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MedArb and beyond: Exploring the Possibilities of Expanding the Canvas of Commercial Dispute Resolution in Sri Lanka

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Abstract

The ADR landscape is evolving at a rapid level across the world and one of the latest trends in such is transferring disputes into ArbMedArb and MedArb. Arbitration and Mediation are recognised as two favourable dispute resolution methods, especially in commercial dispute resolution. When considered in isolation, both mediation and arbitration have unique features. Despite a few substantive and procedural drawbacks in both methods, mediation, and arbitration have gained popularity recently. Moving beyond, the ADR landscape has transformed into a mixed approach of MedArb and ArbMedArb as a modern trend. While this is still in its infancy, this paper examines the possibility of utilising MedArb and ArbMedArb within the existing landscape of Sri Lanka. Arbitration practice in Sri Lanka has a long history and the Arbitration Act No. 11 of 1995 and there are amendments suggested which are to be in force in the future. Notably, the background for Meditation in Sri Lanka started with community mediation and now it has reached a significant milestone in commercial mediation as the enabling legislation for the Singapore convention was enacted recently. This paper uses a doctrinal approach in dealing with primary resources as well as secondary resources when conducting the research. This paper uses an exploratory analytical method. In its findings, the paper highlights that the MedArb practice is adaptable in Sri Lanka within the existing statutory framework and the institutional setup. However, the professionals as well as the commercial community should pay attention to the points discussed in the recommendations for the successful functioning of the MedArb practice.

Keywords: arbitration; commercial dispute resolution; mediation; MedArb

Introduction

Conflicts or disputes are common in human society and dispute resolution methods as alternatives to litigation are also inevitably important for the peaceful and coherent existence of the community. Arbitration and Mediation have established their importance as dispute resolution methods all around the world both in community and commercial dispute resolution spheres. Disputants tend to choose these methods over litigation due to their advantages such as fewer formalities, expertise, flexibility, less time-consuming, party autonomy, confidentiality, cost-effectiveness, etc. Sri Lanka being no exception to this global climate promotes a dispute resolution culture through either arbitration or mediation. This is evident by the recommendation of ADR as a possible solution for law delays and case backlog in the recent Annual Performance Report -2023 Ministry of Justice, Prison Affairs and Constitutional Reforms which records a number of 1,122,113 pending cases to be solved by 31.12.2023.[1]

In the global context, one of the recent trends in ADR is the 'MedArb' practice which simply means mixing

[1] Ministry of Justice, Prison Affairs and Constitutional Reforms, 'Annual Performance Report -2023' (2023) 15.

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the two methods of mediation and arbitration for better utilisation of them in dispute resolution. The other side of this is known as 'arb-med' which refers to the reverse process and it can also be extended to arb-med-arb. The atmosphere created through MedArb contains positive features of both methods and also it allows mitigating the drawbacks in one through the involvement of the other method.[2]

This paper takes a critical approach to reviewing the adaptability of MedArb into the Sri Lankan landscape through an analysis of its challenges and prospects. The first part of this paper attempts to define the concept of MedArb and understand the process as a whole. The second part deals with the challenges in applying MedArb into the Sri Lankan landscape focusing on possible solutions to be adopted. Finally, the paper deals with the progressive recommendations to be adopted in promoting MedArb as a distinct method of dispute resolution in modern times.

What is 'MedArb'?

MedArb has a long history though its emergence as a well-defined separate method is highlighted recently.[3] According to the historical records, Sam Kagel who was a San Francisco lawyer and arbitrator is regarded as the founder to develop Med-Arb to settle a nurses' strike in the 1970s.[4] Today, it is applied in commercial settings without being limited to labour and international disputes. Edna Sussman identifies four categories of 'Combinations and

Permutations of Hybrid Processes' such as 'Med-arb', 'Arb-med or arb-med-arb', 'Co-med-arb', and 'MEDALOA (Mediation and Last Offer Arbitration)'.[5]

A mediator is expected to be a facilitator who encourages parties to find out the best solution that serves the interests of the parties. Comparatively, an arbitrator is vested with a determination power conferred by the parties through appointment. The MedArbitrators is referred to as 'the neutral' in literature because it is a combination of both roles.

According to Alan Wein and Jessica Rogers,

"In Med-Arb, as in conventional mediation, the mediator endeavours to facilitate a negotiated resolution between the parties. If, however, the mediation fails, the mediator then becomes the arbitrator and authoritatively determines the dispute."[6]

Wein and Rogers claim that common law countries and the Western world do not favour MedArb as an ADR method.[7] Despite this opinion, it is noteworthy that many Asian countries have adopted MedArb into their ADR landscapes and have been exploring its possibilities. Nevertheless, MedArb is referred to as a method that is not a 'one-size-fits-all' process.[8] This highlights the fact that the selection of MedArb as a dispute resolution method for a dispute should be an informed and voluntary selection of the parties.

The rationale behind the hybrid process

The disadvantages of both mediation and arbitration

[2] Wein A. and Rogers J., 'The Med-Arb Model Dissected and Analysed in Existing Academic and Practitioner Papers' (Wein Mediators, 2019) https://www.weinmediation.com.au/Med-Arb-Model-Dissected-and-Analysed.pdf.

[3] Bartel, C., 'Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential' (1991) 27 Willamette L Rev 661, 663.

[4] Weisman M.C., 'Med-Arb: The Best of Both Worlds' (2013) 19 Dispute Resolution Magazine.

[5] Sussman, E., 'Developing an Effective Med-Arb/Arb-Med Process' (Financial Industry Regulatory Authority, 2018) https://www.finra.org/sites/default/files/publication_file/neutral-corner-volume-2-2018-0618.pdf accessed 2 August 2024.

[6] Wein and Rogers (n 2) 49.

[7] ibid 50.

[8] Law Council of Australia, 'Med-Arb Commentary: A Guide for Legal and ADR Practitioners' (October 2022) <https://lawcouncil.au/publicassets/19429bd2-68f3-ed11-9482-005056be13b5/2023%2005%2015%20-%20Med-Arb%20Commentary%20v2.pdf> 4.

are highly discussed among the disputants as well as in literature. It is an unfortunate story to hear that the disputants who favour ADR methods over litigation sometimes end up frustrated due to certain drawbacks in the ADR process. Therefore, before moving into exploring MedArb it is important to identify the inherent features of both mediation and arbitration emphasising the drawbacks and how they could be overcome by this hybrid initiative.

Meditation is a process where a third party facilitates the disputants to find a solution that best addresses their interests. A mediator does not interfere with the decision-making powers of the parties and determines the solution at the end. Instead, the mediator role involves the skills of communicator, leader, negotiator, and manager of the mediation process. The mediator is expected to play a neutral, impartial, and disciplined enough to follow the rules and use strategies in conducting the sessions. At the end of this process, the parties should be able to find a win-win solution that serves the best interests of their concerns. The process may end with either settlement or non-settlement, however, the mediator cannot impose a solution on the parties by using authority. Different types of meditation have various approaches to conducting the process such as facilitative, evaluative, and transformative. However, facilitative and evaluative mediation are the most common types that are used while transformative remains a bit distinct and modern.

In contrast, an arbitration generally starts with an 'arbitration agreement' and the party autonomy plays an important role in the process at different stages from selecting the forum to arbitrators. The role of an arbitrator is different from the mediator's role in mediation. Arbitrators known as 'quasi-judicial' are vested with the adjudicative power authorised by the parties to decide the dispute. In contrast, while the mediator facilitates the parties to uncover their interest and identify their strengths and weaknesses, the arbitrator decides the dispute by considering the facts and evidence presented by the parties following a flexible process decided by the parties. Ultimately, the arbitration award is decided not by the parties, but by the arbitrator which is subject to challenges at a court of law on limited grounds. Therefore, arbitration could be a win-lose situation at times.

Owing to the inherent features of both mediation and arbitration, at the outset, MedArb intends to double the positives in both methods and mitigate the risk in both. As Brian Pappas states, "Med-Arb practitioners see an opportunity to offer a process that combines the best of both mediation and arbitration by guaranteeing a final resolution ("finality") but incorporates informal opportunities for settlement ("flexibility")."[9] He believes that the finality element motivates the parties to behave themselves well within the process while flexibility would contribute to 'efficiency and cost-saving' over arbitration.[10] According to Brian, the emergence of MedArb as a dispute resolution method is an outcome of the tendency to legalize ADR methods, and therefore, MedArb was created intending to cure that problem.[11]

The advantages and disadvantages of MedArb

Martin C. Weisman with an optimistic view states that "Med-Arb will continue to grow as a viable and effective process because it is an economical, efficient, and fair method for the settlement of disputes."[12] He reiterated that those who have been Med-Arbs have proved that 'concerns about the misuse of confidential information are overstated'.[13]

In explaining the advantages of MedArb, the human and behavioural psychological matter is highlighted by Katie. According to Katie, the med-arb process itself motivates the parties to arrive at a solution smooth-

[9] Pappas, B., 'Med-Arb and the Legalization of Alternative Dispute Resolution' (2015) 20 Harvard Negotiation Law Review https://papers.ssrn.com/abstract=4102353 accessed 6 May 2024.

[10] ibid 159.

[11] ibid 169.

[12] Weisman (n 4) 41.

[13] ibid.

ly because the parties know 'the threat of having a third party render a decision in binding arbitration'.[14] Therefore, MedArb at the outset encourages the parties to arrive at a solution while protecting their relationship with the other party.[15] Furthermore, Katie identifies MedArb as a cost-effective solution since the process is determined at first as a hybrid version rather than initiating them separately.[16] As a whole, MedArb can iron out the disadvantages of Arbitration and promote flexibility in Mediation.

On the other hand, many criticisms of MedArb devolve from the role of the MedArbitrator or the neutral. As Brian Pappas critically summarises, "Med-Arb cannot satisfy the core values of mediator neutrality, party self-determination, and confidentiality. Nor in arbitration are the promise of arbitrator impartiality, due process right to equal treatment and confrontation, and enforceability of the arbitral award likely to be achieved." [17] Further, the threat to confidentiality remains a main challenge in this process. On the one hand, the futuristic projection of the arbitration can have a deteriorating impact on the mediation carried out first. The mediator will be exposed to the true interest expressed by the parties, especially in private caucus sessions. Therefore, MedArbitrtaor can be 'privy to confidential information'[18], and it can make the parties hesitate to outspeak their interests openly.

The pressure to arrive at a binding decision at the end can be disadvantageous because it might not address the true interests. Rather parties will be artificially forced to end the process with some solution that fits despite reaching the best possible solution.[19]

The issues of confidentiality when the same mediator acts as the arbitrator are also highlighted as negatives.[20] Taking an extreme view, Jeff Kichaven argues that 'Med-Arb should be dead' and he uses the judgment by California state court in *Travelers Casualty and Surety Company v. Superior Court*[21] to prove his argument.[22] His argument is based on the idea that confidentiality in mediation will be diluted in the MedArb process specifically in maintaining a comprehensive record of the award which can be subject to judicial review later on.[23]

The MedArb process in brief

In practical terms, parties' intention for MedArb can be discovered during the pre-hearing or pre-mediation stage. As prominently seen, one of the motivational factors for selecting this method is the parties' willingness to settle the dispute.[24] At the start, it is very important that the MedArb explains the pros and cons of the process with the disciplines required in order to be successful.

According to Katie Shonk[25], the start of the process in MedArb is different from mediation. It generally starts with an agreement in writing on the steps to be followed and regarding the acceptance of the solution derived at the end as binding. Therefore, party autonomy creates a more party-centric flavour to the whole process.[26] Then, the mediation takes place in a facilitative manner and the process will transfer to arbitration thereafter. The same mediator may appear as the arbitrator and act in the vested capacity in examining the case as a whole or the issues that are

[14] Shonk, K., 'What Is Med-Arb? The Pros and Cons of Med-Arb, a Little-Known Alternative Dispute Resolution Process' (Program on Negotiation, Harvard Law School Daily Blog, 6 October 2024).

[15] ibid.

[16] Ibid.

[17] Pappas (n 9).

[18] Sussman (n 5) 1.

[19] Shonk (n 14).

[20] ibid.

[21] T*ravelers Casualty and Surety Company* v. *Superior Court*, 126 Cal. App. 4th 1131 (2005)

[22] Kichaven, J., 'Med-Arb Should Be Dead' (2009) 2 NYSBA New York Dispute Resolution Lawyer 80.

[23] ibid 81.

[24] Weisman (n 4) 41.

[25] Shonk (n 14).

[26] ibid.

not settled at the mediation.[27] As another approach, a different arbitrator can also take over the case in consultation with the mediator who handled the first part.

Tom Arnold explains how MedArb works and states that, "Facilitative mediation, followed by Binding arbitration, perhaps before the same neutral."[28] In practical terms, this entails the same third party acting both as a mediator and an arbitrator whereas in the first instance facilitating the parties to arrive at a settlement and in the second instance determining a final and binding award after considering the issues.[29]

Methodology and Limitations

This paper utilises a doctrinal research methodology where the black letter approach is used to review the primary and secondary sources. However, the literature is limited on the success and drawbacks of MedArb since it is relatively a new phenomenon that has recently been in wide use. The scope of this paper is limited to commercial dispute resolution. While community mediation plays a pivotal role, the applicability of arbitration in community disputes is not visible. Therefore, in this hybrid process of MedArb, the author believes that its applicability should best be discussed within commercial dispute resolution.

Utilisation of 'med-arb' within the landscape of Sri Lanka

Arbitration has not become a success story in Sri Lanka mainly due to practical issues and mediation in the commercial sphere is yet to plant its seeds. Therefore, the main argument of this paper is that MedArb which aims at doubling the positives in each could be a new avenue for the commercial community who doubt the negatives in each. Nevertheless, If MedArb continues to yield negatives, attempts can be made to try out 'ArbMedArb' for a more formalised, predictable, and enforceable solution. However, I suggest that 'ArbMed' is not a viable method because it could create further nuances that are cumbersome for both parties and the arbitrators or mediators.

Looking at the existing legal framework, mediation is historically deeply rooted in the community sphere in Sri Lanka. However, with the recent enactment of the Recognition and Enforcement of International Settlement Agreements Resulting from Mediation (Act No. 5 of 2024), commercial mediation has become a favoured avenue. On the other hand, the Sri Lankan domestic legal framework for Arbitration is governed by the Arbitration Act No. 11 of 1995 which is modelled on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). This establishes the fact that Sri Lanka as a country is obliged to adhere to international standards by creating a domestic legislative framework that facilitates this. It is evident that both legislative frameworks have no direct bar to the use of MedArb. On the other hand, no major legislative reforms are required to adapt MedArb in the Sri Lankan landscape. Article 14 of the Arbitration Act[30] encourages the use of other methods including mediation of a dispute even after proceedings are in place. However, Act No. 5 of 2024 in Article 03 excludes the settlement agreements that are enforceable as an arbitral award and this would not be an obstacle since the award at the end is rendered as an arbitration award in MedArb. One of the greatest advantages is that Sri Lanka as a signatory to the New York convention can enforce arbitration awards and the same could be applied to awards rendered at the end of the MedArb process.

In commercial dispute resolution, Sri Lanka is still developing its institutional framework and limited institutions such as the CCC-ICLP International ADR

[27] ibid.

[28] Arnold, T., 'A Vocabulary of Alternative Dispute Resolution Procedures' (October 1995) Dispute Resolution Journal cited in Wein and Rogers (n 2).

[29] 'Med-Arb – an Alternative Dispute Resolution Practice' (Herbert Smith Feehills, 28 February 2012) <https://www.herbertsmithfreehills.com/notes/arbitration/2012-02/med-arb-an-alternative-dispute-resolution-practice> accessed on 21st July 2024.

[30] Arbitration Act No. 11 of 1995, Art 14.

Center[31], ICLP Arbitration Centre (Centre),[32] and Sri Lanka National Arbitration Centre.[33] Though it has not been utilised so far, the author believes that MedArb would be a better option that has prospects if the challenges discussed below are addressed pragmatically through the intervention of the institutions as well.

Recommendations

When the Sri Lankan landscape is considered, MedArb could be a better option for Small and Medium enterprises who do not possess the financial capacity and expertise to follow a very formal and comprehensive process in litigation. The nature of this sector is that they do not refer their matters entirely to meditation because of the misbeliefs in meditation practice in Sri Lanka. However, in MedArb the element of arbitration enhances credibility through the enforcement mechanism and the involvement of arbitrators with adjudicatory powers compared to the mediators. Therefore, this hybrid process can guarantee them the required flexibility and the formalities within a party-centric approach. Furthermore, it is also vital to draft an adequately detailed 'MedArb' agreement at an early stage to avoid issues during the process. Carol A Ludington believes it could smoothen the process with proper instructions to the neutral, mitigate dissent, and enhance enforceability.[34]

Developing a guide on the role of the MedArbitrator including the professional ethics and best practices would be beneficial. The MedArbitrators should possess the necessary skills and be knowledgeable of the techniques. He must be well-versed in both mediation and arbitration.[35] Especially arbitration is based on a comprehensive legal basis compared to meditation and this distinct nature should be well identified. He should also be able to learn and unlearn certain facts in playing the different roles in order to preserve the trust of the parties.[36] As Weisman explains, the issue of confidentiality can be overcome by explaining the strategy and position of the neutral in dealing with the information exposed in the caucus sessions.[37] Therefore, parties should be informed about the process and a voluntarily chosen MedArb can be a suitable efficient method of dispute resolution.

In addressing concerns relating to confidentiality, Edna Sussman suggests having the mediation without the caucus sessions, conducting the arbitration separately and keeping it under seal until the mediation finishes, having two party-appointed arbitrators to co-mediate the dispute and a chair to be involved in the arbitration especially if the dispute is not solved at the end, allowing parties to appoint separate mediator and arbitrator.[38] He further highlights the importance of maintaining the same neutrality in both aspects to achieve a high efficiency level.[39] As observed, many of these recommendations can best be implemented through the intervention of the institutions. Therefore, this paper recommends that procedural adjustments are inevitable in utilizing MedArb in Sri Lanka.

Conclusion

The role of the MedArbitrator as well as the parties is crucial to achieving success in the MedArb process because many of the challenges identified are

[31] The Ceylon Chamber of Commerce (CCC)and the Institute for the Development of Commercial Law and Practice (ICLP) Alternative Dispute Resolution Centre. For more information: https://www.iadrc.lk/ accessed 02nd August 2024.

[32] For more information: http://www.iclp.lk/ accessed 02nd August 2024.

[33] For more information: https://www.slnarbcentre.com/ accessed 02nd August 2024.

[34] Ludington, C. A., 'Med-Arb: If the Parties Agree -' (2017) 5 Yearbook on International Arbitration and ADR 313, 321.

[35] Weisman (n 4) 40.

[36] ibid 40.

[37] ibid 41.

[38] Sussman (n 5).

[39] ibid.

not substantial, but rather procedural. It is pivotal that the MedArbitrator maintains professionalism and integrity throughout the process. If he attempts to take advantage of his position in both stages, the objectives of the process will not be achieved. Further research in this area within the Sri Lanka context could expand into an empirical study in which the practical insights of both practitioners as well as clients should be critically analysed in recommending reforms to the legal framework. It also investigates the comparative jurisdictions and their exemplary practices in MedArb.

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