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THE PLACE OF MED-ARB IN THE RESOLUTION OF COMMERCIAL DISPUTES

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ABSTRACT

Commercial disputes are a part of everyday commercial transactions and as such effective and efficient mechanisms for the resolution of these disputes are a major concern for parties.

This article will discuss Med-Arb, one of the many mechanisms established over time for the purpose of attaining greater efficiency in the resolution of disputes, criticisms of the process as well as its use in various jurisdictions.

Introduction

In commercial transactions it is predictable that disputes will arise; be it from a misunderstanding of the agreement reached, misrepresentation of the terms agreed upon, the intent to undercut the other party or parties or take undue advantage of loopholes created at the time of entering the agreement, etc.

The effect of disputes in commercial transactions can be disruptive if not downright devastating for one party or all parties. It is to keep the possible disruption that trails a dispute to a minimal level that parties seek the most efficient form of resolving disputes. While litigation is always a readily available option for the resolution of disputes by the parties, over the years men of commerce have developed diverse mechanisms seeking more effective and

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efficient ways of resolving disputes. These mechanisms are referred to as Alternative Dispute Resolution (ADR) processes and they include:

-Negotiation

-Mediation

-Neutral Evaluation

-Case Appraisal

-Conciliation

Arbitration has not been included in the foregoing list of ADR mechanisms due to the on-going debate over whether it is an ADR process or not. This paper will not delve into the issue of the classification of Arbitration as an ADR mechanism.

Irrespective of the ongoing debate around whether or not arbitration is an ADR mechanism, hybrids of some of the above mechanisms including arbitration have been exploited to achieve more efficiency in the resolution of disputes. One of such hybrids is **Med-Arb**, abbreviation for "Mediation-Arbitration". This dispute resolution mechanism which is gaining traction and general acceptability in the commercial world is the focus of this paper.

Med-Arb

Just as the name connotes, Mediation-Arbitration popularly referred to as "Med-Arb" is a form of dispute resolution which combines the mechanisms of arbitration and mediation in the resolution of a dispute. Med-Arb is a process of marrying two fundamental but somewhat opposing goals of ADR, finality and collaboration.[2] Med-Arb attempts to resolve a dispute between parties with the aid of one or more third party neutrals by first utilising the process

[2] Keeping a Secret from Yourself? Confidentiality when the same Neutral serves both as Mediator and as Arbitrator in the same case. An article by Kristen M. Blankley published in Baylor Law Review: Vol. 63:2. www.baylor.edu

of mediation to settle the dispute between the parties and then applying the process of arbitration to resolve any outstanding issues not settled during mediation. The process may be conducted by one or more third party neutrals; a Med-Arbiter or a combination of the Mediator who is distinct from the Arbitrator. The decision to go to arbitration to determine issues not resolved in the mediation process is one taken by the parties in advance, prior to the commencement of the Med-Arb process.

The mediation process is designed primarily to assist the parties achieve a mutually satisfactory resolution of their dispute with the aid of a third party neutral (the "Mediator") who simply facilitates the process. The Mediator holds joint and private sessions with the parties during which he applies negotiating, problem solving and communication skills to the process.[3] The process is informal and flexible and to a large extent controlled by the parties. To this end the Mediator acts as a facilitator with no authority to make any decisions on any of the issues raised and simply assists the parties to reach a settlement.

Some of the strengths of mediation include the involvement of the parties in the settlement of their dispute, speedy settlement of disputes due to its informal and flexible process, savings in cost as it is considered much cheaper than arbitration and litigation. However, one of the major weaknesses is the fact that any decision reached by the parties in mediation does not have a binding effect and will therefore need to be enforced as a contract through the courts. It is interesting to note that at the Lagos Multi-Door Courthouse (LMDC), a court annexed dispute resolution centre, the Settlement Agreement entered into by the parties following a successful mediation process is enforced by the High Court of Lagos State as a judgment of

[3] The CEDR Mediator Handbook 5th Edition published in 2010 by the CEDR International Dispute Resolution Centre, at page 24.

the court.[4] Other than in a setting such as the LMDC, settlement reached by the parties in mediation is considered a contract and enforced as such through the courts.

Arbitration on the other hand is an adversarial process in which the Arbitrator is expected to make a final and binding decision after hearing both parties and weighing the evidence presented by them. While one of the strengths of arbitration is the Arbitrator's power to issue a final and binding decision which is enforceable as a judgment of the court, one of its weaknesses is the element of control taken away from the parties and enjoyed by the Arbitrator. It is argued that this sometimes leads to the reluctance of the parties to comply with the award.

Med-Arb being a hybrid of the mediation and arbitration processes combines the strengths of both processes. This combination gives the parties an opportunity to resolve their dispute by mediation and to have a third party neutral (the "Med-Arbiter" or "Arbitrator") impose a final decision over issues outstanding from the mediation process.

The Med-Arb process was originally established with the Med-Arbiter conducting the roles of the Mediator and the Arbitrator. Over the years variations of the process have been established, possibly to address some of the concerns raised by critics of the process. Some of the variations use two neutrals and others vary the order in which the elements of mediation and arbitration are used.

The common variations of the Med-Arb process are:

- **Med-Arb:** This process involves a single neutral who first mediates the dispute and then arbitrates any issues not settled by the parties during the mediation.
- **Co-Med-Arb:** This process utilises two third-party neutrals; one to serve as Mediator for the mediation phase of the process and the other to serve as the Arbitrator upon

[4] Art. 17 of the LMDC Practice Direction on Mediation

entering the arbitration phase. The Arbitrator only addresses issues not settled during the mediation phase and in some cases will not take part in the mediation. Sometimes, the Arbitrator takes part in the non-confidential sessions of the mediation process.

- **Arb-Med:** Also known as "Post Arbitration Mediation". In this case, a single third-party neutral conducts the arbitration and makes an award but seals it and then proceeds with the mediation. The award is only revealed if the parties fail to settle the dispute by mediation. Settlement by the parties is thought to be encouraged by the threat of the unknown arbitration award.
- **Shadow Mediation:** This process involves conducting the arbitration with a separate neutral in attendance who mediates possible areas of agreement identified in the course of the arbitration.
- **Arb-Med-Arb:** This is a variant established by the SIMC as a model dispute resolution clause which allows a party to start an arbitration and then proceed to mediation after the tribunal is appointed and the arbitration is stayed. If parties reach a settlement in mediation, the resulting Settlement Agreement is taken back to arbitration and forms the subject of a Consent Award.[5]

Process of Med-Arb

In a typical Med-Arb, the first phase of the process is the mediation during which the parties with the help of the Mediator settle as many issues as they can. As earlier stated the Mediator holds a series of joint and private sessions with the parties. In the course of the private meetings held with one party in the absence of the other (known as "private caucuses"), the Mediator solicits confidential information from each of the parties for settlement purposes. At

[5] Singapore International Mediation Centre SIAC-SIMC Arb-Med-Arb Protocol (http://simc.com.sg/siac-simc-arb-med-arb-protocol/) accessed on 20th January, 2016.

the private meetings, the party is encouraged to provide the Mediator with information he does not want the other party to know about.

Following settlement of all or some of the issues a Mediation Settlement Agreement is drawn up and signed by the parties. This brings the mediation phase of the Med-Arb process to an end. Any issues not settled by mediation are then taken before the Med-Arbiter or an Arbitrator in the second phase of the process. The Med-Arbiter or Arbitrator considers the evidence put before him and hears submissions from both parties upon which he renders a final and binding award.

Med-Arb is a flexible process which can be designed to meet the needs of the users. Several variations of the process have been described earlier in this paper. In some cases the process is designed to allow parties go back and forth between mediation and arbitration. An example of this is the Construction Dispute Resolution Services (CDRS) Med-Arb procedure.[6]

Med-Arb in various jurisdictions

Med-Arb has been formally embraced and adopted in various prominent jurisdictions including Japan, Singapore, Hong Kong, Brazil, Australia, Sweden, Canada and the United States of America.

In Singapore, the process is governed by the Singapore Mediation Centre (SMC)[7] and the Singapore International Arbitration Centre (SIAC).[8] Singapore International Mediation Centre (SIMC) was subsequently set up in 2014 to offer mediation of commercial disputes which may have no link to Singapore other than using the SIMC.

[6] Mediation-Arbitration, Med-Arb, Defining the Process. An article published on www.constructiondisputes-cdrs.com
[7] The Singapore Median Centre was set up in 1997
[8] Singapore International Arbitration Centre was established in 1991

Under the Med-Arb process the dispute is submitted to mediation in accordance with the SMC Mediation procedure by one of the parties putting in a request for mediation as well as a notice of arbitration. At the SMC, arbitration is deemed to have commenced on the date the Request for Mediation and the Notice of Arbitration are received by the SMC but no further steps are taken in the arbitration until the conclusion of the mediation at SMC.[9]

In Canada, the Med-Arb process was advocated by some arbitrators as far back as the 1940s and has been considered a popular and effective method for the settlement of labour disputes. It is used by a number of dispute resolution organisations and has legislative backing in many provinces.[10] These include Canada Industrial Relations Board (CIRB), Ontario Grievance Settlement Board (GSB), British Columbia Labour Relations Code,[11] all of which provide for the Med-Arb process in the resolution of labour disputes.[12]

A number of legislation empower an Arbitrator, subject to the consent of the parties, to use mediation, conciliation or similar techniques to encourage settlement of the matters in dispute during arbitration and to resume the role of arbitrator if settlement is not achieved. Japan's Arbitration Law[13] and the Japan Commercial Arbitration Association (JCCA) Arbitration Rules permit an Arbitrator, with the consent of the parties, to attempt resolution of the dispute over which he is presiding.[14] Similarly, under the JCCA Mediation Rules, the Mediator in a dispute may go on to act as Arbitrator in any subsequent arbitral proceedings arising from the same dispute, and any mediation settlement may be incorporated into an arbitral award.[15]

[9] Singapore International Arbitration Centre (SIAC) Arbitration Rules, 2011
[10] Megan Elizabeth Telford, "Med-Arb: A Viable Dispute Resolution Alternative" available at www.irc.queensu.ca
[11] British Columbia Labour Relations Code, 2003
[12] Megan Elizabeth Telford, "Med-Arb: A Viable Dispute Resolution Alternative" available at www.irc.queensu.ca
[13] Japan's Arbitration Law, 2003
[14] Japan's Commercial Arbitration Association (JCCA) Arbitration Rules, 2009
15 Rules 8, 11, Japan's Commercial Arbitration Association (JCCA) Mediation Rules, 2009

The process was formally adopted in the United States in the 1970s with the State of Wisconsin becoming the first State to formally adopt the process on 1st January 1978.[16]

Several international organisations have also embraced the Med-Arb process:- the International Centre for Dispute Resolution (ICDR), the Hong Kong International Arbitration Centre (HKIAC), the International Chamber of Commerce (ICC)[17], the Mediation Rules of the World Intellectual Property Organisation (WIPO)[18], the China International Economic and Trade Arbitration Commission (CIETAC)[19], Stockholm Chamber of Commerce (SCC) Rules of Mediation[20], among others.

In an interview with the Global Arbitration Review, the Secretary General and Vice Chairman of CIETAC, Yu Jianlong, revealed in 2011 that 20 to 30 percent of CIETAC's caseload is resolved by Med-Arb each year.[21]

Criticisms of the Med-Arb process

Notwithstanding the seeming success of the Med-Arb process, there have been several criticisms of the process, some of which are:

Natural Justice Concerns: One of the fundamental principles of arbitration is fair hearing; that parties must be given equal opportunity to present their cases and answer the case of their opponent before an independent and impartial tribunal determining the dispute. In Med-Arb, the practice of private caucusing during the mediation phase of the process whereby the Mediator holds private and confidential discussions with each of the parties in the absence of the other is considered to be a breach of the principle of fair hearing. The proponents of this

[16] Megan Elizabeth Telford, "Med-Arb: A Viable Dispute Resolution Alternative" available at www.irc.queensu.ca
[17] International Chamber of Commerce, (ICC) ADR Rules 2001
18 World Intellectual Property Organisation (WIPO) Mediation Rules, 2002
[19] China International Economic and Trade Arbitration Commission (CIETAC)
[20] Stockholm Chamber of Commerce (SCC) Rules of Mediation, 1999
[21] An interview with Yu Jianlong in Global Arbitration Review, Vol. 6 Issue 5 at www.globalarbitrationreview.com/journal/article/39794/an-interview-yu-jianlong

view argue that the opposing party is not in a position to respond to any information obtained during the private sessions. Another argument is that the Med-Arbiter cannot successfully block out information learnt through mediation when determining an award as Arbitrator and is thus likely to be biased by the information obtained during the private sessions if the matter progresses to arbitration.

Possible manipulation of the process by parties: It is argued that parties could take advantage of private caucuses to try to convince the Arbitrator on the strength of their case or, on the other hand during the mediation process hold back information which they believe will weaken their case during the arbitration.

Possible use of arbitration as a threat during the mediation: A 1995 study on Med-Arb found that the parties were more inclined to settle their dispute using Med-Arb because they knew the Med-Arbiter could arbitrate the dispute if mediation was not successful and therefore did not want to lose the control they enjoyed in resolving their dispute by mediation. It is argued that Med-Arbiters could use this notion to force parties to reach a settlement or impose a settlement upon the parties.

Incompatibility of Mediation and Arbitration: There are arguments that the process and techniques of the two processes are completely different and incompatible – while a Mediator simply assists the parties in negotiating and reaching a settlement of the dispute an Arbitrator's duty is to decide matters totally on the basis of the formal record put before him. The idea of combining two distinct dispute resolution processes to form one process is considered by some ADR professionals as "heretical and even unethical."[22]

Response to the criticisms

[22] Gerald F. Philips, "Same Neutral Med-Arb: What Does The Future Hold?" 60 Dispute Resolution J. 2005 (referred to in "Med-Arb: A Template for Adaptive ADR" by John T. Blankenship, www.blackenshiplawoffice.com)

Advocates of the Med-Arb process in response to the foregoing criticisms argue that the criticisms of the Med-Arb process are directed more at the ability of Med-Arbiters to perform their role rather than the Med-Arb process itself.[23] This view is reinforced by a study conducted on the Med-Arb process successfully used at the Grievance Settlement Board (GSB), a separate arbitration mechanism for public employees of Ontario, Canada, by **Megan Elizabeth Telford.** The study revealed that the success of the Med-Arb process at GSB was undoubtedly due to the fact that all GSB Med-Arbiters are skilled in the process. She goes on to conclude that the skill of Med-Arbiters is therefore an extremely important factor in the success of the process.[24] It is argued that the more progressive approach to mediation relies far less on private caucusing and far more on skills designed to keep the parties on the table and looking at different approaches to tackle the dispute.[25] Some commentators suggest that confidential information acquired in mediation is no more a risk in arbitration than a situation in which an Arbitrator in arbitration or a Judge has to consider the admissibility of evidence. If the evidence is inadmissible a competent Arbitrator should discard it. A competent Med-Arbiter will treat confidential information equally appropriately.[26] The skill of the Med-Arbiter can then be said to be a more determinant factor in the success of the Med-Arb process.

With the flexibility available to the process, proponents of Med-Arb argue that the parties can address these concerns by designing the Med-Arb process itself to reduce or eliminate these concerns.

[23] Megan Elizabeth Telford, "Med-Arb: A Viable Dispute Resolution Alternative" available at www.irc.queensu.ca
[24] Megan Elizabeth Telford, "Med-Arb: A Viable Dispute Resolution Alternative" available at www.irc.queensu.ca
[25] David C. Elliot in his paper "Med-Arb: Fraught With Danger or Ripe With Opportunity?"
[26] Megan Elizabeth Telford citing "David Elliot - Med-Arb: Fraught with danger or ripe with opportunity? Alberta Law Review, 34 (October) 1995)

These concerns have also been addressed in some legislation which contain safeguards to avert claims of bias in the process. The Singapore International Arbitration Act[27] is one of such legislation. It provides that if mediation is unsuccessful, prior to the commencement of the arbitration, the Med-Arbiter is required to disclose to the parties all confidential information obtained during the mediation phase. The Hong Kong Arbitration Ordinance[28] and the China International Economic and Trade Commission (CIETAC)[29] as well as the Arbitration Law of the Peoples Republic of China[30] have similar provisions. The danger here is that parties may be less frank during the mediation phase of the process and therefore not fully commit themselves towards reaching settlement.

Another variation of the Med-Arb process known as Co Med-Arb seems to equally address the 'natural justice' concerns. In Co Med-Arb, the mediation process is split in two parts, one confidential and the other non-confidential. Two Med-Arbiters are appointed by the parties and both are present during the non-confidential sessions whilst only the Mediator is involved in the confidential sessions. The effect of this procedure is that if the dispute is not settled by mediation, it will go to arbitration before the second Med-Arbiter who would not have been privy to the private and confidential discussions held between the parties and the first Mediator.

In response to the argument regarding the threat of an impending arbitration on the mediation phase of the Med-Arb process, experienced Med-Arbiters have argued that the impending threat of an imposed decision "... serves as an incentive for the parties involved to make the most of mediation."[31] The threat of impending arbitration therefore has a positive rather than

[27] S.17 Singapore International Arbitration Act, 1994 and revised in 2002
[28] S.33 Hong Kong Arbitration Ordinance, 2011
[29] Art. 40(2) of the China International Economic and Trade Commission
[30] Art. 51 of the Arbitration Law of the Peoples Republic of China
[31] Megan Elizabeth Telford, "Med-Arb: A Viable Dispute Resolution Alternative" available at irc.gueensu.ca/gallery/1/cis-med-arb,a-viable-dispute-resolution-alternative.pdf

a negative impact on the process as it helps the disputants to develop the right attitude towards efforts to reach their own negotiated settlement.

In response to the perceived incompatibility of mediation and arbitration, it has been argued that the distinct characteristics of the two processes remain separate and intact and one procedure ends before the other begins.[32] The author is of the view that the issue of incompatibility of the two processes does not arise. While the strengths of both processes; the consensual nature of mediation and the finality of arbitration, have been brought together, the distinct characteristics of the processes have been retained and undiluted. Furthermore, the flexibility of the process which allows it to be designed to suit its users allows for any perceived incompatibility that may exist to be adequately addressed. This is seen in the wide variety of the Med-Arb process. Finally, the success and continued prominence of the Med-Arb process lays credence to the fact that this criticism is without justification.

Benefits of Med-Arb

It is no surprise that notwithstanding the forgoing criticisms the Med-Arb process has continued to gain prominence as an effective dispute resolution mechanism. This is no doubt due to the many benefits of the process which include:

- The speed with which disputes are resolved particularly when settled at the mediation phase of the process. Since the arbitration is only required to deal with the unresolved issues, if any, after the mediation phase has been concluded, the number of issues are usually fewer than the parties started out with and will therefore require less time to determine.
- The Med-Arb process with a single neutral even when it gets to the arbitration phase is likely to be faster as the Med-Arbiter is familiar with the facts of the case.

[32] John T. Blankenship, Med-Arb: A Template for Adaptive ADR available at www.blackenshiplawoffice.com

Furthermore, the award is more likely to be in line with the needs of the parties since the Med-Arbiter is likely to be better informed having participated in the mediation process.

- In view of the possibility of settlement at the mediation phase, the process may be considered cheaper where many or all of the issues are settled by mediation without the time and expense required to present the case to an Arbitrator.
- There is a greater certainty of resolving the dispute either through consensual agreement reached by mediation or a determination by a third party through arbitration.
- Any settlement reached during the mediation phase of the process can be recorded in the form of a final award by the Med-Arbiter. This provides the binding effect absent in the mediation process.
- The many variations of the Med-Arb process support the flexible nature of the process. The ability of parties or dispute resolution institutions to design the process as it best suits their needs is seen in the variations established by the many jurisdictions and institutions.

Conclusion

The beauty of the Med-Arb process is the combination of the consensual nature of mediation and the finality of the Arbitrator's decision. It is no surprise therefore that the process is considered a success in the jurisdictions where it is used.

Surveys performed by David Lipsky and Ronald Seeber in 1997 and 2011 found that a reasonable number of responding Fortune 1,000 corporations engaged in Med-Arb; 40% between 1994 and 1997 and 47% between 1997 and 2011.[33]

Going by the above survey, it is safe to conclude that the Med-Arb process is an innovative form of dispute resolution which has caught on globally in other climes, as it provides a quick, efficient and relatively cheaper resolution of disputes. Criticisms of the process seem to have been adequately addressed by various means including the safeguards inherent in some of the legislation and, due to its flexibility, the ability to design the process to minimize these concerns.

The continuous prominence of the Med-Arb process lays credence to the notion that the process has been successful in achieving the goals of expeditious, efficient and effective resolution of disputes. As such, I am of the view that the inclusion of the Med-Arb mechanism in the efforts to encourage the use of ADR and arbitration in the resolution of commercial disputes in Nigeria is a worthwhile consideration.

[33] David Lipsky "How Corporate America Uses Conflict Management: The Evidence of a new Survey of the Fortune 1000" available at www.altnewsletter.com/sample-article/how-corporate-america-uses-conflict-management-the-evidence-from-a-new-survey-of-the-fortune-1000.aspx