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# MED ARB: FUTURE OF DISPUTE RESOLUTION IN INDIA

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## Abstract

Alternative dispute resolution mechanism include arbitration , mediation, conciliation which basically promotes out of the court settlement so that the lengthy and tiring process of litigation can be avoided and there could be speedy and effective disposal of cases . Thus Indian Arbitration and Conciliation Act 1996 was introduced to give effect to the awards passed under these settlements. Med Arb combines both the features of standalone Mediation and Arbitration. Its flexibility may become an edge for the people to adopt this method of dispute resolution. Also its ability to overcome the disadvantages of standalone Arbitration and Mediation makes it a step forward towards a new era. The Med Arbiter has to be so neutral that whatever facts or insights known by him during the mediation phase

should not be used during the arbitration to resolve the dispute as can be said that it's the responsibility of the mediator to not to hamper the process of justice. The following arbitration process develops the minds of the parties as well as med arbiter to settle the dispute which itself makes it more effective than standalone mediation and arbitration.

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## Introduction

Abraham Lincoln once said “Discourage litigation , persuade your neighbors to compromise wherever you can .Point out to them how the nominal winner is often a looser in fee , expenses and waste of time”. Thus it is true and obvious that litigation is a long and draining process and Indian courts have been clogged with large number of unsettled cases. To settle these pendencies and discourage litigation Alternative dispute resolution mechanism was introduced in the Indian judicial system through Legal services act of 1986. Alternative dispute resolution mechanism include arbitration , mediation, conciliation which basically promotes out of the court settlement so that the lengthy and tiring process of litigation can be avoided and there could be speedy and effective disposal of cases .Thus, awards passed under the settlements are enforced through the Indian Arbitration and Conciliation Act, 1996.<sup>1</sup>

The hybrid mechanism of dispute resolution combining both Arbitration and Mediation is a newer and more attractive concept, it is widely being accepted by many countries these days since it is helpful in both public and private laws Med Arb combines both the features of standalone Mediation and Arbitration. In this method the same person acts both as a mediator and arbitrator. As mediator seeks to facilitate a settlement and an arbitrator determines the issues in dispute and issue a final and binding award.

<sup>1</sup> Brian Pappas ,”Med-Arb and the Legalization of Alternative Dispute

Resolution”, Vol. 20 ,Harvard Negotiation Law Review , 1 , 2015

Why Med-Arb is required?

The answer to this question is easy as this method of dispute resolution is way different in its technique and implementation and that is why is outside the orthodox system of regular courts.<sup>1</sup> It is more a convenient approach for the parties as they settle their issues with their free will and as per their own decided time, place, date, procedure and adjudicator. It can be said that this is an autonomous process as the arrangements that are made for settling the issues are at personal level and can be said that this is tailor made resolution device.

“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>3</sup>

Therefore, the benefits of both Mediation and Arbitration are combined together which becomes beneficial for the parties to dispute. The process starts with the assistance of the mediator in collaboration with the parties, proceeding with if the parties do not reach any settlement then the matter further moves for Arbitration. The third party conducting this process is known as Med Arbitrator.

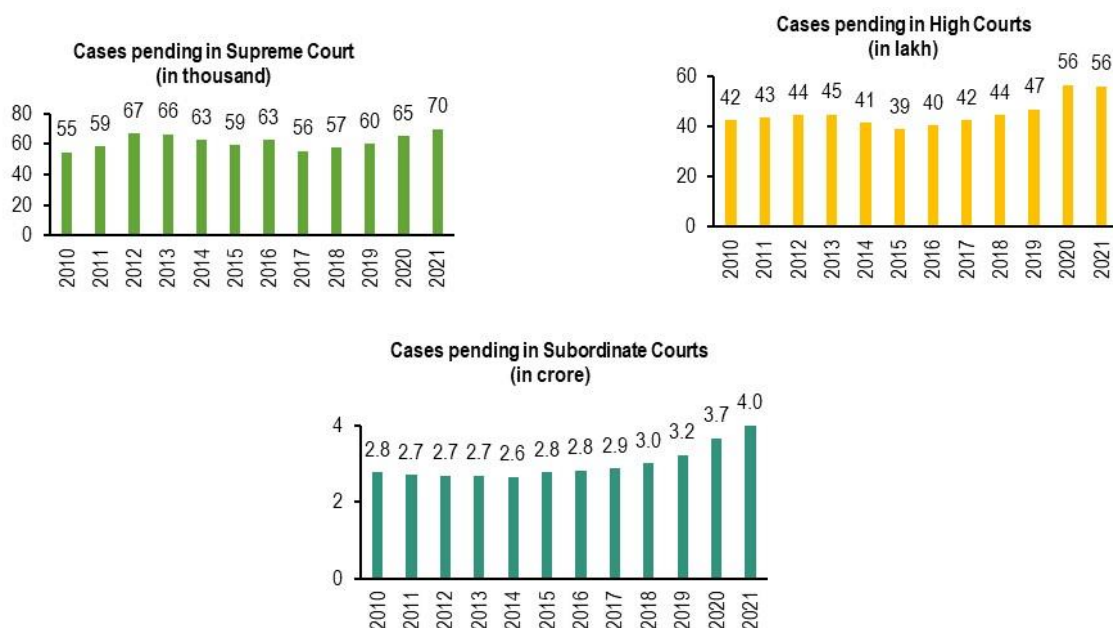
### *Increasing pendencies in India*

To be clearer on the point of pendencies faced by India Judiciary and the increasing number of cases that are yet to be decided.

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<sup>1</sup> Nagda Priyadarshi, “Adeptness of Med-Arb in Dispute Resolution” Vol 2,IJAR,Pg 51,

2017 <sup>3</sup> Zack, Arnold. Public Sector Mediation, Bureau of National Affairs; Washington DC , 1985



Source: PRS Legislative research report on “Pendencies of cases in Indian Judiciary”

- There was an increase in pendency by 2.8% annually. The number of cases pending as of September, 21 were around 4.5 Crores in India.<sup>2</sup>
- If we observe in such a case even if there are no new cases being taken up then also the time taken to dispose of the ending matters itself would be more than a year for all the three court Supreme Court and by High Court and Subordinate court.
- However if we see the data for year 2020 during Covid pandemic, the courts functioning got restricted for few months completely due to which there was decrease in the filing of new cases but since the cases could not be disposed off, it can be concluded that disposal rate was even slower.

Since the above chart is clear representation of the pendencies of the courts in India from subordinate to Supreme Court. This new method of dispute resolution can be adapted

by the Indian courts and an awareness can be spread among the people to incorporate Med Arb clause in any type of agreement entered by them.

**History of Med Arb**

Med Arb has its origin in the public sector collective bargaining that took place in USA by the department of police there. State legislatures of various states have used the hybrid mechanism of dispute resolution for peaceful and efficient discharge of disputes in such cases including labour disputes.

Med Arb- this term was for the first time coined by Sam Kagel after combining the attributes of both Arbitration and Mediation and developing this new hybrid mechanism of dispute resolution. Also the Nurse’s strike case during the 1970s in San Francisco was resolved using this method and reached a successful settlement.

On the Contrary Lon Fuller, one of the great American legal theorist in his various articles argued that any of the alternative

<sup>2</sup> Vital stats Pendency and Vacancies in the Judiciary available at

[https://prsindia.org/files/policy/policy\\_vital\\_state/Vital%20Stats\\_Pendency%20and%20Vacancies%20in%20the%20Judiciary\\_Final.pdf](https://prsindia.org/files/policy/policy_vital_state/Vital%20Stats_Pendency%20and%20Vacancies%20in%20the%20Judiciary_Final.pdf), last visited on 18<sup>th</sup> April, 2023

dispute resolution methods be it Arbitration, mediation or Conciliation have their own individual attributes and goals to be achieved. Therefore they should not be combined because each commands its own “morality”.

But David L Cole president of National Academy of Arbitration U.S during his conversation at Proceedings of the Twenty-third Annual Meeting, National Academy of Arbitrators, Montreal, Quebec, April 6-8, 1970 acknowledged that both mediation and arbitration can be combined to overcome the disadvantages of each mechanism individually and can become beneficial for the people.

However in 2014 Singapore International Arbitration Centre being a proactive member in the field of arbitration and mediation launched their Arbitration-Mediation-Arbitration clause which is popularly known as AMA clause or protocol. The hybrid model of dispute resolution became popular among the Asian countries with this protocol of SIAC and SIMC.<sup>3</sup>

Singapore International Dispute Resolution Academy published a survey report in the year 2020 in which it was concluded that more people prefer hybrid mechanism than standalone arbitration and mediation.<sup>4</sup> Thus with time Med Arb has evolved itself and awareness among the people may lead dispute resolution to another level.

### Evolution of Med Arb in India

In past few years there have been decisions made by Indian judges in certain cases which shows their positive attitude towards Med-Arb like in the case of “M/s.

**Haldiram Manufacturing Company (P) Ltd. v. M/s. DLF Commercial Complexes Limited**<sup>5</sup>, wherein it was held that, if the Arbitration clause of the agreement provides for mutual discussion prior to the arbitration proceedings, then it must hold to be a good law and is regarded in the eyes of Law and if this being dishonoured by the parties it is assumed to be bad in law.”

In the case of “**Centrotrade Minerals and Metal Inc. vs Hindustan Copper Limited**”<sup>6</sup> the apex court held that the Med Arb contract given under UNCITRAL Model Law has the same value as any other existing contractual clause which has value in the eyes of law. Also stated that there should be awareness about Med Arb and should be promoted to reduce the number of pendencies and the burden of court.

In the matter of **Cellular Operators Association of India and Ors vs Department of Telecommunication and Others**, court acknowledged to the importance of Med Arb and its need in today’s world where justice is delayed for long.<sup>7</sup>

Thus, the above discussion portrays that Indian Courts have a welcome approach to Med Arb and it being an unique method to resolve disputes can lead to speedy disposal of cases along with effective enforcement

### Pros of Med-Arb

To analyse more on the fact that why can it become the future of dispute resolution in India we need to focus on the advantages that come with this technique of dispute resolution-

<sup>3</sup> The New SIAC/SIMC AMA-Protocol: A Seamless Multi-tiered Dispute Resolution Process Tailored to the User’s Needs available at <https://simc.com.sg/blog/2015/04/14/the-new-siacsimc-ama-protocol-a-seamlessmulti-tiered-dispute-resolution-process-tailored-to-the-users-needs/> last visited on 28<sup>th</sup> March 2023

<sup>4</sup> SIDRA International Dispute Resolution Survey : 2020

Final Report available at

<https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/83/index.html> last visited on 28<sup>th</sup> March 2023

<sup>5</sup> MANU/DE/1742/2012 ,193 (2012) DLT 410

<sup>6</sup> MANU/SC/8146/2006

<sup>7</sup> MANU/TD/0148/201, (2011)3 CompLJ 452(TelecomDSAT)

- 1) Mediation or arbitration, the decision would reach a **final settlement** through any of the ways.
- 2) This process is flexible since the parties get an opportunity to move back to mediation phase even if they are in arbitration phase for a particular part of the award that is why Med Arb is popular for its flexibility.
- 3) The **efficiency in cost and time** has always been the charm of Med Arb as compared to standalone mediation and arbitration which have a lengthy process to follow.
- 4) If the person or the neutral party in mediation is used for arbitration also he can use his insights of the matter gained during mediation to settle the dispute.
- 5) Very few cases in this process reach to arbitration, thus can be said that the success rate is appreciable.
- 6) The arbitral award acts as a threat for the people to mediate their issues and can be considered as an incentive for the parties to settle their matter.
- 7) The disadvantage of not participating in mediation seriously is overcome through Med Arb as the participation of the parties become genuine and in good faith due to fear of the result which does not have control of the parties.

In Canada, a research was conducted in the matter of Crown Employee grievances wherein it was found that<sup>8</sup> -

- Med-Arb is used in matters which are lengthy in process and has number of interrelated issues to be resolved. It was proved that Med Arb reduces costs and increases efficiency.

- Since very less cases progressed to the arbitration stage it was evident that Med-Arb is successful in resolving disputes.
- However the disadvantages of Med Arb could not be supported through this research

“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>9</sup>

The parties have confidence while signing up for Med Arb that their disputes will anyway be resolved is an edge or advantage as per Indo- American Chambers of commerce.<sup>12</sup> Its efficiency is also enhanced because if in any case the dispute does not get resolve dthrough mediation the parties can move forward for adjudication as soon as possible. The parties to dispute are compelled to opt for this procedure due to its finality.<sup>10</sup> Med Arbiter has a powerful role to play as he has rights to create a final and binding settlement unlike the powers of mediator in standalone mediation who does not have a binding authority.

In addition to and above all , the arbitral settlement reached either through mediation or through both mediation and arbitration has the binding authority and is enforceable by law.

### Cons of Med Arb

The following **disadvantages of Med-Arb** have been identified:

- 1) The knowledge of insights of the matter to the neutral party may become a disadvantage as there are chances of being biased during arbitration.

Alternative Dispute Resolution”, IRC Press ,Queens University,Kingston, 2000

<sup>8</sup> Megan Elizabeth Telford “Med-Arb: A Viable Alternative Dispute Resolution”, IRC Press ,Queens University,Kingston, 2000

<sup>9</sup> McLaren, Richard H., and John P. Sanderson. Innovative Dispute Resolution: The Alternative. Ont.: Carswell, Scarborough, Canada, 1995.

<sup>12</sup> Megan Elizabeth Telford “Med-Arb: A Viable

<sup>10</sup> Dorothee Ruckteschler, Anika Wendelstein Efficient Med-Arb-Med proceedings: should the arbiter also be mediator? Volume 38 Journal of International Arbitration , Issue 6 2021 pp761-774



- 2) The mediators due to fear of arbitration can become forceful on settling the disputes which might result into haphazard settlements.
- 3) The due process may be violated due to the private sessions held during mediation because the other party would not get the opportunity to counter on whatever being stated to the neutral person.
- 4) There are high chances that parties may not disclose less information to the mediator knowing him to be the neutral party for the arbitration.
- 5) Mediation and Arbitration requires different skills and same neutral party for both the process may affect its function.
- 6) Any of the party to dispute can avoid and neglect mediation phase deliberately to force to arbitration making the dispute obvious to go to arbitration.

### Med Arb around the world

Med Arb is a known practice in Asia even though the parties prefer litigation, or standalone arbitration first in belief that the case would get resolved finally but the same parties indulge in the informal process of mediation, since the commercial culture tends to favour a negotiated settlement. Indeed, it has been witnessed that during the course of formal proceedings courts or arbitration tribunals have been encouraging settlement through facilitation.

Japan's Arbitration Law of 2003 and the JCAA Arbitration rules have favoured med arb and their positive attitude towards is reflected through Article 38(4) of the

Arbitration law, which allows an arbitrator to resolve the dispute between the parties through amicable facilitation and settlement with reference to the proceedings on which he is presiding.<sup>11</sup> In the same way under Japan's mediation rules the mediator is allowed to act as an arbitrator in any arbitration proceedings which has resulted subsequent to a mediation proceedings and incorporate any of the mediated part as arbitration award. (rule 8 and 11 JCAA international commercial mediation rules).<sup>12</sup>

Singapore International Arbitration Centre and Singapore International Mediation Centre have together developed a multi-tiered approach of dispute resolution that is Arb-Med-Arb Clause which is also popular as AMA clause, this has been one of the most applauding effort being taken by an international organisation. It brings together the efficiency of mediation and finality along with certainty of an arbitrator award. There is a smooth transition between the two processes given under the protocol which is for different to the med-arb approaches of many other jurisdictions. It is also different to other Med Arb approaches in a way that the arbitrator and the mediator both are individually appointed by the SIAC and SIMC. Despite the fact that both the processes of arbitration and mediation require different neutrals for regulating the matter, the parties to the dispute get right to appoint same neutral for both the processes involved.<sup>13</sup>

However, High court of Singapore in the matter of Heartronics Corporation vs EpI LIFE pte Ltd. Faced which was a matter of med-arb faced a lot of issue in the process as both the parties to dispute initiated a

<sup>11</sup> Mathew Finn, "Remaining the dispute resolution epicentre: is Med-Arb in Europe's future?" Vol 16, Construction Law International, 1, March 2021

<sup>12</sup> Med-Arb an alternative dispute resolution practice available at <https://hsfnotes.com/arbitration/2012/02/28/medarb-an-alternative-dispute-resolution-practice/> last visited on 27<sup>th</sup> March 2023

<sup>13</sup> The New SIAC-SIMC protocol a seamless multi-tiered dispute resolution process available at <https://simc.com.sg/blog/2015/04/14/the-new-siacsimc-ama-protocol-a-seamless-multi-tiered-disputeresolution-process-tailored-to-the-users-needs/> last visited on 29<sup>th</sup> March 2023

litigation in between the mediation proceedings after creating a fuss during the mediation stage and not adhering to the norms and rules, as they did not attend the proceedings and treated it casually. However as per the arbitration clause of the agreement, the defendant initiated stay of proceedings since due to breach of the mediation proceedings, the agreement to arbitrate stood discharged.

Therefore seeing the above matter it can be concluded that the parties to dispute must be careful and need to have an evaluative approach during the incorporation of arbitration clause and this shows that incorporation of an AMA clause may be useful in overcoming such kind of issues wherein the seriousness of the parties is affected due to no written document and procedure.<sup>14</sup>

If I talk about Canada, new Med- Arb rules, a Med Arb designation, templates were introduced in November 2019 by the Alternative Dispute Resolution Institute of Canada. This shows their enthusiasm to accept med arb.

In the matter of Ku-ring-gai council vs Ichor Constructions pty limited in Australia there was review on the implementation of Med - Arb under Australian Commercial Arbitration act. However even after this case, Australia has made very less use of this mechanism of dispute resolution.<sup>15</sup>

Med-Arb in other common law jurisdictions is not very popular especially in countries where the lawyers do not want to indulge in the hybrid mechanism or dispute

resolution. However if we see the situation around the world related to Med-Arb rather than being country specific it shows that parties interest is moving towards faster and cost effective methods of International ADR. Well stated by honourable chief justice of Singapore Sundaresh Menon “ADR should instead stand for appropriate dispute resolution.”<sup>16</sup>

There have been famous cases that have grabbed attention of the world by the way they have been resolved like the matter of **IBM and Fujitsu** which was a multi million dollar dispute, this case was resolved through the process of Med-Arb wherein the parties on the advise of the neutral third party settled the dispute through this mechanism rather than getting trapped in the traditional litigation or individual arbitration.<sup>17</sup>

In the matter of **Conoco inc and Browning ferries Industries** was made responsible for paying to clean up a pond dumped with hazardous chemicals which also came into light due to environmental responsibility. The matter was into litigation for almost three years but could not result to any settlement than the matter was referred for using med-Arb wherein most of the issues were facilitated through mediation and after that the neutral party of the mediation adopted the role of arbitrator and one of the final offers of the parties was passed an authoritative and binding arbitral award.<sup>18</sup>

In the famous case of “**Federal Deposit Insurance Corporation and Cherry, Bekart**”, the auditors of the bank misrepresented the status of Bank although

<sup>14</sup> Telford, “Med-Arb: Is It the Wave of the Future?”, The New York Law Journal ADR Special Report, Nov 23, 2020

<sup>15</sup> Alan L. Limbury, “Med-Arb: getting the best of both worlds” available at <https://imimmediation.org/wpcontent/uploads/2017/11/hybrid-processes-2010-article-by-alan-limbury.pdf> visited on 30th March, 2023

<sup>16</sup> Mediation for everyone: Realizing Mediation’s potential in India, India-Singapore Mediation Summit - 2021

<sup>17</sup> Christian Buhring Uhle, The IBM – Fujitsu Arbitration: A Landmark in Innovative Dispute Resolution, The American Review of International Arbitration, Vol. 2 No. 1, March 1991

<sup>18</sup> Med/Arb in Business Cases: Dispute Resolution Whose Time Has Come available at <https://mediate.com/medarb-in-business-cases-dispute-resolution-whose-time-has-come/> visited on 30th March, 2023

the bank was at major default. After spending huge amount of fees in litigation and not coming to any conclusion the matter was resolved through mediation and finally through arbitration for the remaining issues. Thus it can be said that , Med-Arb has become a trending method of Alternative dispute resolution though opted carefully.<sup>19</sup>

### **Conclusion**

Thus to conclude it can be said that Med Arb is an efficient and cost effective way of dispute resolution. Its flexibility may become an edge for the people to adopt this method of dispute resolution. Also its ability to overcome the disadvantages of standalone Arbitration and Mediation makes it a step forward towards a new era.

However, its type and character is such that it needs to be chosen with care and caution as already stated that it could at some stage affect the process of justice. Since, the Med Arbiter has significant role to play he is at

an advantageous position or authority to settle the disputes eventually even if the parties try to avoid it. Also the skills possesses by the Med Arbiter has to be exceptionally different and well trained to so that he can combine the efficiency and potential of mediator and arbitrator and switch easily during the process. The Med Arbiter has to be so neutral that whatever facts or insights known by him during the mediation phase should not be used during the arbitration to resolve the dispute as can be said that it's the responsibility of the mediator to not to hamper the process of justice.

The following arbitration process develops the minds of the parties as well as med arbiter to settle the dispute which itself makes it more effective than standalone mediation and arbitration. Thus, it can be said that well understood and voluntarily chosen Med Arb will anyway result into better and effective process for the parties to resolve disputes.

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<sup>19</sup> Med/Arb in Business Cases: Dispute Resolution Whose Time Has Come available at <https://mediate.com/medarb-in-business-cases->

dispute-resolution-whose-time-has-come/ visited on 30<sup>th</sup> March, 2023