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## Adeptness of MED-ARB in Dispute Resolution

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### Abstract

Over the time, the nature of dispute settlement has fluxed significantly. And one of the mechanism which has attended the highest priority in this changing process is “Med-Arb”. Med-arb is the combination is a hybrid resolution process bringing together the elements of both Mediation and arbitration. This research article will attempt to light all the positive dynamics of Mediation and arbitration as it is very pertinent to understand the benefits of mechanism which has attained so much of popularity. In this process, parties initially try to collaborate on the dispute with the assistance of Mediator. And following this, i still, no resolution is made then parties move to the course of arbitration. But if dispute is rectified at the initial step itself i.e., mediation, then there is no for the arbitration. The person who conducts the process of Med-Arb is known Med-arbiter. The mediator can assume the role of arbitrator (if qualified) and render a binding decision quickly, or an arbitrator can take over the case after consulting with the mediator. Med-arbiter handles the whole case and if parties had reached an agreement on some issues, the med-arbiter would rule only on the issues that remained. Alternatively, arbitrator could take over all or part of the dispute from a mediator. The med-arb process begins with the standard procedures of a basic mediation without pleadings, discovery, subpoenas and the other formalities that are common to binding arbitration. The mediator has the freedom that mediation allows them in being able to talk to the parties both collectively or privately as he/she deems to be appropriate. Where the parties choose Med-Arb as their dispute resolution mechanism, they prescribe a fixed time frame during which they will retain control over how the dispute will be resolved and work towards a voluntary settlement with the other party, after which they agree to relinquish control over the outcome and opt for a final determination of the dispute by a neutral person. Med-Arb therefore strikes a balance between party autonomy and finality in dispute resolution. The mechanism is proved to be most effective in case when there is time pressure. And also it is purely on the voluntarily basis. Med-Arb could be conducted in institutional approach, like, by following the procedure formulated by institutions like SMC-SIAC Med-arb procedure, CDRS Med-arb rules and procedure etc.

**Keywords:** MED-ARB, Process, Rules & Procedure, Finality.

### Introduction

In the 21st century, world is industrializing at the ascension rate and so are the disputes which are impeding the smooth functioning of the companies, firms and organization. And to resolve these disputes, legal fraternity has devised very efficient and effective mechanism which has proved to be an alternative to the traditional courts and litigation. And it could be termed as Alternative Dispute Resolution (ADR).

People usually resort to ADR because of various reasons which include, “(1) relieving court congestion as well as undue cost and delay; (2) to enhance community involvement in the dispute resolution process; (3) to facilitate access to justice; and (4) to provide more 'effective' dispute resolution.”<sup>1</sup> ADR proves to be very facilitative especially in cases of international dispute where issues like presence of more than two parties or when parties

<sup>1</sup> Goldberg, Stephen B., Eric D. Green, and Frank E. A. Sander. *Dispute Resolution*. Boston: Little, Brown, 1985. Print.

are not sure about jurisdiction in case of dispute or when there is perplexity relating to the existing trade laws in particular nations'. ADR comprises of many mechanisms like Arbitration, Mediation, Conciliation or Family Courts. And in this list the most recent addition is hybrid of Mediation and Arbitration. It is popularly known as 'MED-ARB'.

Med-Arb is a process of combining mediation with the decision making stage of arbitration<sup>2</sup>, although mediation and arbitration are fundamentally different processes.<sup>3</sup> The fundamental difference is that in mediation the parties themselves decide what the resolution to the problem is, whereas in arbitration the arbitrator makes that determination<sup>4</sup>.

Mediation is a voluntary process based on the initial, and ongoing, consent of the parties. Adjudication is not a voluntary process – it is either a statutory right or a contractual right. In conventional med-arb, the parties must initially consent to the process, but once they have consented they are committed until the end – either a settlement or adjudication by the same neutral<sup>5</sup>.

Why Med-Arb is required? It is because Med-Arb provides an opportunity to the parties to resolve the said dispute outside the bounds and nuances of regular courts. It provides the platform to the parties whereas they come together to settle the issues according to their convenience with respect to time, place, procedure, date, adjudicators. In short, it is tailor - made resolution device where parties come to appease the dispute without much pandemonium. It provides autonomy to the parties where they are free to make necessary arrangements at the personal level. "In med-arb, the third-party med-arbitrator attempts to mediate the dispute between the parties. At some point, when mediation is no longer likely to succeed, med-arbitrator, by prior agreement of the parties, switches into the arbitrator's role and issues a binding decision<sup>6</sup>."

In other words, Med-Arb is a tool which combines the benefit of both Mediation and Arbitration approach. 'In this increasingly popular process, parties first attempt to collaborate on an agreement with the help of a mediator. If the mediation ends in impasse, or if issues remain unresolved, the parties can then move on to arbitration'.<sup>7</sup>

In this process, parties initially try to collaborate on the dispute with the assistance of Mediator and following this, i still, no resolution is reached upon then parties move to the course of arbitration. But if dispute is rectified at the initial step itself i.e., mediation, then there is no need for the arbitration. The person who conducts the process of Med-Arb is known Med-arbiter. The mediator can assume the role of arbitrator (if qualified) and render a binding decision quickly, or an arbitrator can take over the case after consulting with the mediator. Med-arbiter handles the whole case and if parties had reached an agreement on some issues, the med-arbiter would rule only on the issues that remained. Alternatively, arbitrator could take over all or part of the dispute from a mediator.

### **Evolution of Med-Arb**

Labor Arbitration has been the key source from where the concept of Med-Arb has enunciated. Initially it was argued by many authors and scholars that Mediation and Arbitration cannot be concomitant in the a single dispute. Harvard Professor Lon Fuller viewed that:

*"Mediation and arbitration have distinct purposes and hence distinct moralities. The morality of mediation lies in optimum settlement, a settlement in which each party gives up what he values less, in return for what he values more. The morality of arbitration lies in a decision according to the law of the contract."*<sup>8</sup>

According to him both mediation and arbitration are different alternatives to resolve the dispute and they differ in their 'morality' aspect. Also he argued that the objective of Mediation was to reach to an 'amicable settlement'

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<sup>2</sup> Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes. 3 *Ohio ST. J. on Dispute Resolution* 385 (1988). Print.

<sup>3</sup> Cooley, Arbitration vs. Mediation - Explaining the Differences. 69 *Judicature* 263 (1986). Print.

<sup>4</sup> Bary C. Bartel, Med-Arb as a distinct method of Dispute Resolution: History, Analysis, and Potential. 27 *Willamette L. Rev.* 661(1991). Print.

<sup>5</sup> "Med-Arb: The Adjudication Perspective." *Slaw RSS*. Web. 20 Apr. 2014. <<http://www.slw.ca/2013/03/15/med-arb-the-adjudication-perspective/>>.

<sup>6</sup> Zack, Arnold. *Public Sector Mediation*. Washington, D.C.: Bureau of National Affairs, 1985. Print.

<sup>7</sup> "'Med-arb': An Effective Tool for Resolving Disputes." *"Med-arb": An Effective Tool for Resolving Disputes*. Web. 20 Apr. 2014. <<http://www.pon.harvard.edu/daily/mediation/med-arb-an-effective-tool-for-resolving-disputes/>>.

<sup>8</sup> Fuller, Lon L. *Collective Bargaining and the Arbitrator*. Madison, WI, 1963. Print.

whereas, objective of Arbitration was to present the 'award'.

But this highly contrasted by the belief of David L. Cole, president National Academy of Arbitration U.S.. He could be quoted as:

*"I fear I will step on some toes when I mention this one - the arbitrator who has the power to mediate. Not too long ago we were told this is the cardinal sin, but it is becoming a little more common. I have been engaged in such endeavors and I have not felt very sinful in doing it; as a matter of fact, I thought it was a useful combination of functions.*

*I would agree that experience as an arbitrator does not suffice to make a good mediator, and vice versa. Indeed, one of the tasks of an arbitrator-turned-mediator is to discard his ingrained propensity to inject his own conclusions as to the rights and wrongs of conflicting claims into the arena of dispute. Nothing is more readily calculated to terminate his usefulness in the mediation role....*

*I think it is perfectly possible to combine mediation and arbitration functions and skills in the same persons and to keep the roles separate as occasion demands. I have seen it work well... "*<sup>9</sup>

Supporting the above views, Herman Torosian, a world renowned Arbitrator, suggested in 1978<sup>10</sup> academy meeting of arbitrators that med-arb can be an effective procedure when the parties have a working relationship with the third-party neutral. He questioned, however, whether med-arb could be effective under a statutory system in which this familiarity may not exist.<sup>11</sup>

He concluded that the success of med-arb as an impasse resolution procedure depends on three things:

- (1) The parties' recognition that a negotiated agreement is preferable to an arbitrated agreement;
- (2) The ability of the parties both to recognize the problems created by med-arb and then to use the process constructively; and
- (3) The availability of effective med-arbitrators.

### **Development in India**

In recent time, within the span of last decade, Indian apex country has also acknowledged the effectiveness of Med-Arb. Court in the case of *Centrotrade Minerals and Metal Inc. vs. Hindustan Copper Limited*<sup>12</sup>. Court in this case held that the Med-Arb contract contemplated under the UNCITRAL Model Law is valid and has the equivalent value to any other existing contract in eyes of law. And court also emphasised that this mode should be encouraged more so that the burden of the court could be reduced.

The court again reiterated the importance of Med-Arb in the recent case of *Cellular Operators Association of India and Ors. vs. Department of Telecommunication and Ors*<sup>13</sup>.

### **Advantages**

As McLaren and Sanderson put it:

*"Linking the two techniques together creates an ADR dynamic that makes the whole a more effective force than the sum of the two components used individually."*<sup>14</sup>

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<sup>9</sup> Somers, Gerald George., and Barbara D. Dennis. *Arbitration and the Expanding Role of Neutrals: Proceedings of the Twenty-third Annual Meeting, National Academy of Arbitrators, Montreal, Quebec, April 6-8, 1970*. Washington: Bureau of National Affairs, 1970. Print.

<sup>10</sup> Stern, James L., and Barbara D. Dennis. *Truth, Lie Detectors, and Other Problems in Labor Arbitration: Proceedings of the Thirty-first Annual Meeting, National Academy of Arbitrators, New Orleans, Louisiana, April 4-7, 1978*. Washington: Bureau of National Affairs, 1979. Print.

<sup>11</sup> Ibid 10

<sup>12</sup> MANU/SC/8146/2006, 2006(4)ALT18(SC), 2006(3)ARBLR201(SC), JT2006(5)SC507, 2006(5)SCALE535, (2006)11SCC245, [2006]Supp(2)SCR146.

<sup>13</sup> MANU/TD/0148/201, (2011)3CompLJ452(TelecomDSAT).

<sup>14</sup> McLaren, Richard H., and John P. Sanderson. *Innovative Dispute Resolution: The Alternative*. Scarborough, Ont.: Carswell, 1995. Print.

The central advantages of med-arb are the certitude of a defined outcome, greater efficiency in terms of time and money, and greater flexibility concerning process and timeline<sup>15</sup>. The key advantages of Med-Arb has been showcased by the David C. Elliot in his paper titled "MED/ARB: Fraught with Danger or Ripe with Opportunity?"<sup>16</sup>, they are:

a) Mediation offers another chance of working out the dispute while retaining control of the decision and "getting on with business";

B)The arbitration component is attractive because, if mediation does not resolve the dispute, arbitration provides a clear end point, usually within a reasonably

c) Acceptable time frame, within a process that can be designed by the parties in dispute, and with a decision maker of the disputants' choice;

d)If the mediator is trusted, the parties often feel that he or she is in as good a position as anyone to make a decision on the dispute in the arbitration phase of the process;

e)The time spent in mediation, with the mediator, serves as a means of giving the mediator enough information for a decision to be made, so time is not "wasted" in a subsequent arbitration hearing;

F)The process is relatively informal, the result comparatively speedy, and the costs controllable.

Med-Arb can produce the prompt result with minimum time, expense and inconvenience to the parties. This is because it combines the flexible and consensual nature of mediation and the finality of arbitration, into a single two-step process<sup>17</sup>. In this mechanism parties don't have to suffer cost associated with the delays related to courts procedure.

It gives the parties greater control over the procedure and regulation over management of the issues involved in dispute<sup>18</sup>. This is because parties are free to incorporate or removed any procedural step from the proceedings and they could provide their own framework in which they want to conduct their proceedings.

Parties are also able to save their personal goals, meaning thereby, they can focus on particular issues on which they need specific result or compromise. This help in proper preparation of parties even before the starting of Med-Arb proceeding.

And special feature or advantage of this mechanism is that when there are vibes that the mediation is going nowhere then without wasting any more time parties can directly skip to Arbitration process. Arbitration process will be initiated from the time when parties agree to resort to this recourse. No time will be wasted as the rules, procedure, and arbitrators are already fixed by the parties. Thus parties are able to save their interest.

According to Indo-American Chambers of Commerce, Med-Arb's biggest and overwhelming advantage is that you know when you sign up that your dispute is going to be resolved<sup>19</sup>. It is also efficient because the neutral is available and the adjudication can proceed immediately if no settlement is reached. The reason for not using a different neutral for the mediation is, in part, because of efficiency and resource concerns.

Adding to the above merits, finality in decision impels the parties to opt for this procedure. The Med-Arbiter has

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<sup>15</sup> Mark Batson Baril and Donald Dickey. "MED-ARB: The Best of Both Worlds or Just A Limited ADR Option?" Web. 20 April 2014. <[http://adrnc.net/wp-content/uploads/2011/12/Resource-Page-MED-ARB-The-Best-of-Both-Worlds-or-Just-a-Limited-ADR-Option\\_0.pdf](http://adrnc.net/wp-content/uploads/2011/12/Resource-Page-MED-ARB-The-Best-of-Both-Worlds-or-Just-a-Limited-ADR-Option_0.pdf)>.

<sup>16</sup> Elliot, David C.. "MED/ARB: Fraught with Danger or Ripe with Opportunity?." *Atlanta Law Review* (34): 163-184. Print.

<sup>17</sup> Claude Thomson and Annie Finn. "Mediation - Arbitration: a contentious but often effective compromise." *The Lawyers Weekly* 15.9 (2006):1-2. Print.

<sup>18</sup> *Ibid*

<sup>19</sup>"MED-ARB: A VIABLE SUBSTITUTE FOR INTERNATIONAL ARBITRATION."Indo- American Chamber of Commerce IACC. Web. 20 Apr. 2014. <<http://iaccindia.wordpress.com/2010/11/11/med-arb-a-viable-substitute-for-international-arbitration/>>.

the complete authority to create a final and binding settlement, and this power is not available to the Mediator<sup>20</sup>. In addition to this, “[r]egardless of whether the final product of a med-arb results entirely from mediation or both mediation and arbitration, it becomes the entire [arbitral] settlement. which is binding and enforceable as law”.

### **Disadvantages**

The biggest issue involved in this mechanism is the potential mistreatment of the confidentiality of information by the mediator when he is acting as the arbitrator to give award. In addition, given the neutral's changing roles in the process, parties have a disincentive to participate fully in the mediation process and disclosing and discussing their interests because they fear that this information will later be used against them.<sup>21</sup>

But this issue could be resolved by the reasoning that the same confidential information will be helping in the final process. Because the Neutral Med-Arbitrator could be knowing about the intentions of the parties. It will help and motivate him to further collect the testimonies and documentary evidence so as arrive at the fair decision making. Also the background of the case or dispute will prove to be an key for the arbiter to reach to a just award.

The principle the natural justice is also surmounted the with partiality because same person i.e., Med-Arbitrator, who has witnessed the earlier proceeding (as Mediator) and known all the facts of the case including the pros-cons will again preside over the same dispute (as arbitrator). In the latter he will be presuming the role of judge. This could be a serious threat to the quality of award which the same arbiters will pronounce. This situations becomes very grave in case when there are instances where single Med-Arbitrator is appointed.

Instances of lack of control could also arise. This is because the mediator has a direct effect on the mediation process. The questions asked by the mediator will seek to bring out the interests of the parties in order to expand the settlement possibilities. The very issues that can play a vital role in mediation may be precisely the things counsel may not want canvassed in an arbitration hearing. Once underlying interests have surfaced during mediation, it may be unrealistic to expect a mediator-turned-arbitrator to put them aside when making an arbitration award. In fact, to put aside what is said in mediation may well lessen the quality of the decision, even if it is theoretically and practically possible to do so.<sup>22</sup>

**Other major disadvantages<sup>23</sup> of the Med-Arb are:**

- a) In mediation, the mediator will seek to surface the interests of the parties in dispute with a view to broadening the potential options for settlement. In arbitration, the last thing either party may want to expose is their underlying interests;
- b) In mediation, the mediator controls the process and often much of the questioning. In arbitration, the arbitrator is typically less involved in questioning, allowing the parties or their counsel to present their case. This lack of process control troubles many lawyers;
- c) In mediation, the parties may each privately caucus with the mediator. In most arbitrations, this would result in the decision being overturned;
- d) In mediation, the parties will attempt to make a settlement seeking to meet their own and the other parties' interests. This will typically involve fashioning an agreement looking to their future relationship. In arbitration, interests are submerged by rights, with each side tending to cast their own case in the best light, and their opponents' in the worst;

### **High profile Success through Med-Arb**

1. IBM and Fujitsu became embroiled in a high profile multi-million dollar dispute. The issues were ultimately resolved by a combined med-arb process. A key component of this success was the way in which the arbitrators took hold of the process and refused to allow the parties or themselves to be caught up in adversarial proceedings. Negotiation, mediation and limited arbitration proceedings resolved the dispute.
2. Conoco Inc. and Browning Ferris Industries became involved in an environmental clean-up dispute over responsibility for paying to clean-up a holding pond in which hazardous chemicals had been dumped. After 3 years of fruitless litigation and ever increasing cost and complexity, the parties agreed to med/arb. Nine months

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<sup>20</sup> Blankenship, John T. “Developing your ADR Attitude: Med-Arb, a Template for Adaptive ADR.” *Tennessee Bar Journal* Nov. (2006): 28-41. Print.

<sup>21</sup> Gerald F. Philipps, “Same-Neutral Med-Arb: What does the Future hold?”. *Dispute Resolution Journal*. May-July 2005. Print.

<sup>22</sup> Ibid 14

<sup>23</sup> Ibid



of mediation settled most issues and narrowed the difference between the parties over liability. The mediator became arbitrator and chose one of the final offers made by each party after about one hour of legal argument.

3. Federal Deposit Insurance Corporation and Chery, Bekart and Holland involved a claim that auditors had misrepresented the status of a bank which had defaulted. After spending \$2 million in fees and costs without getting to trial, the parties agreed to mediation, and ultimately to final offer arbitration to settle the remaining issues

### **Model Med-Arb Process**

The med-arb process begins with the standard procedures of a basic mediation without pleadings, discovery, subpoenas and the other formalities that are common to binding arbitration. The mediator has the freedom that mediation allows them in being able to talk to the parties both collectively or privately as he/she deems to be appropriate. Where the parties choose Med-Arb as their dispute resolution mechanism, they prescribe a fixed time frame during which they will retain control over how the dispute will be resolved and work towards a voluntary settlement with the other party, after which they agree to relinquish control over the outcome and opt for a final determination of the dispute by a neutral person. Med-Arb therefore strikes a balance between party autonomy and finality in dispute resolution. The mechanism is proved to be most effective in case when there is time pressure. And also it is purely on the voluntarily basis.

While designing Med-Arb process<sup>24</sup> following key points or steps could be kept in mind.

#### **1. Consider the order of the process best suited to the dispute or disputes contemplated.**

The process could be:

- A) Mediation followed by arbitration;
  - B) Arbitration proceedings in which mediation is used at an appropriate point;
  - c) Mediation followed by an expedited arbitration process;
- at appropriate points, a mix of processes, alternating mediation and arbitration as the situation requires.

#### **2. A second step deals with the person or persons appointed as the impartial third party:**

- a) Is one person to be appointed as both mediator and arbitrator at the outset of proceedings?
- b) If mediation fails, is the mediator automatically to become arbitrator or is the mediator to be subject to a time-limited confirmation or veto process? Does the mediator have a similar opportunity to decline to serve as arbitrator?
- c) If two persons are to be appointed, what will be their respective roles?

#### **3. A third step deals with process details**

- a) Is the mediation process to be limited by time? Is either party, at any time, able to terminate the mediation phase and institute or continue arbitration proceedings, and if so, how?
- b) Is private caucusing to be allowed at all? If it is, what rules are there about the information provided during private caucusing? In particular, what is the mediator turned arbitrator to do with that information? Options include:
  - The arbitrator is not to take account or rely on information received during private caucus sessions in making a decision;
  - if account is to be taken of information provided in private caucus sessions, any of it on which the arbitrator intends to rely must be disclosed to the other side, with an opportunity given to the other party to respond;
  - accept that whatever the mediator hears will be used as part of his or her decision-making in arbitration. If mediation comes first, give the parties an opportunity to present their case during the arbitration phase, or at least allow the arbitrator to ask questions or call for clarification of issues that might not have been made clear during the mediation process (If mediation occurs after formal evidence has been presented at arbitration, this problem will not arise).
- c) have potential natural justice issues been fully canvassed and decisions made about how to deal with them? Consider if the Arbitration Act applies and its impact on the process design.

#### **4. A fourth step concerns with the mediator/arbitrator**

- a) Does the person have adequate training and understanding of mediation processes to conduct a sound mediation proceeding?
- b) Will the mediator conduct the kind of process the parties want - or are the parties prepared to leave that to the mediator's discretion?

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<sup>24</sup> Ibid 14

C) Is the person someone whose judgment can be trusted if he or she has to make an arbitration decision and is he or she competent to conduct the arbitration phase of the process?

d) To what code of ethics does the mediator/arbitrator subscribe? Is the person able to shift from the role of mediator to arbitrator (and perhaps back again) with integrity, and to pinpoint process and substantive issues for consideration both by the parties and by himself or herself personally?

Depending on the parties and the nature of the dispute or potential disputes, each of the answers to these questions may have a bearing on whether med-arb is an appropriate process to use, and if it is, the design of that process<sup>25</sup>.

#### **Conclusion**

Med-arb has been shown to be an effective method of resolving particular types of disputes in both the private and public sector. Med-arb does effectively combine the useful elements of both mediation and arbitration to create a workable alternative to interest arbitration. Furthermore, its voluntary nature weakens arguments claiming med-arb is a threat to fair adjudication of disputes, thus creating potential for its use in the resolution of disputes.

The characteristics of med-arb suggest that it should be chosen voluntarily with a clear understanding of how the process works and of its potential disadvantages. A med-arbitrator has significant power to coerce a settlement which the parties may not desire. The role of the med-arbitrator requires a unique combination of conciliatory and adjudicatory skills; few people may be able to switch roles effectively in mid-hearing. In addition, the med-arbitrator may be in a precarious situation as privy to confidential information obtained in the mediation phase which he must disregard at the arbitration phase.

Med-arb can be more effective in producing settlement than mediation because of the realization of impending arbitration. It can be more effective than arbitration because areas of disagreement which are ripe for mediation can be mediated without compromising the arbitrator's role. Well understood and voluntarily chosen, med-arb offers disputants an effective, efficient means with which to resolve disputes.

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<sup>25</sup> "ADR Institute of Alberta - ADRIA Links." *ADR Institute of Alberta - ADRIA Links*. Web. 21 Apr. 2014. <<http://www.adralberta.com/links.asp>>.