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Evaluation of Hybrid Models of ADR: Combination of Arbitration and Mediation

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ABSTRACT

Arbitration and Mediation are private dispute resolution processes. In the case of Arbitration, an independent Adjudicator known as an Arbitrator is appointed (the appointment may be of an individual Arbitrator or a panel of Arbitrators) in accordance with the provisions of the Arbitration Agreement between the Parties or by an Order of a Court. The Arbitrator, after hearing the parties at length and considering the evidence presented in the respective case, passes a legally binding Award. On the other hand, in the process of Mediation, the intermediary i.e. the Mediator facilitates an amicable settlement of disputes between the Parties. The outcome of the mediation process is not binding on the Parties to the dispute.

Both the processes, i.e. Arbitration and Mediation are advantageous than litigation in terms of time consumed, costs incurred, the flexibility of procedure and the formalities and complexities involved. However, in comparison to each other, they have their set of advantages and disadvantages. The merits of Arbitration and drawbacks of Mediation are: Firstly, the procedure adopted by the Arbitral Tribunal is similar to that of a Court and hence it reflects judicial propriety whereas the Mediator does not follow any formal procedure and secondly, the Award passed in Arbitration is binding upon the Parties, whereas such is not the case in Mediation. The advantages of Mediation and disadvantages of Arbitration are as follows: Mediation is less expensive and time-consuming as compared to Arbitration, the procedure of Mediation is less complex than that of Arbitration and the Arbitration process becomes mandatory if there is an Arbitration Agreement whereas Mediation can be terminated by the Parties at their will at any point of time during the process.

Therefore, to combine the merits of both these processes and to address the shortcomings in them, the hybrid models which include the advantages of both, Arbitration and Mediation have been gaining prominence. These hybrid models are frequently to settle commercial, labour, industrial disputes. These mechanisms benefit the Parties to the dispute by offering a more efficient procedure than the traditional ones of standalone Arbitration or Mediation.

***Keywords**: Alternative Dispute Resolution, Arbitration, Mediation.*

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I. INTRODUCTION

(A) Mediation-Arbitration

In Med-Arb, the Mediation process is first initiated. If the Parties fail to arrive at a consensus, then a binding Arbitration process is initiated. Therefore, the process starts with Mediation and then it is switched to Arbitration.

(B) Arbitration-Mediation

In Arb-Med, the process starts with Arbitration wherein a non-binding Award is passed and then the Arbitrator-turned Mediator works with the Parties to reach an amicable settlement.

(C) Arbitration-Mediation-Arbitration

In the case of Arb-Med-Arb, if the Arbitration process is not working out well for the Parties, then the dispute is referred to Mediation. And if the Mediation process also fails, then the Arbitration is again resumed.

The following is the analysis of various aspects of these hybrid models of ADR, as mentioned in the research objectives:

II. FEATURES

1. Finality

The hybrid mechanism ensures that the dispute is finally concluded. In the case of Med-Arb and Arb-Med-Arb, a legally binding Award is passed. And in the case of Arb-Med, the Agreement reached in Mediation is a legally enforceable contract. Therefore, the parties to the dispute do not have to remain uncertain regarding the finality as they would certainly receive an outcome to the conflict.

2. Party Autonomy

The most important attribute of these hybrid models is their flexibility. The Parties can mutually decide on the procedure and the formalities to be followed. When one of the modes of ADR does not suit the needs of the parties, they may switch to the other mode during the proceedings.

3. Time and Cost

The time and cost involved in these proceedings are generally low as compared to a standalone Arbitration proceeding. Also, as the same person can continue as Mediator and Arbitrator, there is generally no need to appoint another person(s) and to brief such other person(s) while switching to another mode of ADR.

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III. INTERNATIONAL STAND-POINT

In various Countries, the hybrid models of ADR have been encouraged. In 2020, the Alternative Dispute Resolution Institute of Canada issued Med-Arb Rules and it stated that it is also in the process of creating designations for Med-Arb practitioners.[2] In the case of Ku-ring-gai Council v. Ichor Constructions Pty Ltd[3], the Supreme Court of New South Wales (a State in Australia) analyzed the concept of Arb-Med-Arb and provided guidelines regarding such kind of proceedings.

However, it will be pertinent to note that as compared to the Western Countries, the hybrid models of ADR have received much popularity and acceptance in the Asian jurisdictions. Various Countries have enacted provisions regarding such processes. For instance, as per Article 38(4) of the Arbitration Law of 2003 of Japan, the Arbitrator(s) or the Arbitration Tribunal may attempt to settle the dispute between the Parties, if the parties so consent. And as per Clause C [Mediation followed by Arbitration (Med-Arb)] of the Japan Commercial Arbitration Association's Commercial Mediation Rules, 2020, Med-Arb has been given statutory recognition. In the said clause, it is specified that if negotiations fail between the Parties, then they should try to settle the dispute by Mediation and in case if Mediation also turns unsuccessful, then the dispute should be finally settled by Arbitration. Also, sections 16 and 17 of the International Arbitration Act, 2016 of Singapore, provide that a Conciliator may also act as an Arbitrator with the consent of the Parties. Even the Singapore International Arbitration Centre and Singapore International Mediation Centre have issued the SIAC-SIMC Arb-Med-Arb Protocol in 2014. In an interview with Global Arbitration Review, Yu Jianlong, the Secretary-General of the China International Economic and Trade Arbitration Commission (CIETAC), mentioned that around 20 to 30 per cent of the total cases of CIETAC are resolved by the method of Med-Arb.[4]

Therefore, at the International level, the use of hybrid models of ADR combining Arbitration and Mediation features have been on the rise.

IV. NEED FOR EVOLUTION AND IMPLEMENTATION IN INDIA

In India, as stated earlier, Sec 89 of the Code of Civil Procedure, 1908 recognizes the ADR

[2]ADRIC, *Med-Arb Rules*, June 1st, 2020, available at https://adric.ca/wp-content/uploads/2020/08/ADRIC_Med_Arb_Rules_2020_booklet.pdf (last visited on 28/11/2021).

[3] **[2018] NSWSC 610, available at** https://www.caselaw.nsw.gov.au/decision/5aefb957e4b074a7c6e1efc8 **(last visited on 28/11/2021).**

[4] Alison Ross, *An interview with Yu Jianlong*, Global Arbitration Review (GAR), September 5th 2011, available at https://globalarbitrationreview.com/interview-yu-jianlong (last visited on 28/11/2021).

mechanisms such as Arbitration, Conciliation, judicial settlement including settlement through Lok Adalat and Mediation. The provisions regarding Arbitration and Conciliation are codified in the Arbitration and Conciliation Act, 1996. The Legal Services Authorities Act, 1987 provides the Regulations with respect to Lok Adalats. Also, efforts have been made to codify the provisions regarding Mediation, as the Ministry of Law and Justice on November 5th 2021 released the draft Mediation Bill, 2021 for public comments and consultation.

As per Section 30 of the Arbitration and Conciliation Act, 1996, the Arbitration Tribunal may use Conciliation, Mediation or any other procedure to settle the dispute during the Arbitration proceedings. Though the said provision can be interpreted to recognize the hybrid ADR models such as Med-Arb, Arb-Med, Arb-Med-Arb, etc., there is no express provision regarding them in any Indian statute. Also, the 2017 Report of the High-Level Committee formed to review the institutionalization of Arbitration mechanism in India mentions and recommends the use of hybrid ADR processes by the Arbitral institutions. It is further stated in the Report: "The hybrid 'Med-Arb' process provides at once, efficiency in terms of time and cost, greater party autonomy as to how the dispute can be settled, and a regimented timeline for achievement of outcomes. Thus, it has advantages over separate mediation and arbitration processes. It is of added advantage for parties who particularly value business and commercial relationships and their preservation."

In India, because of the pendency of a large number of cases in Courts, ADR methods have become more of a requirement than a choice. However, because of the huge costs incurred in the standalone Arbitration process, many Parties are discouraged from pursuing Arbitration. Also, as Mediation does not provide for the finality in a dispute, it is a less opted option. And for this reason, hybrid ADR models which are a combination of both these processes would prove to be successful in this Country, if provided the proper impetus.

Therefore, the recommendations given by the High-Level Committee in the above-mentioned Report should be implemented. Also, the hybrid ADR processes should be given statutory recognition in India.

V. Conclusion

From the above contentions, it can be concluded that there should be constant encouragement for adopting hybrid ADR processes which combine the features of Arbitration and Mediation. Especially in these times of pandemic, when even the Corporate Houses do not wish to absorb huge costs of dispute resolution and the filings and formalities of traditional ADR methods have become infeasible, these procedures should be adopted by the Parties to the dispute. In India,

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these processes should be codified to ensure their smooth implementation. Though there may be some practical difficulties while using these processes to settle disputes, it should always be noted that their advantages outweigh their drawbacks.

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