

Multi-Tier Arbitration: A Right to Write Your Own Arbitral Award

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Abstract

In the recent years, there is much development in the field of Arbitration. But it seems that s.30 of the Arbitration and Conciliation Act, 1996 is still in shadow and no efforts have been made to test the potential of the very provision. The drafters of UNCITRAL Model Law have well anticipated the importance of multi-tier arbitration and therefore incorporated s.30 under the UNCITRAL Model Law¹ which is analogous to s.30 of the Indian Arbitration Act. The author in this article has dealt with the potential of s.30 in dispute resolution. The various forms of multi-tier arbitration and their suitability have also been highlighted. Moreover, the extent of party's autonomy in drafting the "ADR-first" clauses and the role of parties in forming the arbitral award has also been discussed.

¹ UNCITRAL Model Law on International Commercial Arbitration, 1985.

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INTRODUCTION

Recent times have seen a shift in attitude of the arbitral institutions in the field of ADR. They are diverting their attention towards other forms of ADR rather than focusing solely on arbitration. Mediation is gaining popularity and the current thinking being to allow parties in commercial disputes to resolve their disputes via mediation. If mediation fails then resolve the dispute via arbitration.

Thus, it is apt that close attention is paid towards the scope of s.30 of the Arbitration and Conciliation Act, 1996 to seek innovative arbitral awards, through multi-tier arbitration processes variants of which are being practiced world over.

s.30 of the 1996 Act¹ extends the scope of the ADR mechanisms. It recognizes the mixing of arbitration, mediation and conciliation. It does not provide any specific time period when any other procedure could be initiated. The usage of words "at any time during the arbitral proceedings" in wider interpretation includes any instance before the arbitral award. "Other procedures" term usage gave this provision a special feature providing scope for future ADR methods that could be developed. Any kind of settlement under this provision is to be

¹ The Arbitration and Conciliation Act, 1996 (Act No. 26 of 1996).

taken as arbitral award having the same status and effect.

Multi-tier arbitration clauses enable parties to resolve their disputes through other ADR mechanisms (such as conciliation, mediation, negotiation etc.) before resorting for arbitration.

Such combination ensures that the dispute progresses to the next stage only if it cannot be resolved at the first stage. Many such ADR combination exist. The general trend however is to avoid arbitration initially and resort to it when all else fail.²

The popularity of arbitration provided the fillip for the standardisation and globalisation of arbitration but the corporate world is growing weary of the process. Cost of international institutional arbitration is the major cause for this creeping disillusionment. Such was also proven in the 2018 International Arbitration Survey³, where the respondents named 'cost' to be the worst aspect of arbitration. Previous surveys dating as far back as 2006 have also shown that respondents find cost of arbitration to be the most irksome aspect of arbitration.⁴

Multi-tiered arbitration clauses are known by various names such as "escalation", "integrated", "multi-step", "stepped" or "ADR-first" clauses. They include "hybrid clauses", i.e., two-tier dispute resolution processes generally comprising both mediation and arbitration procedures.⁵

Different Types of Hybrid Clauses

Med-Arb

The concept of Med-Arb was coined by Sam Kagel, who combined mediation and arbitration processes to create Med-Arb for resolving the San Francisco

Nurse Strike of the 1970s. It is the most common hybrid dispute resolution process which entails the parties using mediation to resolve their disputes with the prior agreement that if mediation does not deliver requisite results, then the dispute shall be referred to a binding arbitration process, wherein the same person (also referred to as the "neutral") shall act as both mediator and arbitrator, unless otherwise agreed.⁶

It is a dual-step procedure with mediation being the initial stage, followed by arbitration as the next and final stage. This process is adopted when (i) certain issues remain unsettled in mediation which now are left to be decided by arbitrators, or (ii) the parties proceed for arbitration after having substantially settled all disputes in mediation, but need to secure the binding enforceability of such settlement.⁷

An example of a Med-Arb clause can be found in Rule 27 of the Japan Commercial Arbitration Association's (JCAA) Commercial Mediation Rules of 2020 which provides that when the parties reach a settlement, they may mutually agree to appoint the mediator to play the role of the arbitrator who shall then record the settlement of the parties as an arbitral award. Rule 8 of the old JCAA International Commercial Mediation Rules of 2009 (JCAA 2009 ICM Rules) provided for the mediator acting as an arbitrator and conducting arbitral proceedings when disputing parties so agree.

The most notable advantage of this mechanism is the elimination of the need to start afresh with a new arbitrator who otherwise would have to be educated about the issues afresh when the mediation process would have failed. Furthermore, the resultant award of Med Arb is binding and legally enforceable, which means that Med-Arb is "Mediation with Muscle" irrespective of the award having been originated from either mediation or arbitration process. Med-Arb thus cures the mediation process of the major malady it was ailing from.⁸

An indispensable prerequisite for Med-Arb process is to have the parties mutually agree in advance to refer to arbitration all disputes left

2 Domitille Baizeau and Anne-Marie Loong, *Arbitration in Switzerland: The Practitioner's Guide* 1451-1461 (Kluwer Law International, 2013).

3 School of International Arbitration at Queen Mary University of London "2018 International Arbitration Survey: 'The Evolution of International Arbitration'" (2018).

4 Hiroyuki Tezuka, Liberm Amicorum, *et.al.*, *International Arbitration: When East Meets West* 277 (Kluwer Law International, 2020).

5 *Supra* note 3.

6 *Supra* note 3.

7 *Supra* note 5.

8 Shivam Goel, "Med-Arb: A Novel ADR Approach".

unresolved during the mediation process.⁹“Med-Arb” process are in practice and have gained popularity in various countries and institutions, including Singapore, Japan and China. However, it has not received the same enthusiasm in Europe.¹⁰

Med-Arb (Pure)

In this process the same person dons the hat of both mediator and the arbitrator. The initial stage is that of mediation wherein if all issues are not resolved, then the dispute is presented to arbitrator, (that is, the same person who was the mediator), to determine the unsolved issues via arbitration.¹¹

Med-Arb-Opt-Out

In this process the issues are resolved by a mediator and generally a new arbitrator who can be called for by either of the contending parties after the termination of the mediation process. The merit of this system is attributed to its commitment towards strengthening the neutrality and confidentiality of the process. However, its merits are generally nullified by the additional time and costs incurred in educating the new arbitrator with the details of the case from a scratch.¹²

Overlapping Med-Arb

This form of Med-Arb involves two persons handling their respective processes as a mediator and arbitrator wherein the Arbitrator attends the mediation session as a silent observer to the mediation session. Only the Mediator is permitted to interact privately with the parties. The arbitrator however, is permitted to observe the joint exchanges and reviews and shared documents.¹³

Plenary Med-Arb

In this type of Med-Arb, a single person engages between the parties on the lines of the agreed Med-Arb processes, however this person is not permitted to conduct any private communication with the parties involved. Thus, reliance has to be placed exclusively on the plenary/formal communication and document exchange. This

prohibition on private engagement mitigates the concerns of award contamination.¹⁴

Braided Med-Arb

In This form of Med-Arb, a single person conducts both mediation and arbitration by switching roles. What makes this system unique is the fact that even in the arbitration stage, parties are allowed the opportunity to mediate amongst themselves and reach a voluntary settlement.¹⁵

Optional Withdrawal of Med-Arb

In this avatar of Med-Arb, parties hold with them the option to opt out of the dispute resolution system after the mediation phase. This option to withdraw from the process upholds the ‘voluntariness’ of their involvement with the dispute resolution process. A single person is in charge of conducting both mediation and arbitration. Beyond Med-Arb and Arb-Med, a range of other ADR processes may be integrated by agreement of the parties, prior, during or near the completion of the arbitral process, with the arbitrators playing the role of mediator or conciliator and vice-versa, in order to achieve a procedure that is tailored to the particularities of the controversy.

Arb-Med

In this type of hybrid arbitration, both Arbitration and mediation are either carried out via one procedure or the two processes are treated distinctly and carried out sequentially. In the former case, an attempt at mediation is carried out during the initial arbitration proceedings. The parties generally prefer to have at least one member of the arbitral tribunal act as the mediator. When the mediation bears no fruit, then arbitration is recommenced with the same arbitrators.

In the second case, the proceeding begins with an arbitration hearing, in which the arbitral tribunal finalises an award, but does not disclose it to the parties. The parties then enter into mediation. Unless another neutral is appointed, it is the arbitrator who performs the mediation. Either party is at liberty to walk away from the mediation at any time and, as an alternative, accept the arbitration award. The

9 *Id.*

10 *Supra* note 5.

11 *Supra* note 5.

12 *Id.*

13 *Id.*

14 *Supra* note 5.

15 *Supra* note 9.

parties' awareness of the arbitrators having the power to issue a binding award if the mediation fails is supposed to operate as an incentive for the mediation to succeed. Arb-Med in its sequential form is uncommon and arguably lends itself best to disputes on issues of quantum or other specific aspects of business negotiations.¹⁶

Thus, it is a process that commences with arbitration but parties make attempts to mediate within or in relation to the arbitral process. The implications of preceding arbitral proceedings may vary depending on when mediation is initiated. If mediation is initiated after document production and the disputed factual issues and legal issues are crystallized, it would be easier for the parties to reach a settlement. What arguments and evidence the parties presented in the preceding arbitral proceedings may have a significant impact if the same arbitrators, who carry their views of the case based on the parties' submissions, act as mediators in the mediation session.¹⁷

Arb-Med-Arb

In this type of hybrid procedure, parties go through an independent mediation process in the course of arbitration, but if parties are unable to settle the matter they go back to the arbitral proceedings.¹⁸

EMERGENCE AND SUITABILITY

Hybrid ADR mechanisms which combine mediation and arbitration possess the merit of resolving disputes in an economical and efficient manner. ADR 2018 International Arbitration Survey¹⁹ clearly reflects the increasing trend of international arbitration to combine arbitration processes with other forms of Alternative Dispute Resolution (ADR) mechanisms.²⁰

The mediation aspect of the hybrid process empowers the parties with a chance to control the process and in a way "write their own judgement." The benefit of mediation is offering the parties the

possibility to control the process which would be of great interest to the parties, particularly where they wish to continue their business relationship.

Mediation acts as a major boon especially in complex disputes involving multiple parties, including parties who are outside the scope of an arbitration agreement. In such cases using arbitration might prolong the dispute further making it more complicated with parallel proceedings in indifferent jurisdictions with different arbitral bodies and/or involvement of national courts. In that case, mediation would work better and could resolve all related disputes with all concerned parties at once.

However, others are sceptical of the reliability of mediation as mechanism to resolve complex disputes because it lacks any coherent enforcement mechanism for internationally mediated settlement agreements.

This is where the combined use of mediation and arbitration may offer parties the ideal solution for removing this impediment by transforming the settlement agreement reached during the mediation session into an arbitral award that can be enforced through the New York Convention.²¹

Suitability

Generally, all suits and cases of civil nature and especially cases falling under the following categories can be resolved via hybrid-arbitration are normally suitable for Multi-Tiered Arbitration:²²

- i. all cases dealing with trade, commerce and contracts, including those disputes which:
 - germinate out of contracts (including all money claims)²³;
 - relate to specific performance;
 - are between suppliers and customers;
 - are between bankers and customers;
 - are between developers/builders and customers;

16 *Supra* note 3.

17 *Supra* note 5.

18 *Supra* note 3.

19 *Supra* note 4.

20 *Supra* note 3.

21 *Id.*

22 Prof. Ved Kumari, Sunanda Bharti *et.al.*, *Alternative Dispute Resolution* 25 (2020).

23 *Afcons Infrastructure Ltd. v. Cherian Verky Construction Company Pvt. Ltd.* (2010) 8 SCC 24.

- are between landlords and tenants/licensor and licensees;
- are between insurer and insured;
- ii. disputes dealing with custody of children;
- iii. matters relating to guardianship of a minor or other person under disability;
- iv. disputes dealing with partition/division among family members/co-parceners/co-owners;
- v. all cases relating to tortious liability including consumer disputes;
- vi. complex disputes involving multiple parties, including parties who are outside the scope of an arbitration agreement.

The following categories of cases are normally unsuitable for Multi-Tiered Arbitration:²⁴

- a. Matrimonial matters, like divorce or restitution of conjugal rights;
- b. Representative suits under Order 1 Rule 8 CPC²⁵ “which involve public interest or interest of numerous persons who are not parties before the court.” (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance);
- c. Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.);
- d. Cases involving “grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration”.
- e. Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.
- f. Cases requiring “protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.”
- g. Cases involving prosecution for criminal offences.

MERITS AND DEMERITS

The advantages for hybrid arbitration are (i) cost and time effective as it encourages an early resolution of the dispute, (ii) it allows parties to have greater

flexibility and freedom to be innovative in reaching solutions.²⁶

Multi-tiered dispute resolution clauses are extremely popular to resolve issues arising out of complex, long-term contracts that stipulate the continued cooperation of parties throughout the duration of the contract. In this regard, the initial stages in a multi-tiered process act as filters, disallowing frivolous disputes to reach the final stage of arbitration which scuttles any delay or impact on the execution of the contract as a whole. Multi-tiered dispute resolution clauses are can be usually found in international construction or infrastructure contracts.²⁷

However, two issues tend to challenge the enforceability of these awards namely: (i) the independence and impartiality of the arbitrator when the arbitrator dons the hat of mediator/conciliator (ii) the enforcement of such clauses when one party does not even make an attempt to resolve the dispute through the other agreed ADR processes before the commencement of arbitration.

Hybrid clauses face the risk of cynicism towards arbitrator’s neutrality and impartiality. This is because the same neutral plays the dual role of arbitrator and mediator, and his judgement as an arbitrator may be influenced by the *ex-parte* discussions (or caucusing) with the parties during mediation.

In order to avoid this problem, the parties must expressly and mutually reach an agreement in advance of waiving any potential challenge on the suspect partiality of the agree in advance that any potential challenge of the arbitrator based on lack of impartiality due to information acquired in the mediation is waived by the parties throughout the process. At the same time the neutral must not forget that as an arbitrator the neutral is to decide the matter with detachment and impartiality. It is thus pertinent that arbitrator maintains the dignity of the arbitral proceedings without compromising on the effectiveness of the mediation process.

Mediators are generally privy to confidential and prejudicial information in the mediation caucuses and such information is not revealed to the other party during the arbitral proceedings. This makes

²⁴ *Supra* note 23 at 26.

²⁵ The Code of Civil Procedure, 1908.

²⁶ *Supra* note 3.

²⁷ *Id.*

the neutral's judgement prone to being influenced by such information.

As can be observed, this issue strikes at the heart of procedural justice and due process aspects of Hybrid Arbitration. The evidence or statements that a party makes during the mediation caucuses, are not subjected to cross-examination by the opposing party which means that opposition parties do not get an opportunity to determine the veracity of the statements.

Another pertinent issue arising out of multi-tier dispute resolution clauses deals with enforcement. Would the parties be sanctioned if they do not abide the various stages of ADR preceding arbitration?²⁸

HYBRID ARBITRATION IN PRACTICE

It has been observed that Civil law arbitrators are more prone to lead parties in an arbitral proceeding to a settlement as compared to common-law-oriented who fear that a proactive approach in this respect which is based on facts and arguments not yet sufficiently established and, might subject them to challenges for bias.

The Japanese law of Arbitration emphasises and encourages on reaching settlements at early stages of the arbitral proceedings i.e., via mediation or conciliation with the consensus of the disputing parties. Article 38(4) of the Japanese Arbitration Law prescribes that an arbitrator is empowered to facilitate a settlement during arbitral proceedings subject to the agreement between parties regarding the same. This makes the general practice in JCAA (Japan Commercial Arbitration Association) arbitration distinct from Western arbitration or litigation practices.

This gives us a glimpse of why it would seem uncommon to common law practitioners that an arbitrator serves as a conciliator/mediator in an effort to reach a settlement, and in this capacity, to meet *ex-parte* with the opposing sides and discuss the merits of the case and decide the case in case parties are unable to reach a settlement.

December 2018 saw the birth of The Rules on the Efficient Conduct of Proceedings in International

²⁸ *Supra* note 3.

Arbitration ('Prague Rules'). These Rules aim for the enhancement of the efficiency of arbitration proceedings via the adoption of increasingly inquisitorial style of proceedings instead of the adversarial approach. This meant that tribunals had to pursue a more proactive stance while managing proceedings as is done in Civil Law countries. (for example- at the time of taking evidence in International Arbitration.)

Article 9 of Prague Rules calls upon the tribunals to facilitate the attainment of a mutual settlement of disputes at any stage of the proceedings. It further permits any member of a tribunal to act as a mediator and attempt to reach an amicable resolution of the case, subject to the written agreement between the parties in this regard. The Prague Rules further prescribe the erstwhile mediator to continue as arbitrator upon the failure of mediation subject to the written agreement of the parties.

On 1 January 2019, the JCAA amended its Commercial Arbitration Rules along with its Administrative Rules for UN Commission on International Trade Law (UNCITRAL). It simultaneously launched a new set of separate rules called the 'Interactive Arbitration Rules'. These Rules make communication between parties and arbitral tribunals mandatory for ensuring effective and economical services. Articles 48 and 56 of the Interactive Arbitration Rules require tribunals (i) to share a document, as early as possible, which contains a summary of the parties' positions and factual and legal issues that arise (ii) to provide preliminary views on key factual and legal issues, before a decision is made regarding whether a hearing is necessary. Unlike the Prague Rules, which are mere guidelines for tribunals and parties, the Interactive Arbitration Rules mandate a more active role of tribunals.

In 2017, the International Chamber of Commerce released the revised Note to arbitral tribunals and parties. This prescribed for the utilisation of sealed offers. A sealed offer is an offer from one party to another to settle a dispute that is made on a 'without prejudice save as to costs' basis. These are called 'Calder bank offer' in the English common law countries²⁹.

²⁹ *Calderbank v. Calderbank* (1975) 3 All ER 333.

Parties are not to reveal the contents of the sealed offer to the tribunal till the tribunal declares its decision on merits and is ready to apportion the arbitration costs. Though the tribunal possesses the discretion to decide what weight, should be given to a sealed offer, a party's unreasonable refusal to accept a settlement offer may be taken into account by the tribunal when deciding the allocation of costs. Adoption of sealed offers thus incentivizes the parties to reach a settlement by taking the settlement offer seriously and consider the strength of their own cases carefully.³⁰

The hybrid arbitration clauses can also prescribe that the neutral may *not* play the dual role of mediator and arbitrator, unless backed by express consent of the parties. The rules issued by the ICC, LCIA, AAA, WIPO, and the Swiss Chambers of Commerce and Industry ("Swiss Chambers") all reflect this modern practice.

The Swiss Chambers in their Swiss Rules of International Arbitration in 2004 (the "Swiss Arbitration Rules", revised in 2012) and the Swiss Rules of Commercial Mediation in 2007 (the "Swiss Mediation Rules") highlights the implementation of hybrid clauses. In the latter, the Swiss Chambers provided for a model clause for only one type of two-tiered clause: mediation followed by arbitration. In this set-up parties are to attempt mediation for a period of 60 days before they can proceed for arbitration governed by the Swiss Arbitration Rules.³¹

However, both the Swiss Arbitration Rules³² and the Swiss Mediation Rules³³ specifically provide for recourse to arbitration after the commencement of mediation and vice-versa.³⁴

The Swiss Mediation Rules make it explicitly clear that the same person can play both arbitrator and mediator only when parties explicitly accept such an arrangement. Furthermore, it is only on the explicit agreement of the parties that arbitrators can take

into consideration the information received during the mediation session.

The Swiss Mediation Rules are silent as to whether the arbitrator may act as mediator; however, one can assume that this would be the case unless the parties decide otherwise.³⁵

Where the courts are required to review a multi-tiered arbitration clause and the parties' compliance thereto, the court shall generally proceed with determining the enforceability of the clause subject to the general principles followed in the interpretation of contracts such as:

1. Whether or not the language used is permissive ("may") or mandatory in nature ("shall", "will", "must");
2. Whether or not the clause prescribes time limits for initiation and termination of the ADR process before proceeding on to the next stage; and
3. Whether the party seeking to rely on the clause has itself, in good faith, sought to enforce the pre-arbitration steps.³⁶

The principles established by the Swiss Supreme Court are in tandem with the approach taken by State courts in other countries such as Australia, United States and United Kingdom, and by arbitral tribunals in ICC Arbitration (where awards are available).³⁷

Under Swiss law, the unsolved question is whether the commitment to first mediate before proceeding to arbitration (or litigation) constitutes a procedural agreement. To put it another way, would going through mediation first be a condition precedent for beginning arbitration and determining the procedural admissibility of the claim, or is it a substantive agreement, like any other contractual provision? In the latter scenario, a breach of the initial tier requirements would be viewed as a breach of contract, with conventional contract law remedies available (assuming loss can be proven), but no impact on the arbitral tribunal's jurisdiction. The Swiss authors appear to be split on the subject.³⁸

30 *Supra* note 5.

31 *Supra* note 3.

32 Swiss Rules of International Arbitration (Swiss Rules), 2021.

33 Swiss Rules of Mediation, 2021.

34 *Supra* note 3.

35 *Supra* note 3.

36 *Id.*

37 *Id.*

38 *Id.*

SUCCESSFUL MULTI-TIER ARBITRATION

Japan

Med-Arb is quite common at the ADR centres of the local bar associations. If the parties reach a settlement during mediation, and if the parties enter into arbitration, they can request the mediator to be the arbitrator who then proceeds to deliver an arbitral award based on the settlement agreement. The arbitral award has the same force as any final judgment delivered by a court. Moreover, the arbitral award can be enforced more easily as compared to out-of-court settlement agreement. Parties enforce the award through an enforcement order, while a party who wishes to enforce an out of court settlement agreement must take the long and arduous route of filing a lawsuit to obtain a court judgment, and this will require a full trial in open court.

The ADR centres of the local bar associations in Tokyo have also developed a mechanism to look after the enforcement of the settlement agreements wherein settlements arrived during the mediation session. This system permits the enforcement of the settlement reached during the mediation session governed by the local bar associations via the 'immediate settlement procedure' which is held in the Tokyo Summary Court.

Enabling the enforceability of a settlement agreement made during mediation would increase the popularity of mediation and lead to efficient resolution of disputes.

However, on the flip side, unregulated use of such private settlements can be abused by those parties who are superior to the other party with respect to bargaining power. The new Commercial Mediation Rules provide for the mediator's obligation to sign the mediated settlement agreement if all the parties so agree (Article 26.2)³⁹ and the parties right to request that the JCAA attest that the mediation agreement resulted from mediation administered by the JCAA (Article 26.3)⁴⁰. These

39 Japan Commercial Arbitration Association Commercial Mediation Rules, 2020.

40 *Ibid.*

provisions were newly introduced so that settlement agreements made under the new Commercial Mediation Rules will be enforceable under the Singapore Convention on Mediation (also known as the United Nations Convention on International Settlement Agreements Resulting from Mediation; the "Singapore Convention").⁴¹

The Singapore Convention⁴² is a multilateral treaty produced by UNCITRAL. The Convention prescribes a uniform framework facilitating the efficient recognition and enforcement of mediated settlement agreements for resolving international commercial disputes. The Singapore Convention, resembling the framework of the 1958 New York Convention, which contains provisions for the enforcement of arbitral awards. One of the major objectives of the Singapore Convention is to promote and encourage the adoption of mediation for the resolving cross-border commercial disputes. Given the lack of a cross-border mechanisms providing for legal enforcement of settlement agreements reached via mediation was acknowledged as a major irritant in discouraging the countries from using mediation.

Unlike the New York Convention⁴³, there is no reciprocity reservation under which a contracting state requires reciprocity for enforcement of mediated settlement agreements under the Singapore Convention by contracting states. Given the lack of a reciprocity requirement, a state seeking an asymmetric advantage for its nationals could simply not join the Convention at all, because it could still obtain the benefits of the Singapore Convention, which admits enforcement of settlement agreements made in such non-contracting states, in other contracting states.

In Japan, mediated settlement agreements are not enforceable by themselves. One needs to obtain an arbitral award or judgment within Japan. This raises the question that when Japan is a part

41 *Supra* note 5.

42 The Singapore Convention (The United Nations Convention on International Settlement Agreements Resulting from Mediation), 2018.

43 The New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards), 1958.

of an international commercial disputes and wants to enforce mediated settlement agreements in international commercial disputes as a signatory state to the Singapore Convention, how there exist a difference between enforceability mechanisms of domestic and international commercial disputes?

No unanimous opinion exists as to whether or not the new legislation should provide for enforceability of settlement agreements only in “international” (commercial) mediation in order to accede to the Singapore Convention, or whether it should also provide for enforceability of settlement agreements in domestic mediation at least in particular types of cases for which there is a demand to render enforceability in practice (e.g.- claims of expenses required for custody of a child, under certain conditions etc.)

The opt-in clause of the Singapore convention is another feature which has generated much interest in the legal community. The implication of this clause is that though the Convention, by default would apply to mediated settlement agreements, however, Article 8(1)(b) of the Convention provides the states with the option to apply the Convention on an ‘opt-in’ basis. This implies that the Convention can be applicable only to a mediated settlement when the concerned parties agree to have it applied.

Republic of Iran is the only country, which has reserved the right under the ‘opt-in’ clause. It is yet to be seen as to how many countries would ratify the Singapore Convention.

Hong Kong

In Hong Kong, the Arbitration Ordinance, 2011 governs the Med-Arb process in Hong Kong is subjected to the Arbitration Ordinance of 2011. This Ordinance prescribes for the neutral to play the dual role of mediator and arbitrator when the dispute remains unsolved in the mediation stage.⁴⁴

The Mediation constituent of Med-Arb, as per the Mediation Ordinance of 2013, is left to be governed by Arbitration Ordinance. The Ordinance of 2013 tackles with concerns over violations of Natural

44 Deekshitha Srikant and Arka Saha, “Amalgamating the Conciliatory and the Adjudicative: Hybrid Processes and Asian Arbitral Institutions” 3(1) *Indian Journal of Arbitration Law*.

Justice, confidentiality and legal status of the entire hybrid arbitration process which crop up due to the dynamic role-switch which the med-arbiter needs to perform.⁴⁵

The mediation rules of Hong Kong International Arbitration Centre are contained in the Hong Kong Mediation Council (HMC), established in 1999, renounces any opportunity of Med- Arb services being provided via the institution. Rule 14 does not permit the neutral to act in a dual role of mediator and arbitrator in the arbitral proceedings post the mediation phase, or any other dispute germinating out of the same contract.⁴⁶

Singapore

The trio of The Singapore International Arbitration Act⁴⁷, “The Singapore Mediation Centre (SMC) and the Singapore International Arbitration Centre (SIAC) render the facilities of SMC-SIAC Med-Arb hybrid arbitration procedure, under which contending parties aim at reaching an agreement via mediation, governed by SMC which is taken up further via arbitration, governed by SIAC rules, if mediation process doesn’t prove to be fruitful.” If, however, the mediation process proves successful then as under Rule 6(2) of the SMC Mediation Procedure, the mediator is permitted to switch into an arbitrator and bestow upon the settlement the binding enforceability of an arbitral award.⁴⁸

CONCLUSION AND SUGGESTIONS

To sum up the discussion, it can be clearly stated that the two points of contemplation for hybrid arbitral process are on the neutrality of the neutral when the neutral plays a dual role and the consequences of non-compliance of stages of hybrid arbitral process. Ultimately, drafting a multi-tiered arbitration clause with specific care increases the chances of both settlement and enforcement.⁴⁹

It is thus important that a multi-tiered arbitration clauses should deploy clear language stating with

45 *Id.*

46 *Supra* note 45.

47 International Arbitration Act, 1994.

48 *Supra* note 5.

49 *Supra* note 3.

precision the intention of the parties. The language so used should be devoid of any subjectivities and ambiguities. The clause should clearly state what role the neutral is to play in the entire process. Is the neutral to be only mediator or arbitrator or does the neutral don dual hats? It is advisable that the hybrid arbitration clauses can also generally stipulate that the same neutral may *not* perform the role of both mediator and arbitrator, unless backed by express consent of the parties.

Mentioning specific time restrictions for starting and ending each stage can also make the operation of clause more effective. Additional issues could also be addressed such as the jurisdiction of the arbitral tribunal; sanctions on refusing compliance with the agreed pre-arbitration steps; the parties' rights, pending any preliminary ADR process, such as the right to apply to the courts (or an arbitral tribunal) for relief and the interruption of any statutory limitation periods by initiating a pre-arbitration tier.⁵⁰

The creation of hybrid arbitration mechanisms in the realm of international arbitration empowers parties with the option to be flexible in choosing the most desirable variant in resolving their disputes. It is thus pertinent that more predictable, efficient and enforceable hybrid dispute resolution mechanisms develop in the arena of international arbitration. For only these mechanisms can resolve the complex disputes crossing over multiple jurisdictions which characterise the proceedings of international arbitration. Tribunals and counsel should always be flexible, open-minded, and creative in choosing the most appropriate and efficient mechanism of dispute resolution subject to the facts and circumstances of each case. This is the only way international arbitration can survive in times to come.⁵¹

Considering the present time where Arbitration has become analogous to the traditional litigation it is material to understand the essence of s.30⁵² and

50 *Id.*

51 *Supra* note 5.

52 The Arbitration and Conciliation Act, 1996.

the need to encourage the disputants to have an "ADR-first" clause which in turn will enable them to write their own award by settling their dispute on mutual agreed terms.

'Impetus shall come from within. If induced, will not last for long'⁵³

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