Article

Arbitrability of Cross-Border Surrogacy Disputes : An Indian Perspective

Mayan Prasad* and Surabhi Shekhawat**

With the growth of surrogacy in India, it has become important to have an effective means of dispute resolution between the parties to the surrogacy agreement. Of all the forms of dispute resolution, arbitration would be the most advisable as it is cost-effective, less time consuming and affords the ends of justice in a better fashion. The awards resulting from arbitrations held outside India would be subjected to Part II of the Arbitration and Conciliation Act, 1996. This can however lead to various legal complexities as this part is restricted to only commercial transactions and the Indian courts might not give enforce such arbitration awards as it might relate to rights *in rem* or can interpret the best interest of the child differently from arbitral tribunal. To provide for effective dispute resolution in surrogacy disputes, the Indian Arbitration Act must enlarge its scope to include non-commercial transactions, there should be a special legislation dealing with surrogacy disputes and a uniform legal instrument at the international level to remove the ambiguity in this field must be introduced.

[I] INTRODUCTION

Advancement in the area of reproductive medicine has resulted in various treatment options becoming available to infertile couples. Surrogacy, one such reproductive method, has become increasingly popular inspite of controversies regarding its ethical aspects.[1] It caught the public eye in the mid-1980s,[2] through the cases of *Baby Cotton*[3] in the United Kingdom and *Baby M*[4] in the United States. Though surrogacy and adoption target the same clientele,[5] surrogacy is a preferred means of having a child as there is atleast a partial biological relation between the child and the parents.[6]

It has rapidly become a global concept[7] due to the restrictive legal approach to surrogacy in the home state of the couple which wishes to have a child (hereinafter referred to as the 'commissioning parents'), in particular commercial surrogacy, combined with lower costs for the entire procedure overseas.[8] In terms of the cross-border "phenomenon", India's surrogacy industry has received perhaps the most attention.[9] Approximately 400 million US dollars[10] a year of India's medical tourism industry is attributable to the reproductive segment of the market. But, in the absence of a global legislative framework, highly complex legal problems arise from international surrogacy arrangements[11] giving rise to cross-border surrogacy disputes.

* Advocate, Allahabad High Court, the author can be reached at mayanprasad@gmail.com

** Student, 5th year LLB, GLC Mumbai. The author can be reached at surabhi_mumbai09@hotmail.com

Published in Articles section of www.manupatra.com

Part II of the paper gives an overview of what surrogacy is. Part III elaborates how surrogacy related disputes would be resolved in a better manner by way of arbitration as compared to litigation in courts. Arbitration is a forum that requires lesser time and cost for dispute resolution and the arbitrators are in a better position to judge the matter, as shall be elaborated later. In Part IV, the paper discusses whether surrogacy is arbitrable or not under the Indian Law and comparative scenario overseas. Part V provides ways in which non-arbitrability issues can be tackled to promote arbitration as a mode of dispute resolution for surrogacy.

[II] WHAT IS SURROGACY?

When a woman agrees to carry a child (or children) for the commissioning parents and relinquishes her parental rights following the birth of the child, the arrangement is referred to as surrogacy and the woman is called the surrogate mother[12] (hereinafter referred to as the 'surrogate'). Such an arrangement may be altruistic, wherein the intending parent(s) may pay the surrogate either nothing at all or a sum of money for meeting her "reasonable expenses" associated with such an arrangement, or it may be commercial, wherein the intending parent(s) pay the surrogate financial remuneration which goes beyond such "reasonable expenses".[13]

[III] ARBITRATION - A PREFERRED FORM OF DISPUTE RESOLUTION

"*As a litigant, I should dread a lawsuit above all else, other than sickness and death.*"[14]

Disputes arising out of cross-border surrogacy agreements normally pertain to the custody of the child, parenthood, nationality, contractual obligations of the parties etc.[15] There are many advantages that arbitration can afford in disputes relating to surrogacy as compared to court litigation.

(A) Time and cost elements

Compared to long and expensive court proceedings, arbitration offers a timely and cost-effective process for settling disputes, especially in India where there is a heavy backlog of cases in Courts.[16] In a study conducted in the US, it was found that the median time from filing to the delivery of the award was just 16-½ months for arbitrations.[17] Meanwhile the average time from filing of the suit to the delivery of judgment for litigation was 25 months.[18] In many cases, parties find it difficult to obtain or afford representation for the entirety of court proceedings. They may, however, afford the costs arising out of arbitration.[19]

(B) Litigation: a cob web of procedures

In arbitration, the parties have to comply with limited procedures. Such procedure can be altered by a mutual agreement between the parties, contrary to courts where the parties need to pass through several procedures before the dispute can be conclusively decided.[20] This is because arbitration agreements are a species of contract law wherein the parties can craft the terms or parameters by which an arising dispute will be handled in arbitration.[21] Such flexibility is not available in litigation.

(C) Arbitrators are in a better position to judge

In India, judges of courts get changed every few months depending on their assignment. Therefore the likelihood of the same judge hearing the entire matter is

Published in Articles section of www.manupatra.com

low. Whereas in arbitration, there is continuity of the same arbitrator throughout the arbitration resulting in less wastage of time, more detailed knowledge, consistency of approach and orders. Arbitrators can deal with discrete issues or all the issues – the advantage of former is that there can be specific arbitrators for specifically complex or sensitive or detailed or specialist element of case, with the remainder being in the normal court process.

Additionally, arbitration can be used to resolve a part of the dispute or all the issues in the dispute together. This feature of arbitration is especially important for surrogacy disputes because disputes arising from a surrogacy arrangement can range from a comparatively simple question of determination of sum of consideration to be paid, to the complex question of determining the custody of a child.

(D) Interests of the child

It is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.[22] Thus, an arbitration will be in a better position to ensure the 'best interest of the child' while considering the same things that normal courts consider when they decide what is in the child's best interest.[23]

(E) Confidentiality

The arbitration process is confidential contrary to court proceedings where the intimate details of the parties' lives are open on display to third persons. The surrogacy disputes involve private and sensitive issues which the parties would not be comfortable in being argued in open court. In arbitration, only the arbitrator(s), the parties and their legal representatives are present.

(F) Applicable law of choice

Cross-border surrogacy disputes can lead to complicated questions of private international laws with different laws being applicable to the parties. An Arbitral Tribunal has no mandate to follow the statutes of various countries, but rather its mandate is to effectuate the intentions of the parties.[24] The law applicable is decided by the parties in the arbitration agreement itself. Further, under recognized arbitral principles of *amiable compositeur* and *ex aequo et bono*,[25] if permitted under the arbitration agreement, arbitrators are free to fashion a just remedy.

[IV] ARBITRABLE NATURE OF SURROGACY DISPUTES

(A) The legal regime in India

Indian Arbitration Law

When the seat of the Arbitral Tribunal is situated outside India and an application is made, by either of the parties to the surrogacy dispute, to an Indian Court for the enforcement of the Award made by such a Tribunal (hereinafter referred to as 'Foreign Award'), Part II of the Arbitration and Conciliation Act, 1996 (herein 'the Act') would apply.[26] Part II of the Act has incorporated provisions of the New York Convention[27] and the Geneva Convention.[28] As suggested, arbitration is a more preferred form of

Published in Articles section of www.manupatra.com

dispute resolution in surrogacy matters. But, as far as international arbitrations are concerned, there are certain discrepancies in the Indian law which create barriers to this form of dispute resolution.

Article I clause 3[29] of the New York Convention, appended as Schedule I to the Arbitration Act, left the choice of making the Convention applicable to only those disputes that arise out of 'commercial' relations, to the signatory State. While enacting its national law, India has retained the applicability of the said Convention only to those disputes that arise out of legal relations that are 'commercial' in nature as per Indian Law.[30] On similar lines, the applicability of the Geneva Convention has been retained only to 'commercial' legal relations.[31] Thus, it is evident that a conscious effort has been made by India to keep the enforcement of awards regarding disputes arising out of non-commercial relations outside the ambit of International Arbitrations.

Though there is no legislation on surrogacy in India, commercial surrogacy has been recognized by Indian Courts.[32] However, the pertinent question is, have the Courts used the word 'commercial' with regards to surrogacy in the same context as it has been used in Part II of the Arbitration Act? For understanding this, we need to analyze the meaning of the word 'commercial'.

'Commercial' - The literal and contextual meaning

The term 'commercial' has not been defined in the Act but the Preamble to the Act makes a reference to the UNCITRAL Model Law on International Commercial Arbitration, 1985 (hereinafter referred to as the 'Model Law'). A footnote to the Model Law has explained the term 'commercial' as:

"The term 'commercial' should be given a wide interpretation as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring, leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road."

Though this explanation is not exhaustive, it can be gathered that the context in which the word 'commercial' has been used, relates to trade and business. The Supreme Court of India has given a similar explanation to the words 'trade' and 'commerce' used under Article 301[33] of the Indian Constitution:[34]

> *"Trade and commerce do not mean merely traffic in goods, i.e., exchange of commodities for money or other commodities. In the complexities of modern conditions, in their wide sweep are included carriage of persons and goods by road, rail, air and waterways, contracts, banking, insurance, transactions in the stock exchanges and forward markets, communication of information, supply of energy, postal and telegraphic services and many more activities - too numerous to be exhaustively enumerated - which may be called commercial inter-course."*

The 'legal relation' between the surrogate and the commissioning parents in a surrogacy agreement cannot be viewed as 'trade', 'business' or 'commercial' as that would commoditize the child born out of such an agreement. The sum of

Published in Articles section of www.manupatra.com

money paid to a surrogate mother may be treated as compensation for her lost wages (or reasonable living expenses, if not employed prior to the pregnancy), medical and other pregnancy-related expenses and living costs (9 months pregnancy plus 3 months post-birth recovery).[35] Payments beyond reasonable expenses can be treated as a 'reimbursement for pain and suffering'.[36] A transaction would be considered as 'commercial' if one party contributes to the trade of the other party and if such a contribution results in monetary profits.[37] Since a surrogate mother is neither a participant in the commissioning parents' business nor does the payment made to her constitute 'profit', *vis-a-vis*, such a transaction cannot be viewed as 'commercial'. While construing the expression 'commercial' under the Act, it has to be borne in mind that the Act is calculated and designed to sub-serve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration.[38]

If either of the parties makes an application to the Indian Courts for the enforcement of a Foreign Award on surrogacy, the Courts may refuse to entertain it as Part II of the Arbitration Act does not cover non-commercial arrangements. Commercial disputes while often complex are generally transactional whereas disputes such as surrogacy disputes are essentially relational conflicts with interdisciplinary complexity including legal, emotional, psychological and parenting issues.[39]

If surrogacy is not 'commercial' in the context of 'trade', then in what context is it 'commercial'? And what would the 'legal relation' between a surrogate and the commissioning parents be?

Surrogacy and consumer protection law

Since the relation between the commissioning parents and the surrogate mother is not 'commercial', the relation may be viewed as that of a 'consumer'[40] and 'service provider',[41] respectively. A 'consumer' is anyone who consumes goods or services at the end of the chain of production.[42] It has been argued that commercial surrogacy may be seen as a 'service' such that the GATS[43] could be applied to it in instances of cross-border surrogacy agreements.[44] Surrogacy is seen as a legitimate form of 'work' because it involves the servicing of a consumer.[45] From a liberal economic perspective, the exchange of a financial sum entitles the commissioning parents to both a service and to consumer rights.[46]

The legislation that governs such transaction in India is The Consumer Protection Act, 1986. This Act is inapplicable to goods purchased or services hired for 'commercial purpose', as has been specified in the definition to the word 'consumer'. Surrogacy becomes 'commercial' by virtue of the payment made by the commissioning parents to the surrogate. But, there is a distinction between the legal relation of trade-commercial and consumer-commercial inspite of there being payment of money. It is the context in which the word 'commercial' has been used, that is of prime importance. The context of 'commercial' under the Arbitration Act is more in terms of trade-commercial and not consumer-commercial.

Disputes involving rights in rem

The Indian Courts have been reluctant to give up their prerogative in cases involving rights *in rem* i.e., rights that affect the world at large.[47] If any case involves questions, the adjudication of which would result in a judgment laying down general legal

Published in Articles section of www.manupatra.com

principles, then such principles would be applicable to third parties in future disputes too.

Recently, the Apex Court in *Booz Allen*,[48] referring to the issue of arbitrability noted that: "*generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration*" The Court also gave few examples of non-arbitrable disputes that relate to actions *in rem*, such as testamentary matters, matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody, matters relating to guardianship, etc.

It is inadvisable to exclude all cases relating to *in rem* claims from arbitration. The Supreme Court has created confusion as to the arbitrability of disputes in the *Booz Allen* judgment by stating incoherently that all disputes which relate to rights *in rem* cannot be adjudicated in a private forum i.e. an arbitral tribunal. There will be cases in which the Arbitral Tribunal will be called to determine the question of custody of the child which in turn will include determination of parentage of the child. Such declarations will *prima facie* be declarations *in rem.*

Jurisdiction of special courts

In *Booz Allen*, the Court also held that if the issues involved in a dispute are governed by any special statute then only the special courts established under such statutes are conferred jurisdiction to decide the matter. So, if a surrogacy dispute is covered under the Consumer Law etc., the Court may require the parties to approach the consumer forum and not opt for arbitration.

There is no direct law or court ruling dealing with arbitration of surrogacy related disputes, but since the nature of such disputes is similar to that of family related disputes, the jurisprudence evolved by courts in such matters can be referred to.

In *Sam Chetti*,[49] the Madras High Court held that a guardianship matter cannot be referred to an arbitrator because arbitration is allowed where all parties interested agree that the matter between them shall so be referred. However, in a guardianship dispute the party most interested i.e. the minor, cannot agree to such a reference. This case was based on the contractual limitations of arbitration. However, in a few cases the courts have upheld family disputes to be arbitrable. In *Nalla Ramudamma*[50], the Madras High Court held that there was nothing to suggest that arbitrators are not competent to pass an award in matters arising out of matrimonial disputes. In *Faqir Mohammad*,[51] the Allahabad High Court held that an arbitrator can adjudicate on suits for dissolution of Muslim marriage as it is not excluded by the provision of Dissolution of Muslim Marriages Act, 1939.

Thus, even though in a dispute arising out of a surrogacy arrangement, the rights of the affected parties may be covered by various special statutes, parties should not be prohibited from settling their dispute out of court simply because a special court has been set up for that purpose.[52]

The observations of the Hon'ble Delhi High Court are important in this regard.

> '*No doubt, for determination of disputes the State provides the mechanism in the form of judicial fora, i.e. administration of justice through the means of judicial system established in this country as per the Constitution and the laws. However, it is also recognized that that is not the only means for determination of lis or resolution of conflicts between the*

Published in Articles section of www.manupatra.com

parties. Still the parties are given freedom to choose a forum, alternate to and in place of the regular courts or judicial system for the decision of their inter se disputes. There has been a recognition of the concept that notwithstanding the judicial system, parties are free to chose their own forum in the form of arbitration. This was first recognized by enacting Arbitration Act, 1891. Introduction of Section 89 in the Code of Civil Procedure by amendment to the said Code in the year 2002 takes this concept further by introducing various other forums, known as Alternate Dispute Resolution.' [53]

The (Draft) Alternative Dispute Resolution and Mediation Rules, 2003 drawn up by the Indian Government suggests that child custody disputes can be referred to ADR.[54]

Public policy

Under Section 48 of the Act, the Courts can refuse enforcement of foreign awards if '*the enforcement of the award would be contrary to public policy in India.*' When examining the objective of arbitrability of an international dispute, a court must apply its concept of international public policy. As they are not the organs of a particular legal order, arbitrators dealing with the same issue will generally apply the requirements of genuinely international public policy, subject to considerations regarding the enforcement of their awards.[55]

Drawing the line between arbitrable and non-arbitrable disputes involves a consideration of two important policy objectives: ensuring that sensitive matters of public interest are resolved before the national courts; and promoting arbitration as a vibrant system of ADR. Although these two objectives, each valid in its own right, are sometimes portrayed as competing, they are not in practice wholly irreconcilable.[56] For this reason and for ensuring that the interests of society are protected in sensitive areas the arbitrators hear disputes relating to public policy, whether or not the main contract containing the arbitration agreement actually contravenes public policy.

The courts will then be able to review the public policy issue if an action is subsequently brought to enforce or set aside the resulting award. Thus with the growing acceptance of arbitration, at least in the international sphere, public policy limits to arbitrability are gradually disappearing.[57] Arbitrators now adjudicate disputes involving such public matters as intellectual property rights, antitrust and competition, securities laws, bankruptcy, corporate law, taxation; and allegations of fraud, corruption or bribery.[58]

A full bench of the Indian Supreme Court has recently in *Shri Lal Mahal* v. *Progetto Gano Spa*,[59] held that enforcement of foreign award cannot be refused on the ground that it is contracy to "public policy" even if it is "patently illegal".

The Indian public policy on surrogacy is still unclear. A party to the dispute may take advantage of this grey position of law to have the arbitral award set aside by challenging it in a court of law on the grounds that commercial surrogacy is against public policy. But, owing to the recent judicial trend on public policy, it is more likely that it cannot be a ground that can be availed of by the parties.

(B) The legal scenario overseas

Judicial approach on child custody

In cases of child custody the Courts have been reluctant to give up their *parens patriae* jurisdiction to arbitration. However there have been examples of cases in which

Published in Articles section of www.manupatra.com

courts may stay proceedings pending compliance with arbitration agreements even in matters of child support.[60]

In United States, arbitrability of child custody has received inconsistent treatment.[61] Some courts[62] have refused to enforce agreements to arbitrate such disputes; some[63] have held the arbitrator's award on such disputes to be subject to *de novo* review by the court to the extent that it does not conflict with the best interests of the child and some[64] have gone to the extent of allowing binding arbitration for resolution of such disputes.[65]

The Courts have followed the well-cited cases of *Sheets v. Sheets*[66], in which it was held that: *"there seems to be no clear and valid reason why the arbitration process should not be made available in the area of custody and incidents thereto."*

Thus the courts have held that custody disputes can be referred to arbitration provided it is reviewable by the courts. This can lead to certain complications, like delays which would not be in the best interest of the child.[67]

Recent emerging trends

Recently the importance of arbitration has been realized in other fields that were traditionally left for the courts to determine. For example, in family proceedings, arbitration was not thought of as an alternative mode of dispute resolution. But now there is a growing realization of importance of arbitration in settling disputes relating to family law.

This is evident from the growing initiatives taken in various countries for referring such disputes to arbitration. For instance, in England, a new scheme has been launched by the Institute of Family Law Arbitrators to encourage individuals to settle their family disputes by way of arbitration.[68] In the United States, North Carolina became the first state to adopt an arbitration statute specifically designed for family cases.[69] This statute became the basis for national Model Family Law Arbitration Act for the American Academy of Matrimonial Lawyers. Similar trends have been followed in Australia[70] and Canada.[71]

[V] THE WAY FORWARD

With the increasing prevalence of international surrogacy in India, it is likely that disputes related to it will continue to arise in the absence of coherent legal framework.

(A) Indian Arbitration Law

Commercial – wider meaning

As has been elaborated, the context in which the word 'commercial' has been incorporated in the Act is with regards to trade and business transactions. It does not include other forms of transactions which, though they are commercial in nature owing to an exchange of money, are not part of business or trade. In order to ensure that, the purpose of arbitrating a surrogacy dispute and the intentions of the parties, don't get defeated, the courts must not bind themselves by the contextual meaning of the term 'commercial'. The Indian Courts must not limit the enforcement of foreign awards under Part II of the Act to those where the legal relation between the parties is 'commercial' in the business sense. It must widen the scope of the term commercial to

Published in Articles section of www.manupatra.com

include other forms of commercial legal relations as well, including a consumer-service provider relation.

Judicial Review to examine best interest of child

If the Indian Courts entertain arbitrations on surrogacy disputes, it will be able to review such a Foreign Award under Section 48(2)(b) of the Arbitration Act, if the need arises. This provision, however, does not provide a second look at the Award at the enforcement stage as Section 48 does not permit review on merits. It does not provide for modification of Awards. If the Award appears to be in conflict with best interest of the child, the only option available to court is to set aside the award. Thus the entire arbitration procedure proves to be worthless.[72] Therefore, the legislature should amend the Act specifically providing for a substantive judicial review of the award in child custody disputes to make these disputes arbitrable.

Expand the application of the New York and Geneva Conventions

Presently, India has limited the applicability of the New York Convention and Geneva Convention to disputes arising out of legal relations that are commercial. It must be hoped that with the growth in many countries of international family law arbitration, more countries will extend the application of these Conventions to non-commercial relations as well, such as those governed by family law.[73]

(B) Special legislation governing only surrogacy

The Indian Government has introduced the Alternate Reproductive Technologies (Regulations) Bill, 2010 to regulate surrogacy in India. But, the Bill is still pending. The Bill makes no provisions for the settlement of disputes by arbitration or such other alternative modes.

The approach taken in British Columbia is a welcomed step forward. The Draft Family Law Act encourages the use of out-of-court dispute resolution processes – family dispute resolution – where appropriate. Section 8 imposes obligations on family dispute resolution professionals to ensure that their clients are aware of the most appropriate and effective services for resolving their disputes, based on the clients' circumstances. Section 9 allows for future development of mandatory programs and out-of-court services to assist families. The Commercial Arbitration Act will be amended to explicitly provide for the arbitration of family law disputes [ss. 190, 191]. Arbitration agreements will be binding on the parties as an agreement made under the Act, and may not be entered into until after the dispute to be arbitrated has arisen [ss. 192, 194]. A party may appeal an arbitral award on a question of fact or a question of mixed fact and law ensuring the best interest of the child [s. 196].[74]

It is essential to have similar provisions in Indian laws which along with ensuring that there is an amicable and speedy resolution of disputes ensures a regulatory mechanism to check that arbitration procedure is not misused and the "best interests of the child" is protected.[75] It may be then that dramas like that of the Balaz twins would be avoided if all states were to recognize private contracts regarding reproduction.[76]

(C) Uniform international regime

The Indian Government has introduced the Alternate Reproductive Technologies (Regulations) Bill, 2010 to regulate surrogacy in India. However, the problem is not

Published in Articles section of www.manupatra.com

solely that of the internal consistency and overall coordination of the Indian legal framework. More important is the coherence of the Indian legal system with that of the other market participants.[77]

For example, in New South Wales (Australia) a law has recently been enacted criminalizing the practice of international surrogacy,[78] with the intention that it would prevent the circumvention of domestic law and actively protect surrogates from exploitation. Since domestic criminalization did not prevent couples from evading the laws and seeking surrogates overseas, extraterritorial criminalization is therefore unlikely to inhibit maternal desperation either.[79] Furthermore extraterritoriality may give rise to an underground trade, further perpetuating the existing risks associated with the practice and raising greater concerns for exploitation.[80] A multilateral, legally binding instrument would establish a global, coherent and ethical practice of international surrogacy.[81]

In 2010, the problem of international surrogacy arrangements was identified as an emerging international family law issue that required further study and discussion by the Special Commission on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption. To facilitate the standards set by the Conventions, a Central Authority should be established in each country to establish effective co-operation between/among participating states. This system is very well embedded in Conventions of the Hague Conference on Private International Law.[82]

Without Regulations, the courts struggle to deal with the growing number of cases in which surrogacy has already taken place and the intended parents fight for the legal recognition of their parenthood.[83] The judges thus tend to avoid precedents and look for informal and non-legal solutions as long as the child is still in her country of birth.

Such Regulations should provide for an effective ADR mechanism which may result in an amicable resolution of disputed issues and reduce the likelihood that either party will try to back out of the agreement entirely.

[VI] CONCLUDING REMARKS

International commercial surrogacy has been increasing at a dramatic rate. With an increase in commercial surrogacy arrangements, the number of disputes arising out of such arrangements also increases. An international problem of this highly unusual type, raising serious questions of the interests of vulnerable children can never be satisfactorily resolved unilaterally.[84] Neither at the international nor national level (in India) is there a legal framework to deal with such disputes. Passing through the judicial channel only prolongs the matter and leaves the fate of the child and the other parties hanging. Such disputes involve the parties at an emotional and psychological level, unlike trade matters where everything is at a technical level and the only losses there can be are monetary losses. Such disputes must be given undivided attention and must be settled swiftly, which is highly impossible to achieve by courts as they are already overburdened with over 3 crore cases, across India.[85] Arbitration being a forum where the parties are not entangled in the cobweb of judicial procedures, surrogacy disputes can be resolved better by Arbitral Tribunals as the constitution of the Tribunal is at the discretion of the parties, it is time-saving, cost-effective *inter alia.* Owing to all of this, the scope and applicability of the Indian Arbitration Act must be widened to include disputes, such as those arising out of

Published in Articles section of www.manupatra.com

cross-border surrogacy, a special law governing surrogacy must be passed at a national and international level.

Endnotes

1. See M. Freeman, 'Is Surrogacy Exploitative?' S McLean (ed), *Legal Issues in Human Reproduction*(Dartmouth Publishing London 1989) 164.
2. Susan Markens, *Surrogate Motherhood and the Politics of Reproduction* (University of California Press London 2007) 9.
3. *Re C (A Minor) (wardship: surrogacy)* [1985] FLR 846 (Latey, J).
4. *Matter of Baby M* (1988, N J) 537 A2d 1227.
5. I Lebowitz-Dori 'Womb for Rent: The Future of International Trade in Surrogacy' (1997) 6 *Minnesota Journal of Global Trade* 329, 329.
6. D. Durand Cook, Esq., 'Surrogacy v. Adoption' *creating families* available at http://www.creatingfamilies.com/media/surrogacy vs. adoption.pdf (last visited 24/04/2014).
7. Lisa C. Ikemoto, 'Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services'(2009) 27 Law & Inequality 277; Mary Keyes, 'Cross-border surrogacy agreements' (2012) 26 Australian Journal of Family Law 28.
8. *Baby Manji Yamada* v. *Union of India* MANU/SC/8083/2008
9. Margaret Ryznar, 'International Commercial Surrogacy and Its Parties' (2010)43 J. *Marshall law Review*1009, 1016; Usha Rengachary Smerdon, 'Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India' (2008)39 *Cumb. L. Rev.* 15, 15-16, 23-27.
10. Randeep Ramesh, 'British Couples Desperate for Children Travel to India in Search of Surrogates: Ethics under Scrutiny as Would-be parents are Enticed by Lower Costs and Relaxed Laws', *Guardian*, 20 March 2006, 26.
11. *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 at 8; L Theis, N Gamble and L Ghevaert, 'Re X and Y (Foreign Surrogacy) : A Trek Through a Thorn Forest' (2009) 39 *Family Law Journal* 239,242.
12. Hague Conference on Private International Law, 'A Preliminary Report on Issues arising from International Surrogacy Agreements'(March 2012); Cf. Carol Sanger, 'Developing Markets in Baby-Making : In the Matter of Baby M'(2007)30 *Harv. J.L. Gender* 67, 94.
13. 228th Law Commission Report, 'Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy'(2009) Government of India; Hague Conference on Private International Law, 'A preliminary Report on Issues arising from International Surrogacy Agreements'(March 2012).
14. Judge Learned Hand, 'The Deficiencies of Trials to Reach the Heart of the Matter' in Maurice H. Merrill (ed), *Lectures on Legal Topics* 87, (1926).
15. D Howe, 'International Surrogacy – A Cautionary Tale' (2008) 38 *Family Law Journal* 61; D Cullen,' Surrogacy: 'Commissioning' Parents Not Domiciled in UK – Matters To Be Borne in Mind by Those Contemplating Surrogacy Arrangements' (2008) 32 *Adoption & Fostering* 1.
16. Kannan Kasturi, 'Civil litigation? No, thanks.' (2009) *indiatogether available at* http://indiatogether.org/civil-government (last visited 24/04/2014).
17. National Arbitration Forum, 'The Case for Pre-Dispute Arbitration Agreements: Effective and Affordable Access to Justice for Consumers' (2004) *adrforum available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2004EmpiricalStudies.pdf (last visited 24/04/2014).
18. *Ibid.*
19. Colin Kaeser, 'The emergence of arbitration in family law in Australia' (2004) 6 *ADR Bulletin*, part 7,4..

Published in Articles section of www.manupatra.com

20. Saurabh Bhagotra, 'Family Disputes and Arbitration', *The Barrister*, *available at* <http://www.barristermagazine.com/archive-articles/issue-52/family-disputes-and-arbitration.html> (last visited 28/02/2014)

21. National Arbitration Forum, 'Business-to-Business Mediation/Arbitration vs. Litigation' (2005) *adrforum, available at* < http://www.adrforum.com/users/naf/resources/GeneralCommercialWP.pdf> (last visited 24/04/2014).

22. *Re: X & Y (Foreign Surrogacy)*, [2008] EWHC (Fam) 3030, ¶ 8 (Eng.).

23. 'Family law arbitration' (2013) *family law education for women, available at* <http://www.onefamilylaw.ca/en/familylawarbitration/> (last visited 27/12/2013).

24. Julian D.M. Lew, *Applicable law in international commercial arbitration: A Study in Commercial Arbitration Awards*, (New York: Oceana 1978).

25. From equity and conscience. In the context of arbitration, it refers to the power of the arbitrators to dispense with consideration of the law and consider solely what they consider to be fair and equitable in the case at hand.

26. *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.* MANU/SC/0722/2012

27. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38.

28. The *Geneva Protocol* on *Arbitration Clauses* (adopted 24 September 1923, entered into force 28 July 1924) 27 L.N.T.S. 157.

29. "*When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, and State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial undertaking national law of the State making such declaration.*"

30. Section 44. **Definition**.- *"In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India....declare to be territories to which the said convention applies."*

31. "Section 53. Interpretation.- *In this Chapter "foreign award" means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924..... award are pending in the country in which it was made.*

32. *Jan Balaz* v. *Anand Municipality & Ors.* MANU/GJ/0766/2009.

33. *"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."*

34. *Atiabari Tea Co.; Ltd.* v. *The State Of Assam And Ors*. MANU/SC/0030/1960.

35. Katarina Trimmings and Paul Beaumont, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level'(2011)7 *Journal of Private International Law* 623.

36. *Johnson* v. *Calvert*, 19 Cal Report 2d 494.

37. *Kamani Engineering Corporation Ltd.* v. *Societe De Traction et D'Electricite Societe Anonyme* MANU/MH/0075/1965; *Josef Meisaner Gmbr & Co.* v. *Kanoria Chemicals & Industries* MANU/WB/0008/1986; *Laxmi Engineering Works* v. *P.S.G. Industrial Institute* MANU/SC/0271/1995; *M/s Comed Chemicals Ltd.* v. *C.N.Ramchand,* Arbitration Petition No. 17 of 2007.

38. *R.M. Investments & Trading Co. Pvt. Ltd.* v. *Boeing Co.* MANU/SC/0246/1996; *Renusagar Power Co. Ltd.* v. *General Electric Co.*, 3 SCC at p. 723-24 : SCR at p. 492; *Koch Navigation Inc.* v. *Hindustan Petroleum Corporation. Ltd.*, 6 SCC at p. 262: SCR at p. 75

39. Catherine Morris, 'Arbitration of Family Law Disputes in British Columbia Prepared for the Ministry of Attorney General' (2004) *bcjusticereview, available at* <http://www.bcjusticereview.org/working_groups/family_justice/paper_07_07_04.pdf> (last visited 24/04/2014).

Published in Articles section of www.manupatra.com

40. Section 2(*d*)(*ii*) - *"Consumer means any person who hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who 4[hires or avails of] the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person; (but does not include a person who avails of such services of any commercial purpose."*

41. Section 2(*o*) - *"service" means service of any description which is made available to potential (users and includes the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, [housing construction] entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service."*

42. *Morgan Stanley Mutual Fund* v. *Kartick Das,* 1994 (4) SCC 225; *Inter Freight Services Pvt. .Ltd.* v. *Usha International*, 1996 CCJ 171.

43. The General Agreement on Trade in Services (adopted 15 April 1994, entered into force 01 January 1995) 1869 UNTS 183.

44. See Christina Stephenson, 'Reproductive Outsourcing to India: WTO Obligations in the Absence of US National Legislation'(2009) 43 *J. World Trade* 190; Jennifer Rimm, Comment, 'Booming Baby Business: Regulating Commercial Surrogacy in India'(2009) 30 *U. PA. J. INT'L L.* 1429, 1450.

45. Lucy Rash & Casey Burchell 'Surrogacy : A right to choose or a responsibility to question?' Mary Journal Eds. 2012 [Originally written 2011].

46. Narayan, U, 'The "Gift" of a Child: Commercial Surrogacy, Gift Surrogacy, and Motherhood' Boling, P (ed.), *Expecting Trouble: Surrogacy, Fetal Abuse, & New Reproductive Technologies* (Westview Pr 1995)177-20.

47. *Chiranjilal Shrilal Goenka (Deceased) through Lrs.* v. *Jasjit Singh and Ors*. MANU/SC/0496/1993; *Osprey Underwriting Agencies Ltd. and Ors.* v. *ONGC Ltd.aAnd Ors.* MANU/MH/0700/1998; *Mangilal Fateram Maheswari* v. *Devichan Mangallal* MANU/NA/0022/1947.

48. *Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd. & Ors*. MANU/SC/0533/2011.

49. *Sami Chetti* v. *Adaikklam Chettu* MANU/TN/0346/1923.

50. *Nalla Ramudamma* v. *Nalla Kaisi Naidu* MANU/TN/0077/1945.

51. *Faqir Mohammad* v. *Amina* MANU/UP/0073/1964.

52. Pankhuri Agarwal, 'Arbitrability of Disputes in India: Still Grappling in the Dark' (2013) 5 *The Indian Arbitrator* 5.

53. *HDFC Bank Ltd* v. *Satpal Singh Bakshi* MANU/DE/3263/2012.

54. Available at http://lawcommissionofindia.nic.in/alt_dis.pdf (last visited 31/03/2014).

55. E. Gaillard & J. Savage, eds., *Fouchard, Gaillard, Goldman On International Commercial Arbitration*(The Hague: Kluwer Law International, 1999) para 559.

56. See A. Redfern &M. Hunter, *Law and practice of International Commercial Arbitration*, (2d ed. London: Sweet &Maxwell, 1991) 137.

57. R. Briner, *The Arbitrbility of Intellectual Proterty Disputes with Particular Emphasis on the Situation in Switzerland*, (WIPO Publication No. 7282002 Worldwide Forum on the Arbitration of Intellectual Property Disputes, 3-4 march 2002) at para 1.11.2.4.

58. Fouchard, Gaillard, Goldman *supra* n. 48 at 339-59.

59. MANU/SC/0655/2013.

60. *Kolada* v. *Kolada* (2000) 6 R.F.L. (5th) 288 (Alberta Q.B.).

61. Barbara E. Wilson,'Who's Watching out for the Children - Making Child Custody Determinable by Binding Arbitration - Dick v. Dick'(1996) *J. Disp. Resol.*.225.

62. *Fence* v. *Fence*, 314 N.Y.S.2d 1016 (N.Y. City Fam. Ct. 1970).

63. *Sheets* v. *Sheets*, 22 A.D.2d 176 (N.Y. 1964).

Published in Articles section of www.manupatra.com

64. *Dick* v. *Dick*, 534 N.W.2d 185, 187 (Mich. Ct. App. 1995); *Faherty* v. *Faherty* (1984) 477 A.2d 1257 (N.J.); *Kolada* v. *Kolada* (2000) 6 R.F.L. (5th) 288 (Alberta Q.B.).

65. Agarwal *supra* n. 52 at pg. 13.

66. *Sheets* v. *Sheets* (1964) 254 N.Y.S.2d 323.

67. *Glauber* v. *Glauber* (1993) 600 N.Y.S.2d. 740.

68. 'Family arbitration scheme launched by the newly formed Institute of Family Law Arbitrators (IFLA)', (22 February 2012) *CIArb News, available at* < http://www.ciarb.org/news/ciarb-news/family-arbitration-scheme-launched-by-the-newly-formed-institute-of-family-law-arbitrators-ifla.php> (last visited 14/04/2014).

69. Article 3 - Family Law Arbitration Act, 1999.

70. Part VIII of the Family Law Act 1975 and Part 5A of the Family Court Act 1997.

71. Department of Justice, 'Dispute Resolution Reference Guide'(1995) *www.justice.gc.ca, available at* <https://www.google.co.in/search?q=susie+shah&oq=susie+shah&aqs=chrome..69i57j0l5.10231j0j8&sourceid=chrome&espv=2&es_sm=93&ie=UTF-8#q=canada+arbitration+family+dispute> (last visited 24/04/2014).

72. Agarwal *supra* n. 53 at pg. 13.

73. David Hodson, 'Arbitration in International Family Law: The English Experience, the Worldwide Prospective and the International Opportunities' (2013) *International Family Law Group.*

74. Available at <http://www.cle.bc.ca/PracticePoints/FAM/11-FamilyLawAct.pdf > (last visited 24/04/2014).

75. Wilson *supra* n. 61.

76. Yasmine Ergas, 'Babies without borders: Human rights, human dignity, and the regulation of international commercial surrogacy' (2013) 27 *Emory International Law Review*117, 138.

77. *Ibid* at 133.

78. *Surrogacy Act 2010 (NSW),* section 11.

79. Jenni Millbank,'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or 25 Brick Walls?' (2011) 35 *Melb U L Rev* 165, 197.

80. Annika Tombleson, 'Contracting the New Delhi belly: Responding to the practice of International Surrogacy'(2012) *University of Otago, available at* <http://www.otago.ac.nz/law/research/journals/otago043937.pdf >(last visited 24/04.2014).

81. RL Lee, 'New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation' (2009) 20 *Hastings Women's Law Journal* 275.

82. e.g. the 1980 Hague Convention on the Civil Aspects of International Child Abduction (Arts 7-11 and 21-30), the Adoption Convention (Arts 6-13 and 14-21), and the 1996 Hague Convention (Arts 29-40). The creation of Central Authorities to facilitate the operation of these Conventions is mandatory for all Contracting States. Contracting States bear an obligation to deter all practices contrary to the objects and standards of the relevant Convention.

83. Engel, Martin, 'Cross-Border Surrogacy: Time for a Convention?' Dethloff et al. (eds.) *Family Law and Culture in Europe: Developments, Challenges and Opportunities*(Intersentia 2013); Proceedings of the Fifth Conference of the Commission on European Family Law; Intersentia 2014, Forthcoming. Available at SSRN: http://ssrn.com/abstract=2348270

84. Hague Conference on Private International Law, Council on General Affairs and Policy of the Conference, Conclusions and Recommendations adopted by the Council, 5–7 April 2011, pp 3–4, at <http://www.hcch.net/upload/wop/genaff_concl2011e.pdf>; Mary Keyes, 'Cross-border surrogacy agreements', (2012) 26 *Australian Journal of Family Law* 28.

85. Metro India, 'Alternate Dispute Resolution Reduces Burden on Courts', 29th January, 2014. Available on http://metroindia.com/Details.aspx?id=12866.

Published in Articles section of www.manupatra.com