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Med-Arb: A New Era of Tailored Mechanisms of Dispute Resolution

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ABSTRACT

Med-Arb, a hybrid dispute resolution process, combines mediation and arbitration in a single framework. This essay explores the nuanced dynamics and advantages of Med-Arb, shedding light on its increasing popularity in resolving complex disputes. In this essay, we discuss the evolution of the modes of dispute resolution and the growing needs of the society that gave birth to several methods of dispute resolution mechanisms. We individually study the components of Med-Arb, identify the drawbacks in each of them, and ultimately understand the necessity and objective of Med-Arb. We also discuss the procedure of Med-Arb and briefly touch upon its types and finally discuss why Med-Arb should be encouraged. This essay ultimately is a comprehensive explanation of Med-Arb and highlights its importance as a modern method of dispute resolution.

I. THE HISTORY OF DISPUTE RESOLUTION

Disputes have always been a part of human history, people constantly have tried to evolve mechanisms to resolve these disputes and today, if we disentangle all of the magisterial flowers that have been attached to it, our judicial system is just an elaborate scheme for dispute resolution. As we speak of the almighty judiciary, we need to understand how we have evolved this form of dispute resolution as a society.

Initially for dispute resolution, the only requirement was a position of power, which may vary from a king or the head of the village to the head of a large family, the only mechanism for resolving the dispute was to allow a person in power to formulate his opinion and take his word for gospel. This came in with a plethora of problems, unlimited arbitrariness and misuse of power go hand in hand. Society at this point decided that for the best resolution of dispute, power must be complemented with a mechanism that prevents bias and does not leave it entirely on the whims of the person in power.

A. The modern adjudication system

To meet this demand of society, we have built the current system of adjudication. This

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system has integrated the position of power with the restrictions that need to be placed to ensure unbiased resolution of disputes. This system however has 2 major flaws, one of them being the obvious traffic of people and delayed decision-making, the other one however indicates the change in societal needs. The second problem people had was that they did not have any say in any of the disputes. At least in civil matters and familial disputes, oftentimes the circumstances are such that intimate connection with the parties as well as the parties' opinions become essential which could not be effectively achieved in the regular judicial system and hence arose the need for better modes for resolving disputes.

B. Alternatives to modern adjudication

To satisfy these needs of the people, in the year 1996, the Arbitration and Conciliation Act was brought into existence. This act along with the amendment in section 89 of CPC in the year 1999 and the latest legislation of the Mediation Act (2023) created a flexible system of adjudication that balanced power, justice as well as interests of both parties together and was labelled the alternate dispute resolution mechanisms. The lawmakers were also careful to make these provisions in addition to the existing system and in cases where there is no complexity the regular judicial proceeding will be pursued. This seems like a dream combination, however, in the last decade, the growth of society was at such an exponential rate that even these alternate methods were proving to be insufficient. People wanted the power to pick and choose smaller components of various forms of alternative dispute resolution and tailor it to the circumstance at hand, this ultimately led to the birth of Hybrid alternative dispute resolution. Though there are several forms of hybrid alternative dispute resolution, this essay focuses only on MED-ARB, which is an interplay between mediation and arbitration.

II. MED-ARB: A HYBRID FORM OF DISPUTE RESOLUTION.

Med-Arb, as the name suggests, is a combination of mediation and arbitration. This however is a very vague definition and doesn't encompass the details that Med-Arb darb contains, however before getting into the details and accurate definitions of Med-Arb we have to understand each of its components individually. We will look at what arbitration is? What are the limitations of arbitration? Similarly, we will also analyze the mediation procedure and finally understand what med-arb is and how med-arb provides a solution for the limitations of both these components.

A. What is arbitration?

“Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to

one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court”³

Arbitration is an adjudicatory mechanism that bears a close resemblance to the judicial system. Though one may argue that it is flexible and the parties have control over aspects surrounding the proceedings, this is merely a portrayal of an ideal scenario, there are major flaws in the fundamental arbitration mechanism.

The first of such flaws is that the majority of the proceedings follow the judicial procedure itself, from methods of collecting evidence, calling of witnesses, taking opinions of experts and even the arguments itself is a mirror image of a courtroom. The basic objective of arbitration was that it would become an “alternate” for litigation itself; we have unfortunately rebranded the judicial mechanism while providing a phoney sense of control to the parties.

Moving to the second issue, the “discretion” provided to parties is also not applicable in a practical manner, for parties to have control over any aspect surrounding the proceedings, both sides must agree on the said aspect, however, as these parties are often disputing parties, they have polarising opinions in most situations barring a few exceptional circumstances. Ultimately in the majority of the circumstances, the parties cannot exercise the control that they are supposed to have.

Another major flaw is that the arbitration proceedings are supposed to be cost-effective and are also supposed to be time efficient. These are again far from the truth. From surveys conducted in the year 2021, the cost of arbitration has become way more expensive than that of regular litigation and the scenario has been escalated to the point that in cases of domestic arbitration itself, the amount payable is being extended to 50 lakhs for a single dispute.⁴

Though arbitration is not very differentiable from litigation with respect to the procedure, however, we cannot undermine its necessity, arbitration is a reasonable substitute for judicial proceedings but it can satisfy the needs of the parties that opt for arbitration only when the parties are concerned about securing their relationship and not only with winning the dispute.

B. What is mediation?

The new act of 2023 has made defining mediation an easy task, the legislation provides for an inclusive and exhaustive definition *of "mediation" includes a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community*

³ “What is arbitration?”, WIPO,2020, <https://www.wipo.int/amc/en/arbitration/what-is-arb.html>

⁴ SNEHIL SRIVASTAVA, “ Arbitration in India : Economical on paper expensive in nature”, MAY 1 2021 <https://www.jlsrjournal.in/arbitration-in-india-economical-on-paper-expensive-in-real-by-snehil-srivastava/>,

mediation, conciliation, or an expression of similar import, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator, who does not have the authority to impose a settlement upon the parties to the dispute;”

It is a “*process in which an impartial third party-a mediator facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. A mediator facilitates communication, promotes understanding, focuses the parties on their interests, and seeks creative problem-solving to enable the parties to reach their own agreement.*”⁵ Mediation is an ideal method of adjudication in many ways other than being completely distinct from the judiciary as it prioritizes relationships, provides confidentiality, is comparatively cheaper, is fairly informal and flexible, and so on.

This however in any way doesn't make mediation the pinnacle of dispute resolution, mediation proceedings come with their set of disadvantages. Parties are in complete control of the flow of the proceedings which means that they are directly arguing which in many cases instead of providing a common ground increases animosity and worsens the relations between the parties.

Another compelling argument several experts have given is that since the mediation proceedings are not adjudicatory in nature, meaning the parties are not compelled to bind themselves to the recommendation of the mediator, the time and money invested would be meaningless.

The 2 major takeaways that we have are:

That arbitration proceedings are subject to inherent conceptual flaws, and that would be the reason why people should go for mediation.

That if people go for mediation and if they fail to come to an agreement they would have essentially wasted their time for no reason.

Analyzing these points to make an effective dispute resolution mechanism, what we need is a procedure that would help us avoid the arbitration proceedings unless absolutely necessary and also a mechanism to attach meaning to the time invested by the parties in mediation. This is the basic objective of Med-Arb.

⁵ Radford, Mary F. “Is the Use of Mediation Appropriate In Guardianship Cases.” Stetson Law Review, XXXI, p. 617., www.stetson.edu/law/lawreview/media/is-the-use-of-mediation-appropriate-in-adult-guardianshipcase.pdf. 4 Vorys, Yoland

C. Definition and Inception of Med-Arb

Sam Kagel was the pioneer of this alternative conflict resolution process; to resolve a contentious San Francisco nurses' strike in the 1970s, he combined mediation and arbitration into a single process known as Med-Arb.

To provide a structural definition and understanding the essence of Med-Arb it is *“a hybrid, two-stage alternative dispute resolution process where the parties agree to give the mediator power to convert automatically to being an arbitrator and make a legally binding award if the mediation fails to result in settlement. The arbitration phase of the process will be legally binding, and the arbitrator’s award is enforceable”*⁶

The major objective of Med-Arb is to provide meaning to the mediation proceedings and not make it such that the time and effort that the parties have invested in these proceedings are deemed to be frivolous and provide a smooth transition to arbitration proceedings. To boil down the concept of Med-Arb, arbitration is used as a backup tool for mediation and the parties do not have to start over with the adjudication procedure.

D. Med-Arb Procedures and Types

An advance agreement between the parties agreeing to arbitrate any disputes that cannot be properly mediated is a crucial prerequisite to a Med-Arb.

When mediated talks fail to result in a settlement, the parties can then decide to go for arbitration, this combination of arbitration and mediation is titled as Med-Arb. The mediator may take on the role of an arbitrator and provide a final and legally binding decision about the unresolved subject(s)

Another benefit of resolving disputes through Med-Arb is that it provides several variations, thereby giving flexibility to the parties. A few types of Med-Arb are

a. Opt-Out Med-Arb: This form of Med-Arb allows parties to designate different neutrals for every procedure. It lessens the problem of partiality and guarantees confidentiality.

b. Arb-Med-Arb: In this form of Med-Arb a documented arbitration award is withheld after the First Arbitration. It gives the parties an opportunity to mediate prior to the award being delivered. Whenever there is a stagnation, the award which was withheld earlier is delivered.

c. Overlapping-Med-Arb: In this form, the arbitrator engages in the mediation but remains isolated from the parties' private correspondence with the mediator. saves time and work

⁶ Mediation-arbitration (med-arb) definition, LexisNexis, 2024, <https://www.lexisnexis.co.uk/legal/glossary/mediation-arbitration-med-arb>

while guaranteeing impartiality and secrecy.

d. Plenary Med-Arb: Directly restricts privileged discussions.

E. Why should people go for Med-Arb?

In the Med-Arb process, the benefits of arbitration and mediation are combined and the process thereby annuls major drawbacks each of them has individually, it offers a distinctive and effective method of resolving disputes. Choosing med-arb encourages candid dialogue and cooperation which gives parties a chance to try peaceful dispute resolution through mediation. Parties may find this dual-stage method appealing when seeking a balance between collaborative negotiation and a conclusive resolution, making med-arb an attractive option for those desiring both flexibility and finality in resolving disputes. Med-Arb has several benefits as enumerated below:

a. **Informal and Voluntary Process:** Compared to traditional litigation, Med-Arb offers a less rigid and more flexible process. Since these procedures are usually optional, everyone may take part voluntarily and have frank conversations to agree.

b. **Facilitation by a Neutral Third Party:** In Med-Arb, an impartial third party serves as the mediator and arbitrator if needed. This individual assists in facilitating discussions and negotiations between the parties who has received training in conflict resolution methods. Their neutrality contributes to the process's fairness and objectivity.

c. **Confidentiality:** Arbitration and mediation processes are often kept private. Parties can openly discuss issues, look into possible solutions, and exchange information thanks to this secrecy without worrying about being found out or having their reputations ruined. Additionally, maintaining confidentiality helps foster a climate of open communication and cooperation when addressing conflicts.

d. **Expenditure:** Compared to traditional litigation, the Med-Arb procedure is frequently less costly. Through the avoidance of protracted legal actions, legal fees, and other associated expenditures, they can contribute to time and cost savings. This can be especially helpful for workers who might not have the money to fight long-term legal disputes.

e. **Tailored Solutions:** When it comes to dispute concerns, Med-Arb allows for the development of more creative and focused solutions. Rather than only depending on past court decisions or legal precedents, the parties are free to create solutions that satisfy both parties and take into consideration their concerns and interests. This flexibility might lead to solutions that are more to everyone's satisfaction.

f. **Maintenance of Relationships:** Conflicts can place a strain on the stable relationships between parties. The process of Med-Arb encourages productive dialogue and teamwork, which can support the maintenance of the working relationship or provide a peaceful continuance.

g. **Speedier Resolution:** Due to their less backed-up dockets, Med-Arb frequently results in quicker resolutions than the court system.

III. CONCLUSION

In summary, every aspect of the litigation, including the alternative dispute resolution, has advantages and disadvantages. However, we must look into alternative approaches as well and not limit ourselves to its drawbacks. Similar to that, med-arb provides a variety of options that may be appropriate in various situations, when we have an opportunity to tailor the dispute resolution process exclusively based on our circumstances, it is only logical to use such options. The advocates must encourage such modes and being social engineers have a moral responsibility to explain risks, goals, waivers, rights, due process, and objections to the parties entering into such an agreement. In Med-Arb specifically, the parties' willingness to make concessions and find cooperative solutions is rewarded by providing a smooth mechanism to transition into arbitration and have their dispute resolved. Since Med-Arb provides for amicable negotiations while maintaining a mechanism for a final decision if necessary, its flexibility, and efficiency, make it particularly appealing and better 'value for money'. Med-arb is a compelling option for people or organizations looking for a comprehensive and flexible approach to conflict resolution that facilitates both cooperative discussion and a successful resolution because of this special combination.
