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INTERNATIONAL ARBITRATION AND MEDIATION: FRIEND OR FOES?

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INTRODUCTION

The following essay aims to analyze whether International Arbitration and Mediation go hand in hand or are they set apart by its usage. To lead the discussion under the above-mentioned title it is necessary to understand that Arbitration and Mediation are sub-set of the main set that is ADR, in the sense that they fall under the same head as a means of Dispute Resolution process apart from Judicial Settlement. Arbitration and Mediation both aim to amicably settle the dispute at a low cost and within less amount of time. The question that we wish to analyze here is that whether Arbitration and Mediation both aid each other in arriving at a resolution for the dispute and not whether they are worse/better off than one another. The only way in which the two dispute resolution mechanisms are different is in ways that they use different methods for dispute resolution but the fact remains that they aim to ultimately help parties resolve their dispute. It is essential to point out that there is no fight of preference wherein the parties will choose one over the other because the choice of the parties depends upon the nature of the dispute and which mechanism is better suited. The only way one would preside over the other is that if the parties

require a non-binding settlement wherein they can discuss with one another and not indulge in the procedure of oral arguments and written submissions then they are likely to go for Mediation as their Dispute Resolution Mechanism instead of Arbitration. When the parties wish that they do not want to deal with the time taking and expensive procedure of the court and decide on their tribunal, then they may opt for a quasi-judicial and binding process of Arbitration. Let us now analyze whether International Arbitration and Mediation go hand in hand when used together through hybrid mechanisms.

HYBRID FORMS OF DISPUTE RESOLUTION

There are procedures wherein one can use both arbitration and mediation for resolving the same dispute. This is known as Hybrid Processes that combine two elements into one¹. This can be employed in different ways and we shall discuss a few forms below:

Med-Arb- Mediation and Arbitration is a procedure wherein the parties appoint an Arbitrator who will also act as the Mediator in the dispute. The person appointed will be the same person fulfilling both the roles i.e. of both Arbitrator and Mediator; this is to avoid any discrepancies and to not break the flow of the dispute resolution process. Under this head, the first step is to commence the resolution process as mediation wherein the same neutral will act as a mediator and if the parties fail to arrive at a settlement it is when the mediator will switch roles to that of an Arbitrator and thereby issue a binding award upon the parties².

Arb-Med- The Second hybrid form is the Arbitration and Mediation which is similar to Med-Arb the difference is that the 'same neutral Arb-Med' hears the dispute that is substantive

¹*Hybrid Processes. Beyond Intractability*, Christopher Honeyman Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: July 2003

²*Med-Arb: An Argument for favoring Ex-Parte communications in the Mediation Phase*, Edan Sussman, World Arbitration and mediation Review Vol. 7 No. 2 2013

hearing for the process of arbitration is conducted and thereafter, prepares an arbitral award under the seal wherein the award is sealed in an envelope. The same neutral then conducts mediation proceedings and if the parties fail to arrive at a settlement then he shall enforce the arbitral award³.

Arb-Med-Arb- In this process the same neutral first initiates the commencement of the dispute resolution process with the arbitration. Thereafter suspends the process of Arbitration to initiate mediation, before he can start with the substantive hearing process under the arbitration proceedings. If after the mediation process if the parties arrive at a settlement then they will request the same neutrality to issue a consent arbitral award. On the contrary, if the parties fail to arrive at a settlement, the arbitrator will proceed with the arbitration proceedings and towards the end issue a binding arbitral award⁴. This process aims to create a Mediation window in between the Arbitration process.

Med-in-Arb- Under this head the proceedings will be conducted as arbitral proceedings only difference will be that the neutral will encourage the parties to arrive at a settlement and at the same time will continue to fulfill his role as an arbitrator⁵.

Arb-in-Med- This form of dispute resolution is the opposite of the abovementioned Med-in-Arb as the name suggests. Under this head, the proceedings are mainly that of mediation but the mediator instead of just being the facilitator also uses techniques to set up a stage to encourage

³Arnold Ingen-Housz, *ADR in Business: Practice and Issues Across Countries and Cultures*, Chapter 17, Vol II, Wolters Kluwer Law & Business

⁴*Ibid*

⁵Thomas Stipanowich and Veronique Fraser, *The International Task Force on Mixed Dispute Resolution: Exploring the Interplay between Mediation, Evaluation and Arbitration in commercial Cases* 40(3) *FORDHAM INT'L L J* 839, 845-847 (2017)

the parties to arrive at a settlement⁶. This may be done by using non-binding evaluation and settlement techniques.

Now considering these hybrid forms that use both arbitration and mediation in the same proceedings we can understand how useful they are to one another and complement each other's procedure. Once used collectively wherein the same neutral can switch to the role of a mediator from being an arbitrator and vice-versa only expands the platform and means for dispute resolution⁷.

USING MEDIATION IN INTERNATIONAL ARBITRATION

Another important point to note when we are at a discussion of determining as to how negative or positive an impact Mediation has on International Arbitration is the fact that Mediation helps preserve the relationship between the parties. Since Arbitration is a quasi-judicial process there is an undeniable strain on professional, personal, or trade relations between the parties because in arbitration there is no scope of negotiation, the arbitrators cannot suggest possible solutions to the dispute⁸. What the arbitral tribunal will decide through its arbitral award is who holds the said right in question, be it right to estoppel or right to seek performance or any other right in question.

Settlement cannot be advised if the resolution simply aims at adjudicating the dispute, this is why with adopting mediation as a part of the adjudication there is an option to promote settlement instead of the only adjudication and preserve instead of straining the relationship of the parties.

⁶*Ibid*

⁷ CHUA, Eunice. *A contribution to the conversation on mixing the modes of mediation and arbitration: Of definitional consistency and process structure*. (2018). Transnational Dispute Management. 1-15. Research Collection School Of Law

⁸Phil Neiman, *How does Mediation "Preserve Relationships"* <http://www.neimanmediation.com/how-does-mediation-preserve-relationships/>

It is pertinent to note that even when parties approach the court for judicial settlement or even arbitration for that matter is because they are frustrated with the fact that there is no consensus between them and there has arisen the need to have the dispute adjudicated. What nobody tells them is there are alternatives they can opt for instead of investing their time, money, and energy in arbitration procedures. Arbitration though resolves the dispute within a minimal amount of time while giving parties the freedom to customize their arbitration proceedings isn't the last option available for settlement of commercial disputes apart from judicial settlement⁹. Parties may sometimes need counseling more than adjudication. One of the biggest advantages of mediation is that it helps identify the interests of the parties, wherein arbitration only seeks to determine the rights of the parties¹⁰. Once the parties understand each other's demands and needs they can then make compromises to accommodate the needs of one another and thereby arrive at a settlement. In any case, there is always a scope of negotiation by identifying the need of each other and if that fails is when parties should resort to adjudication of their disputes. The Med-Arb Process primarily follows this idea of promoting settlement amongst disputants to first mediate their way to a settlement, failing which they can adjudicate¹¹.

BINDING SETTLEMENT AGREEMENT

The reason why most parties opt for Arbitration instead of Mediation is that they have a pre-determined notion that Mediation as a dispute resolution mechanism is “soft”¹². This is because

⁹An Introduction to International Arbitration, Stephenson Harwood LLP, <https://www.shlegal.com/flipbook/an-introduction-to-international-arbitration/files/assets/common/downloads/An%20introduction%20to%20international%20arbitration.pdf>

¹⁰ Ellen F Kandell, *Arbitration vs. Mediation* <https://www.imimmediation.org/2019/04/27/arbitration-v-mediation/>

¹¹ Alan Limbury, *Hybrid Dispute Resolution Processes: Getting the Best While Avoiding the Worst of Both Worlds?* https://www.cedr.com/about_us/arbitration_commission/Hybrids.pdf (2009).

¹² <https://www.mediatornetwork.org/why-are-attitudes-changing-about-mediation>

of its characteristic value that it is non-binding¹³. It is misconceived to think that there is no binding effect of the Mediation process; the settlement that arrives out of the resolution once signed by the parties becomes binding upon them. The settlement agreement works similar to a contract, wherein breach of terms of the agreement will result in legal consequences. Mediation can result in a binding resolution be it through mutual consent to sign the settlement agreement¹⁴. The United Nations Commission approved the Model Law on International Commercial Mediation in June 2018 and the Convention was signed on 1st August this year setting a milestone in Mediation. The United Nations Convention on International Settlement Agreements Resulting from Mediation¹⁵ came to be known as the Singapore Mediation Convention and will fulfill the same purpose that the New York Convention does for Arbitration. The effect of this Convention is extremely significant to ensure enforceability of International Settlement Agreements resulting out of International Commercial Mediation. Thus, removing the frustration that mediation isn't as effective as Arbitration unless the parties settle and sign a settlement agreement.

PROCEDURE AND PROCESSES

The beauty of the Mediation process is that the parties themselves arrive at a settlement if any; the job of the mediator is to facilitate the process of Mediation. The Mediator can only make suggestions that will help the parties arrive at a settlement but does not offer solutions to the parties. Mediation is a process that is informal, flexible, and voluntary that generally if settled,

¹³*Ibid*

¹⁴ <https://www.sharrocpitman.com.au/post/binding-settlement-agreement>

¹⁵ Singapore Mediation Convention, https://www.uncitral.org/pdf/english/commissionsessions/51st-session/Annex_I.pdf

leaves the parties with a win-win situation. The parties also have an option of keeping the information confidential at both ends¹⁶. Arbitration on the other hand is modeled on procedures of a judicial settlement wherein they follow litigation in ways that it involves pleadings, oral and written submissions, evidence, expert report, interlocutory and interim measures¹⁷. And when we compare the advantages of these two with each other, it doesn't fit the bill for a party who is specifically looking at an informal setup and a means to keep the information confidential while at the same time willing to make a compromise. In such a scenario where one party is seeking a compromise and the other is adamant on one-sided results, may not necessarily lead to a settlement amongst them and the Mediation is likely to fail. It is at this point that Arbitration can be initiated to assist the parties in arriving at a resolution for their dispute in the form of an arbitral award rendered by an Arbitrator.

MEDIATION vs. ARBITRATION

Parties who opt for an alternate means outside of judicial settlement need to understand that even though they are procedurally different from one another, they have the same goal in mind i.e. resolution of the dispute in question. It is understood from the above discussion that the role of the mediator is not to decide and issue an order, decree, or an award but to assist parties in understanding their interest in the dispute. The role of the arbitrator on the other hand is fulfilled by a person who could be a retired judge, expert practicing in the field relevant to the dispute, or a lawyer with a substantial law practice and thus makes it a completely formal process.

¹⁶Constantin-AdiGavrila, *The roles of the Mediator* July 14, 2019
<http://mediationblog.kluwerarbitration.com/2019/07/14/the-roles-of-the-mediator/>

¹⁷ https://www.adr.org/sites/default/files/document_repository/AAA_Stages_of_the_Arbitration_Process.pdf

Differences between the two are numerous but with our discussion, we have understood that the two are capable of assisting each other in the process of dispute resolution¹⁸.

INTERNATIONAL MEDIATION

Mediation has not reached International acceptance as has International Arbitration and the initiatives for setting up International Mediation Centres have only just begun and can be accelerated now with the Singapore Mediation Convention coming into play. This is so for the reason that International Disputes mainly arise out of commercial cross-border disputes and in such a scenario parties are mainly looking to either litigate or Arbitrate their commercial disputes instead of making a compromise through Mediation. The Singapore Mediation Convention provides a framework for enforcing International Settlement Agreements resulting from Mediation, thus promoting Cross- Border Mediation. Parties can now consider International Mediation for their Cross-Border Disputes instead of just Arbitration. Apart from this, considering this rigid mindset of the disputants, in the year 2014 Singapore took the initiative of setting up its first International Mediation Centre to promote International Mediation and break the bubble that Mediation isn't suitable for International commercial disputes. It also offers Arb-Med-Arb along with Mediation in International Disputes¹⁹. The step taken by the Singaporean Government is relevant in ways that it is using its position as the preferred seat of Arbitration to encourage the use of Mediation as a mechanism. Just as how Singapore has emerged as the hub of Arbitration, Australia has since been the biggest market for Alternative Dispute Resolution. Clients in Australia prefer mediation over other mechanisms, for the reason

¹⁸Supra Note 10

¹⁹ www.simc.com.sg

that the societies there believe in promoting societal harmony free of human conflict²⁰. By choosing Mediation they are opting to preserve the relationship between parties instead of straining them because of disputes that are bound to arise amongst humans or even commercial contracts.

CONCLUSION

The understanding that Arbitration and Mediation can be conducted simultaneously and facilitate both counseling and a binding resolution depicts that Mediation is the friend here and not an enemy. It is only making dispute resolution easier. At a time like today wherein there is no decrease in the number of disputes arising every year, a creative mechanism like the hybrid form of Arb-Med or Med-Arb should be encouraged. Mechanisms like these are not only beneficial to the legal system of the country but also beneficial to the disputants, in ways that they can avoid high fees of arbitrators and lawyers by only opting for Arbitration or avoid double payment for Mediator and then Arbitrator/Lawyers or even court when resorting to Judicial Settlement when Mediation fails²¹. Thereby we have concluded that Arbitration and Mediation cannot be foes, if for the least not friends; they show the scope of being creatively used together and even separately to achieve amicable solutions.

²⁰ <https://campbellbridge.com/wp-content/uploads/2012/12/MEDIATION-AND-ARBITRATION.pdf>

²¹ Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 Harv. Negot. L. Rev. 157 (2015).