remains circumscribed by the fundamental principles distinguishing civil and criminal law. While arbitration offers efficiency and party autonomy in resolving disputes, its application in criminal matters is constrained by concerns of public policy, victim rights, and the overarching mandate of the state to prosecute offences. Nonetheless, ADR mechanisms, particularly those aligned with restorative justice, hold promise for addressing certain categories of criminal cases, emphasising reconciliation and community involvement. As legal systems evolve, a nuanced approach is essential to balance the benefits of arbitration with the imperatives of criminal justice.

Arbitration has rightfully earned its place as a powerful tool for resolving civil and commercial disputes. It's fast, flexible, private, and cost-effective. However, when we step into the world of criminal law, the terrain changes completely. Criminal cases are not just about settling scores between two parties; they involve the interests of society at large, questions of guilt and innocence, and sometimes a person's freedom and reputation. This is where arbitration hits a natural limit.

While arbitration can still play a complementary role — for example, in disputes that have both civil and criminal aspects, like commercial fraud or breach of trust — it cannot and should not replace the criminal justice system. Arbitrators don't have the power to

⁴¹ *Ayyaswamy v A. Paramasivam* (2016) 10 SCC 386

investigate crimes, compel witnesses, or punish offenders. More importantly, they're not equipped to provide the public accountability and procedural fairness that criminal trials demand.

That said, we shouldn't see arbitration and criminal proceedings as enemies. In many cases, they can run side by side, each doing what it does best: arbitration, dealing with contractual fallout, and courts, dealing with criminal misconduct. The key is knowing where to draw the line.

In the end, arbitration is a valuable mechanism — but not a cure-all. When crime is at the heart of a dispute, justice needs the full force of the law, not just a private resolution. Arbitration may guide us through the business of disputes, but only the courts can walk us through the duty of justice.