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MED-ARB: ITS SYNTHESIS AND IMPLICATIONS IN ALTERNATIVE DISPUTE RESOLUTION METHODS

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Abstract

The Med-Arb process is a synthesised alternative dispute resolution method encouraged by mixing mediation and arbitration to efficiently and effectively resolve conflicts. Firstly herein, the Mediation is conducted by a neutral third-party, mediator, who helps the parties in dispute to identify underlying interests and work towards a mutually satisfactory resolution. This allows for creative solutions in a non-adversarial environment which the conventional court proceedings does not offer. If mediation does not succeed, it transitions seamlessly to Arbitration process, where the same mediator becomes the arbitrator and renders a binding decision after carefully reviewing the evidences and arguments, in similarity to court setting.

This integration promotes collaboration, encouraging parties' autonomy to find common ground while controlling the outcome. Med-Arb is time-efficient and provides assurance that disputes will be resolved quick and fast even if mediation fails. However, concerns exist regarding the mediator's potential bias while changing over to being an arbitrator, which could compromise neutrality. This article efforts in showcasing the process of Med-Arb and its implications in achieving to be a balanced, efficient and cost-effective method of alternative dispute resolution mechanism.

(**Keywords**: Arbitration, Mediation, Med-Arb process, ADR Mechanism and Litigation)

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Introduction

Shades of grey in decision making is a challenge upon us, as we often prefer the clarity of black and white choices, which seem stronger. However, embracing complexity and considering multiple perspectives, much like Nelson Mandela did, can lead to innovative solutions. This approach requires effort, empathy, and imagination, as it involves understanding opposing viewpoints. The potential reward for cultivating this mindset is wisdom, which transcends simple dichotomies and enriches our understanding of issues.[1]

Disputes are a natural part of human interaction occurring in various contexts such as business property, intrapersonal occurrences and interpersonal relationships. To address these conflicts effectively, alternative dispute resolution (ADR) mechanisms have gained traction since amendment of Section 89 to the Civil Procedure Code,[2] which mandated the courts to refer the court cases having elements of settlement to either Arbitration, Conciliation, Lok Adalat or Mediation. The process of Mediation as non-adversarial and Arbitration as parties designed adversarial process is been the most popular and applied among them. In the recent past, Mediation-Arbitration (Med-Arb) process, which merges the elements of mediation and arbitration as a hybrid concept has become the catchy and experimented ADR mechanism in few countries viz., USA, Singapore, Australia etc., because it provides a balanced and comprehensive approach to the conflict resolution.

Mark Fotohabadi from the Agency for Dispute Resolution, a leading national provider of dispute resolution services in California, identifies ten significant advantages of ADR over traditional litigation viz., choice, competency, control, customization, confidentiality, communication, ongoing relationships, cultural change, cost savings and creativity.[3] The Med-Arb process commences with the mediation where a neutral third party, the Mediator facilitates dialogue between the involved parties to explore possible solutions. Upon applying all techniques of mediation, if the dispute does not get resolved on amicable terms, the process transitions smoothly to Arbitration, allowing the very same mediator to embark upon the role of an arbitrator and make binding decisions on the core issues of the dispute. This dual phased

[1] Dr. Richard Stengel, Mandela's Way: Lessons on Life, Love and Courage, Crown Archetype (1st ed. March 30, 2010).
[2] Inserted to CPC by Act 46 of 1999, s. 7 (w.e.f. 1-7-2002), earlier rep. by Act 10 of 1940, s. 49 and the Third Schedule.
[3] The ACICA Review, December 2013, http://acica.org.au/assets/media/News/ACICA-Review-December-2013.pdf

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structure leverages the collaborative nature of mediation alongside the conclusive nature of arbitration.

Med-Arb is thus valued for its efficiency, cost-effectiveness, restorative orientations and preservation of right to shift to adversarial process at any point without having to fetch appropriate jurisdictional courts and file necessary pleadings seeking appropriate reliefs accordingly. However, this model is not foolproof without confusion, the biggest being the bias that trickles down to the arbitrator from what he had before been a mediator in the very same dispute. The other hurdle is the jurisdictional and statutory restrictions for any such mediator to attain competency to act as an arbitrator without following due process of law. Consequently, a thorough evaluation is essential to address and clarify on the double acting being done by the same person as mediator/arbitrator under different process having different approach to resolve a dispute. However, the Med-Arb process is gaining grip and is being highlighted as the versatile and effective method of achieving prompt and amicable resolutions in a dynamic way. The authors shall further explain the process of Med-Arb, and effort to analyse it in simple terms by considering its plausibility, palpability and its implausibility in making it a rational process of dispute resolution in the future.

Learning about the MED-ARB Process:

Med-Arb, signifies to meet the growing demand for flexible and effective conflict resolution strategies across various contexts. This hybrid approach is proficient in scenarios where involved parties prioritize a resolution that merges the collaborative advantages of mediation, characterized by open dialogue and mutual consensus and with the authoritative clout of arbitration, which culminates in a legally binding decision.

The awareness and acceptance of Med-Arb has been expanding mostly among legal practitioners, organizations and individuals engaged in ADR. Professionals well-versed in the Med-Arb process are leveraging their expertise and experience in both the processes, mediation and arbitration to offer a holistic approach to resolving disputes. Large corporations, especially those navigating international business transactions, exhibit a heightened acceptance to the process of Med-Arb by embedding Med-Arb clauses within their contracts to facilitate a more streamlined method for addressing potential conflicts.

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However, the public may misread the Med-Arb process and refrain from accepting it on the fear of neutrality being breached by the Mediator, and the other major impediment being the litigant's tendency to conceal the core issues/remedies to avoid its later repercussion if dispute travels to arbitration over mediation. To bolster the misunderstanding of Med-Arb, various educational and training initiatives are provided by legal institutions, ADR entities and professional associations working towards quick and effective adjudications. These programs are designed to enlighten the benefits, potential upsides and procedural components of the Med-Arb process. Contributions from academic research in law, mediation and arbitration further enhance the knowledge dissemination regarding Med-Arb, with scholars and researchers publishing relevant articles, books, and empirical studies that appraise its effectiveness, good practices, ease and real-world applications. Furthermore, professional organizations such as State and Central Bar Associations, Bar Counsil backed by the Apex and High Courts take an active role in advocating for opting avant-garde ADR methods like Med-Arb through workshops, seminars and conferences aimed at increasing its application and expertise.

The Mediation Stage

The Med-Arb process begins with the selection of a neutral third party, often referred to as the "Med-Arbiter." This individual possesses expertise in both mediation and arbitration techniques, ensuring a seamless transition between the two stages. The Med-Arbiter's neutrality and impartiality are critical in maintaining the integrity of the process. The parties involved in the dispute are encouraged to engage in open communication facilitated by the Med-Arbiter. This phase aims to create a collaborative and autonomous environment where parties can express their perspectives, interests, and concerns. The Med-Arbiter assists the parties in identifying their underlying interests and exploring potential solutions by helping them focus on interests rather their positions and uncover creative and mutually acceptable resolutions. The primary goal of this phase is to facilitate a voluntary settlement that addresses their needs and concerns.

Mediation and arbitration, both serving as alternative dispute resolution processes, are occasionally misconstrued due to their shared characteristic of involving a third party selected by the disputing parties to resolve conflicts outside the formal court system. The overlapping perceptions can partly be attributed to the two distinct mediation approaches employed:

- **The Facilitative Approach:** The facilitative approach, commonly favored in Western legal systems, centers on convening parties in a neutral environment to achieve a

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settlement. The mediator, often lacking a legal background, begins by engaging in separate meetings with each party. During these private discussions, the mediator encourages the parties to concentrate on the commercial aspects at hand, particularly the desired commercial resolution and potential areas of compromise. After these preliminary dialogues, involving alternating interactions with each party, a collective session is held. Here, the parties collaboratively assess whether, as influenced by their separate discussions with the mediator, a mutually acceptable middle ground can be reached. This process typically involves multiple mediation sessions before a comprehensive settlement is attained and duly documented. The inherent advantage of this approach lies in its capacity to facilitate a shared understanding of commercial concerns, fostering direct communication within the presence of an impartial third party. Importantly, these interactions remain "without prejudice" to their formal legal stance in any parallel litigation or arbitration, rendering the search for a mutually acceptable compromise.

- **The Evaluative Approach:** In contrast, the evaluative approach to mediation bears resemblance to settlement meetings convened by judges in some civil law jurisdictions, such as India and Japan. In this method, the mediator, who often possesses legal expertise, may engage in joint interactions or private caucus with each party, encouraging them to evaluate reasonableness of their respective claims. The mediator brainstorms the parties to propose solutions and concessions that lead to amicable settlement. However, a notable distinction emerges: the evaluative mediator will address on the comparative strengths and weaknesses of party's legal position. Additionally, the mediator will offer insights into the consequences of opting for adversarial route and the potential pitfalls therein.

In both facilitative and evaluative mediation approaches, the aim is to facilitate dispute resolution through effective communication and negotiation. These distinct methodologies cater to the varying nature of manifold conflicts and the diverse preferences involved.

The Arbitration Stage

If the parties fail to reach a resolution through mediation, the process seamlessly travels to arbitration process. The Med-Arbiter, who has now become an arbitrator, embarks a different role with enhanced authority. Arbitration introduces a formal structure to the process. Both parties plead their cases, evidence and arguments, much like traditional arbitration proceedings. The Med-Arbiter evaluates the facts and the law submitted and renders a binding decision

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accordingly. One of the key advantages of the arbitration phase is the finality of the decision. The award issued by the Med-Arbiter is legally binding and enforceable, providing parties with a definitive solution to their dispute.

History and Development of Med-Arb

Med-Arb is a hybrid Alternative Dispute Resolution (ADR) mechanism that was developed in the 1970s. It is primarily credited to Sam Kagel and was originally created to resolve the San Francisco Nurses" Strike.4[4] A 2011 survey indicates a shift among Corporations in USA towards mediation over arbitration firstly, as they seek to avoid lengthy litigation.[5] In Asia, both mediation and arbitration are experiencing significant developments, particularly in Singapore and Australia, with mediation gaining traction across various sectors. Similarly on the sideline, Arbitration facilities such as HKIAC, SIAC, and ACICA are expanding due to supportive legislation and initiatives aimed at promoting alternative dispute resolution (ADR). The 2011 Hong Kong Arbitration Ordinance stands out for streamlining arbitration processes and enhancing the authority of arbitral tribunals while ensuring confidentiality for proceedings. Additionally, in 2013, HKIAC administered new Arbitration rules aimed to increase procedural flexibility. The Australian government support and backing is crucial for the growth of ADR, exemplified by its backing given to ACICA, under the UNCITRAL Model Law through the International Arbitration Amendment Act, 2010. This momentum underscores a broader regional effort to foster a culture of Med-Arb, with emerging authorities like the Korean Commercial Arbitration Board and the Kuala Lumpur Regional Centre for Arbitration. These trends suggest the growing acceptance of Med-Arb as a viable means of securing ends of justice effectively.

MED-ARB: Benefits

The strategic combination of mediation and arbitration offers several noteworthy advantages, encompassing the following:

- A Med-Arbiter, already acquainted with the intricacies of the case, the parties, and their legal representatives, possesses a unique advantage to facilitate the resolution. This

[4] https://www.bls.gov/wsp/publications/annual-summaries/pdf/work-stoppages-1970.pdf
[5] The 2011 Survey of Fortune 1000 companies sponsored jointly by the Cornell University Scheinman Institute on Conflict Resolution, the Straus Institute for Dispute Resolution at Pepperdine University School of Law, and the International Institute for Conflict Prevention & Resolution. Abstract available here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2221471

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familiarity equips to distinguish the optimal juncture within the proceedings and contributes to an efficient orchestration of the process.

- It offers a significant advantage in terms of cost and time efficiency. The process overall allows in reaching a final decision in a more expedited manner compared to traditional litigation.
- The arbitration phase of Med-Arb ensures a binding decision, eliminating the uncertainty which may arise from unresolved disputes.
- Any resolution arising from Med-Arb can be seamlessly transcribed as a conclusive award by the Tribunal.
- Med-Arb has exhibited success in the Asian context. The China International Economic and Trade Arbitration Commission (CIETAC) illustrates this efficiency wherein, approximately 20 to 30 percent of CIETAC's annual caseload is resolved through Med-Arb. Additionally, a study analyzing the reports of Japan Commercial Arbitration Association (JCAA) underscores the effectiveness of this approach in settling 25 cases among 48 cases referred to this process.[6]

In summary, the confluence of mediation and arbitration presents a pragmatic framework that harnesses the strengths of both methods, culminating in timely, cost-effective and enforceable solutions.

Med-Arb: Shortcomings

Instances have emerged where the integration of arbitration and mediation has encountered challenges in achieving a harmonious synergy. The primary concern arises from the potential dual role assumed by the Med-Arbiter, serving both as a mediator and arbitrator. It is customary for the same individual to hold these dual roles within the context of the proceedings. Yet, this practice can raise issues related to impartiality and fairness. Notably, the absence of robust procedural safeguards exposes parties to the risks of perceived bias.

In *Gao Haiyan v. Keeneye*,[7] when mediation failed to yield a resolution, the arbitrator issued an award significantly lower than the amount previously offered to the respondent during mediation. The arbitrator's involvement extended to advice the respondent to affiliate to collaborate on a proposal, with the eventual award amount being only a fraction of the proposed

[6] Japan Commercial Arbitration Association (JCAA) newsletter No.22
[7] CACV No.79 of 2011

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value, failing which a punitive measure was threatened to be imposed for the respondent's lack of cooperation. While the initial instance court set aside the award due to apparent bias, the Court of Appeal upheld it, citing insufficient evidence to warrant the allegations.

The potential for the Med-Arbiter to develop a skewed understanding of the parties positions within the arbitral proceedings poses a substantial threat to the integrity of the case. Furthermore, the utilization of information gleaned during mediation, which might be informal and could emanate from meetings with only one party, raises concerns of due process violations.[8] Sharing information limited to a single party session during mediation could transgress due principles since such information might subsequently serve as evidence in arbitration, denying the opposing party an opportunity to counter or challenge it.

To address this issue, the Singapore International Mediation Centre (SIMC) rules have instituted a confidentiality provision. This provision restricts the utilization of any communications or disclosures from mediation in judicial, arbitration, or similar proceedings, unless mandated by applicable law. This initiative demonstrates a conscious effort to safeguard the fairness and impartiality of the process while recognizing the potential risks associated.

The selection of a Mediator and an Arbitrator involves distinct individuals fulfilling separate roles. Mr. James Peter, an esteemed Mediator in Switzerland, proposes a method that involves both the mediator and arbitrator jointly conducting a preliminary hearing with the involved parties. This aims to establish factual clarity before the mediation phase commences. This approach serves to enhance both mediation and arbitration efforts.[9] By avoiding potential issues of bias and undue influence by the Med-arbiter, this process creates an environment conducive to open communication during mediation.

Med-Arb in India

The increasing backlog of cases and the burden on courts have spurred the growth of Alternative Dispute Resolution (ADR) practices in India. The ADR methods officially recognized under Section 89 of the Civil Procedure Code, 1908 (CPC) includes arbitration, conciliation, settlement by Lok Adalat, and mediation. The Arbitration and Conciliation Act,

[8] Blankenship, John T., Developing your ADR Attitude: Med-Arb, a Template for Adaptive ADR, TENNESSEE BAR JOURNAL 13 (2006)
[9] James T. Peter, 'Med-Arb in International Arbitration', The American Review of International Arbitration, [1997] 8, 101

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1996 governs arbitration and conciliation, while judicial settlement through Lok Adalat is regulated by the Legal Services Authority Act, 1987. Mediation, initially introduced under the Industrial Disputes Act, 1947 as a recognized dispute resolution method, gained further recognition through the Code of Civil Procedure (Amendment) Act, 1999, which introduced Section 89. Subsequently, the Mediation Rules, 2003, and finally we now have the Mediation Act, 2023.

Regarding the Med-Arb approach, the Arbitration and Conciliation Act, 1996 permits the arbitral tribunal to encourage dispute settlement through mediation, at any point during the arbitral proceedings, subject to the parties' agreement as per Section 30. If a settlement is reached, the arbitral tribunal can, upon request, formalize the agreement as an arbitral award on agreed terms and conclude the arbitration proceedings. The Indian judiciary has also acknowledged the significance of merging Mediation and Arbitration procedures to create a mechanism promoting settlement between parties. This approach can either reduce the arbitration burden or prevent it entirely. A Med-Arb clause or Agreement in accordance with the UNCITRAL Model Law is recognized as valid and equivalent to other existing contracts or arbitration agreements under the law.

The Indian Institute of Arbitration and Mediation (IIAM) Rules, acknowledge Med-Arb, referring to it as the initiation of mediation following a referral by the arbitral tribunal. According to the IIAM Rules, if a dispute is partially or fully resolved, the parties must document the resolution, sign it, and submit it to the IIAM, which will then forward it, along with the Mediation Status Report and settlement agreement, to the Arbitral Tribunal.10[10] The IIAM rules has also suggested model clauses for Med-Arb and processes. The authority conferred on arbitral institutions by the Arbitration and Conciliation (Amendment) Act, 2019, along with affirmations by the High Court or the Supreme Court, could further enhance the popularity of the Med-Arb procedure. In the case of *Centrotrade Minerals and Metal Inc. vs. Hindustan Copper Limited*[11] the court affirmed the validity of a Med-Arb clause or agreement under the principles of the UNCITRAL Model Law. This ruling established that such a clause holds equivalent legal weight to the contract or arbitration agreement. This precedent aligns with the shifting global landscape of Med-Arb.

[10] IIAM Rule 10 (D), Rule 11 (D)
[11](2006) 11 SCC 245

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In response to this evolving landscape, arbitral institutions have the opportunity to integrate provisions for Med-Arb into their rules. This alignment, with the perspective of the Supreme Court, as exemplified in the above said case, and the UNCITRAL Model Law reflects the modern trend towards integrated dispute resolution approaches. The proactive stance of arbitral institutions like the Indian Institute of Arbitration and Mediation (IIAM) in pre-emptively accommodating the potential popularity of the Med-Arb procedure signifies a tangible shift towards its broader adoption. This anticipatory approach underscores the commitment to effective and progressive dispute resolution practices through Med-Arb.

Events To Be Highlighted

Event 1: IBM v. Fujitsu[12]

The case highlights the utilization of Med-Arb in international arbitration. The dispute arose from a settlement agreement between IBM and Fujitsu in relation to allegations that Fujitsu had used IBM programs to develop compatible operating system software for its own mainframes. The contract between them signed in 1983, lacked necessary specifications and negotiations to resolve the disputes if any. The arbitration clause in the contract was invoked in 1985 under the American Arbitration Association (AAA) Rules. Although the arbitration clause did not explicitly provide for mediation, the parties, guided by the arbitrators' advice, agreed to employ alternative dispute resolution methods including mediation. The parties appointed their chosen arbitrator in accordance with the AAA Rules and proceeded with mediation.

Through the mediation process, the parties reached an agreement that included a lump sum payment by Fujitsu for a license fee, covering both past and future use of the program. This outcome benefited both parties and prevented them from expending further resources on a prolonged arbitration process. This case exemplifies the positive application of the Med-Arb process, leading to a win-win situation. It emphasizes that mediation need not be seen as a final decision; it can foster collaborative problem-solving considering their future relationships.

Event 2: Dubai International Financial Centre (DIFC) Courts

The Dubai International Financial Centre Courts have implemented a distinctive Med-Arb process as a dispute resolution alternative. In this method, the procedure initiates with

[12] American Arbitration Association, Commercial Arbitration Case No. 13T-117-0636-85 [Sept. 15, 1987 and Nov 29 1988]

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mediation, and should mediation prove unfruitful, the same mediator assumes the role of an arbitrator to issue a legally binding decision. Established in 2004, the DIFC has rapidly evolved into a global hub for financial activities. The primary objectives behind its inception were to attract foreign investments and elevate Dubai into a prominent international center for commercial and financial transactions. As an independent jurisdiction under the UAE Constitution, the DIFC operates under its own civil and commercial laws, largely influenced by common law principles. The hearings here occur without legal representation in an intimate, informal environment, conducive to amicable discussions. As a result, a significant proportion of disputes are resolved swiftly, with approximately 90% of cases concluding within a four-week timeframe. The DIFC Courts Med-Arb approach demonstrates a comprehensive strategy to expedite dispute resolution, offering parties the advantages of mediation while providing a seamless transition to arbitration when negotiations prove unfruitful. This innovative framework, supported by cutting-edge technology, underscores the DIFC's commitment to efficient, effective, and accessible dispute resolution mechanisms.[13]

CONCLUSION

Diverse mechanisms in legal framework often lead parties to hold distinct expectations concerning the mechanisms for resolving their disputes. Given this context, while med-arb is a recognized practice in Asia, America, Europe and Australia, certain parties, especially those hailing from common law jurisdictions, may harbor reservations regarding the Med-Arb concept and its potential ramifications on concurrent arbitration or litigation proceedings. Addressing such concerns and fortifying the efficacy of Med-Arb, thereby minimizing susceptibility to challenges from dissatisfied parties, necessitates proactive measures. These measures should encompass reaching a consensus either during contract drafting or subsequently when dispute emerges at any critical stages. Among these, the precise configuration of the mediation process and the confidential status of information unveiled during mediation, stand paramount.

Efforts aimed at harmonizing expectations and mitigating apprehensions can have a transformative impact on the Med-Arb process. Through early agreement on the Med-Arb procedure’s finer nuances, parties can cultivate an environment of shared understanding and

[13] Koster, Harold and Koster, Harold and Obe, Mark Beer, The Dubai International Financial Centre (DIFC) Courts: A Specialised Commercial Court in the Middle East (January 22, 2018). Available at SSRN: https://ssrn.com/abstract=3237126 or http://dx.doi.org/10.2139/ssrn.3237126

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acceptance. Concretely, parties may stipulate the Med-Arb format, assuaging concerns and promoting clarity. Additionally, delineating the privilege or confidential nature of information disclosed during mediation ensures a transparent framework that aligns with parties' preferences. By encouragement of proactive communication and alignment of expectations, parties can engender a conducive atmosphere for the Med-Arb process. This process ultimately strives to enhance parties trust in the fairness and effectiveness of the procedures. Therefore, establishing consensus on crucial aspects like mediation format, information confidentiality and the format of arbitration serves as a pivotal foundation for optimizing the potential of the Med-Arb approach, making it to be the outstanding hybrid synthesis and solution for larger acceptance of ADR methods.

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