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A Blend of Arbitration and Mediation: Analysis of the Possibilities and Challenges in Utilising MedArb Practice in Sri Lanka

Pramoda Vithanage

pramoda@law.cmb.ac.lk

Department of Commercial Law, Faculty of Law, University of Colombo, Sri Lanka.

Abstract

The ADR landscape is evolving at a rapid level across the world and one of the latest trends in such is transferring dispute resolution into Arb-Med-Arb and Med-Arb. Arbitration and Mediation are recognised as two favourable dispute resolution methods, especially in commercial dispute resolution. When considered in isolation, both mediation and arbitration have unique features. Despite a few substantive and procedural drawbacks in both methods, mediation, and arbitration have gained popularity recently. While transferring into a mixed approach of MedArb and Arb-Med-Arb is still in its infancy in the context of Sri Lanka, this paper examines the possibility of utilising MedArb practice within the existing landscape in the country. Arbitration practice in Sri Lanka has a long history and the Arbitration Act No. 11 of 1995 and its amendments suggested which are to be in force in the future lays the statutory framework for arbitration. Notably, the background for Mediation in Sri Lanka started with community mediation and now it has reached a significant milestone in commercial mediation as the enabling legislation for the Singapore Convention was enacted recently. This paper uses a doctrinal approach in dealing with primary resources as well as secondary resources when conducting the research. This paper uses an exploratory analytical method. It also includes a comparative study that examines the MedArb practice in Hong Kong as a progressive Common law jurisdiction. In its findings, the paper highlights that the MedArb practice is adaptable in Sri Lanka within the existing statutory framework and the institutional setup. However, it urges that the professionals and the commercial community pay attention to the points discussed in the recommendations for the successful functioning of the MedArb practice.

Keywords: Arbitration, Commercial dispute resolution, Mediation, MedArb.

Introduction

This paper takes a critical approach to reviewing the adaptability of MedArb into the Sri Lankan landscape through an analysis of its challenges and prospects. Conflicts or disputes are common in human society and Sri Lanka has no exception to this fundamental truth. From the inception of the formal legal framework, Sri Lankan legal practice has been biased towards an adversarial culture due to the influence of legal traditions. However, dispute resolution methods as alternatives to litigation have been in existence for so long and the utilisation level remains different from time to time. Despite being community disputes or commercial disputes, these alternative dispute resolution methods are inevitably important for the peaceful and coherent existence of the community. In return, it also enhances the confidence of the international business community and ultimately fosters economic development (Dawood, 2024, p. 26). As focused on in this paper, arbitration and mediation have established their importance as dispute resolution methods all around the world both in community and commercial dispute resolution spheres. Disputants tend to choose these methods over litigation due to their advantages such as fewer formalities, expertise, flexibility, less time-consuming, party autonomy, confidentiality, cost-effectiveness, etc. In the global context, one of the recent trends in ADR is the 'MedArb' practice which simply means mixing the two methods of mediation and arbitration for better utilisation of them in dispute resolution.

When the Sri Lankan climate of administration of justice is considered, the Annual Performance Report-2023 of the Ministry

of Justice, Prison Affairs and Constitutional Reforms highlights a number of 1,122,113 pending cases to be solved by all courts and labour tribunals as at 31.12.2023 (Annual Performance Report-2023, p. 16). The said report and consecutive annual reports of several years recommend ADR including Arbitration and Mediation as a possible solution for law delays and to reduce the case backlog (APR 2023, p. 5). Therefore, developing the canvas of ADR within Sri Lanka is paramount important due to its contribution in numerous ways. One possible way of such expansion is the use of MedArb in solving disputes through a pragmatic process.

Overall, the main objective of this paper is to explore to what extent MedArb is adaptable within the Sri Lankan jurisdiction. The first part of this paper addresses the corresponding sub-objective of defining the concept of MedArb and understands the rationale behind the process with its possibilities and challenges discussed in brief. The second part examines the existing legal framework for arbitration and mediation and the space provided within them for adopting 'MedArb'. It also discusses the challenges in applying MedArb into the Sri Lankan landscape focusing on possible solutions to be adopted. This paper also critically analyses the insights gleaned from MedArb practice in Hong Kong through an analysis of its statutory arrangements. Finally, the paper deals with progressive recommendations in promoting MedArb as a distinct method of dispute resolution in modern times.

What is ‘MedArb’?

MedArb is simply a hybrid process that combines both mediation and arbitration to advance the positive outcomes of both in order to enhance the dispute resolution process. MedArb has a long history though its emergence as a well-defined separate method is highlighted recently (Abramson, 1999; Hoellering, 1997; Peter, 1997; Blankley, 2011). According to the historical records, Sam Kagel who was a San Francisco lawyer and arbitrator is regarded as the founder to develop Med-Arb to settle a nurses’ strike in the 1970s (Weisman, 2013, p. 40). Nevertheless, today, it is applied in commercial settings without being limited to labour and international disputes.

The atmosphere created through MedArb intends to generate positive features of both methods and also allows mitigating the drawbacks in one through the involvement of the other method (Wein & Rogers, 2019). This hybrid process is recognised in numerous categories and a three dimension categorisation is discussed by Deason, “mediation followed by arbitration (med-arb), arbitration followed by mediation (arb-med), or arbitration with the possibility of a break in the proceedings for mediation (mediation window)” (Deason, 2013, p. 219). In addition, this process can be extended to arb-med-arb depending on the circumstances of each dispute. Furthermore, Edna Sussman (2018) identifies four categories of combinations and permutations of this hybrid process such as ‘Med-arb’, ‘Arb-med or arb-med-arb’, ‘Co-med-arb’, and ‘MEDALOA (Mediation and Last Offer Arbitration)’. Nevertheless, MedArb is referred to as a method that is not

a ‘one-size-fits-all’ process (Law Council of Australia, 2022). This highlights the fact that the selection of MedArb as a dispute resolution method for a dispute should be an informed and voluntary selection of the parties.

MedArbitrator is referred to as ‘the neutral’ in literature because it is a combination of both roles. According to Alan Wein and Jessica Rogers, “In Med-Arb, as in conventional mediation, the mediator endeavours to facilitate a negotiated resolution between the parties. If, however, the mediation fails, the mediator then becomes the arbitrator and authoritatively determines the dispute” (2019, p. 49).

Wein and Rogers claim that common law countries and the Western world do not favour MedArb as an ADR method (Wein & Rogers, 2019, p. 50). However, it is noteworthy that many Asian countries have adopted MedArb into their ADR landscapes and have been exploring its possibilities. This is evident by the argument raised by M. Scott Donahey referring to the nature of the Asian cultures in embracing “harmonious” solutions, in order to preserve the relationship rather than focusing on what is legally correct which can obstruct the relationships between the parties (Donahey, 1995).

The rationale behind the hybrid process

The disadvantages of both mediation and arbitration are highly discussed among the disputants as well as in literature. It is an unfortunate story to hear that the disputants who favour ADR methods over litigation sometimes end up frustrated due to certain

drawbacks in the ADR process. Therefore, before moving into exploring MedArb it is important to identify the inherent features of both mediation and arbitration emphasising the drawbacks and how they could be overcome by this hybrid initiative.

Mediation is a process where a third party facilitates the disputants to find a solution that best addresses their interests. A mediator does not interfere with the decision-making powers of the parties and determines the solution at the end. Instead, the mediator's role involves the skills of communicator, leader, negotiator, and manager of the mediation process. The mediator is expected to play a neutral, impartial, and disciplined role to follow the rules and use strategies in conducting the sessions. At the end of this process, parties should be able to find a win-win solution that serves the best interests of their concerns. The process may end with either settlement or non-settlement, however, the mediator cannot impose a solution on the parties by using authority. Different types of mediation have various approaches to conducting the process such as facilitative, evaluative, and transformative. However, facilitative and evaluative mediations are the most common types that are used while transformative remains a bit distinct and modern.

Both arbitration and mediation can start with an agreement to arbitrate and mediate. In comparison, party autonomy takes a larger control in deciding different aspects of the arbitration process from selecting the place of arbitration to arbitrators. However, in terms of the role played, an arbitrator's engagement is different from the mediator's approach in the process. Arbitrators known as 'quasi-judicial'

are vested with the adjudicative power authorised by the parties to decide the dispute. In contrast, while the mediator facilitates the parties to uncover their interest and identify their strengths and weaknesses, the arbitrator decides the dispute by considering the facts and evidence presented by the parties following a flexible process decided by the parties. Ultimately, the arbitration award is decided not by the parties, but by the arbitrator which is subject to challenges at a court of law on limited grounds. Therefore, arbitration could be a win-lose situation at times. In summary, arbitration remains a more formal and methodical process in which substantive and procedural law takes a stance as compared to mediation in which the interest of the parties takes prominence.

Overall, Arbitration and Mediation are inherently different in terms of "decision-making, nature of process, legal status of outcome and other factors" (Alexander, 2013). Owing to the inherent features of both mediation and arbitration, in theory, MedArb intends to double the positives in both methods and mitigate the risk in both. As Brian Pappas states, "Med-Arb practitioners see an opportunity to offer a process that combines the best of both mediation and arbitration by guaranteeing a final resolution ("finality") but incorporates informal opportunities for settlement ("flexibility")" (Pappas, 2015). He believes that the finality element motivates the parties to behave themselves well within the process while flexibility would contribute to 'efficiency and cost-saving' over arbitration (Pappas, 2015, p. 159). According to Brian, the emergence of MedArb as a dispute resolution method is a response to the tendency to legalise ADR methods, and

therefore, MedArb was created intending to cure that problem (Pappas, 2015, p. 169). Looking through a different lens, Harold I. argues that international arbitrators are the best to attempt in settling cases and thereby mediation can be integrated into the process which unintentionally could turn into med-arb (Abramson, 1999, pp. 1–2).

The MedArb process in brief

In practical terms, the intention of the parties for MedArb can be discovered during the pre-hearing or pre-mediation stage. As prominently seen, one of the motivational factors for selecting this method is the parties' willingness to settle the dispute (Weisman, 2013). At the start, it is very important that the MedArbitrator explains the pros and cons of the process with the disciplines required in order to be successful.

According to Katie Shonk (2024), the start of the process in MedArb is different from mediation. It generally starts with an agreement in writing on the steps to be followed and regarding the acceptance of the solution derived at the end as binding. Therefore, party autonomy creates a more party-centric flavour to the whole process (Shonk, 2024). Then, the mediation takes place in a facilitative manner and the process will transfer to arbitration thereafter. The same mediator may appear as the arbitrator and act in the vested capacity in examining the case as a whole or the issues that are not settled at the mediation (Shonk, 2024). As another approach, a different arbitrator can also take over the case in consultation with the mediator who handled the first part.

Tom Arnold explains how MedArb works and states that, "Facilitative mediation, followed

by Binding arbitration, perhaps before the same neutral" (as cited in Wein & Rogers, 2019). In practical terms, this entails the same third party acting both as a mediator and an arbitrator whereas in the first instance facilitating the parties to arrive at a settlement and in the second instance determining a final and binding award after considering the issues (Hoellering, 2012).

The possibilities and challenges of MedArb

The literature discusses both the positive and negative sides of med-arb as an alternative method. Martin C. Weisman with an optimistic view states that "Med-Arb will continue to grow as a viable and effective process because it is an economical, efficient, and fair method for the settlement of disputes" (Weisman, 2013, p. 41). He reiterated that those who have been Med-Arbs have proved that "concerns about the misuse of confidential information are overstated" (Weisman, 2013, p. 41).

In explaining the advantages of MedArb, the human and behavioural psychological matters are highlighted by Katie. According to Katie, the MedArb process itself motivates the parties to arrive at a solution smoothly because the parties know "the threat of having a third party render a decision in binding arbitration" (Shonk, 2024). Therefore, MedArb at the outset encourages the parties to arrive at a solution while protecting their relationship with the other party (Shonk, 2024). Furthermore, Katie identifies MedArb as a cost-effective solution since the process is determined at first as a hybrid version rather than initiating them separately (Shonk, 2024). MedArb can iron out the disadvantages of Arbitration and promote flexibility in Mediation.

On the other hand, many criticisms of MedArb devolve from the role of the MedArbitrator or the neutral. Many authors including Lon L. Fuller and Harold I. Abramson strongly claim that the same neutral partaking in two processes in different roles may lead to risking both being “impartiality as arbitrator and her flexibility as settler” and the parties also lose the opportunity of a real process (Abramson, 1999, p. 4; Fuller, 1963). As Brian Pappas critically summarises,

Med-Arb cannot satisfy the core values of mediator neutrality, party self-determination, and confidentiality. Nor in arbitration are the promise of arbitrator impartiality, due process right to equal treatment and confrontation, and enforceability of the arbitral award likely to be achieved (Pappas, 2015).

The issue of the Same-Neutral Med-Arb has been discussed by many, and among them, Gerald F. Phillips highlights the ethical issues as a major concern (Phillips, 2009, p. 75). The issues of confidentiality when the same mediator acts as the same arbitrator are also highlighted as negatives (Shonk, 2024). This is evident from the fact that The American Arbitration Association takes a step back in recommending the same-neutral med-arb unless the parties urge to do so (Phillips, 2009, p. 76). On the other hand, it should be noted that Gerald F. Phillips discusses some of the positives which can double the benefits of med-arb by utilising the same neutral (Phillips, 2009, p. 77). As one possible solution to address these issues, Abramson suggests that protocols be used to avoid the

inherent risk when one serves as the neutral (Abramson, 1999, p. 6).

Further, the threat to confidentiality needs to be examined thoroughly as a main challenge in this process. On one hand, in a hybrid process, arbitration itself can create a deteriorating impact on the mediation carried out first. Generally, in mediation, the mediator is exposed to the true interest expressed by the parties, especially in private caucus sessions. Therefore, MedArbitrator can be “privity to confidential information” (Sussman, 2018), and it can make the parties hesitate to outspoke their interests openly. In case confidential information has influenced an award at the end of the MedArb process, the parties lose the right to challenge the arbitration award since the ground would be not within the purview of limited grounds to challenge an arbitration award.

Taking an extreme view, Jeff Kichaven argues that “Med-Arb should be dead” and he uses the judgment by California State court in *Travelers Casualty and Surety Company v. Superior Court* (126 Cal. App. 4th 1131 (2005)) to prove his argument (Kichaven, 2009, p. 80). His argument is based on the idea that confidentiality in mediation will be diluted in the MedArb process specifically in maintaining a comprehensive record of the award which can be subject to judicial review later on (Kichaven, 2009, p. 81). He also states that, “in med-arb, the neutral’s power to adjudicate inherently gives that neutral the power to intimidate and bully the parties into a settlement they do not want, in fear of the result that same neutral may well impose” (Kichaven, 2009, p. 82). This pressure to arrive at a binding decision at the

end can be disadvantageous because it might not address the true interests. Rather parties may be artificially forced to end the process with some solution that fits despite reaching the best possible solution (Shonk, 2024).

Methodology and Limitations

This paper utilises a doctrinal research methodology where the black letter approach is used to review the primary and secondary sources. The use of doctrinal research methodology is insisted due to the theoretical and analytical depth that it could contribute towards the analysis of the paper. However, the literature is limited on the success and drawbacks of MedArb since it is relatively a new phenomenon that has recently been in wide use. Among the giants in arbitration and mediation, Asia holds a special tendency towards using medarb, and specifically countries like Hong Kong and Singapore are in the lead. This paper examines the lessons that can be gleaned from the comparative jurisdiction of Hong Kong as an Asian counterpart.

The scope of this paper is limited to commercial dispute resolution. While community mediation plays a pivotal role, the applicability of arbitration in community disputes is not visible in Sri Lanka. Therefore, in this hybrid process of MedArb, the author believes that its applicability should best be discussed within commercial dispute resolution.

Results and Discussion

Utilisation of ‘MedArb’ within the landscape of Sri Lanka

Arbitration has not become a success story in Sri Lanka (Kanag-Isvaran, 2011) mainly due to practical issues and mediation in the commercial sphere is yet planting its seeds. Therefore, the main argument of this paper is that MedArb which aims at doubling the positives in each could be a new avenue for the commercial community who doubt the negatives in each. Nevertheless, If MedArb continues to yield negatives, attempts can be made to try out ‘ArbMedArb’ for a more formalised predictable, and enforceable solution. However, the parties and the counsels should be mindful not to create further nuances and complexities for both parties and the arbitrators or mediators when the process is getting comprehensive.

Looking at the existing legal framework, mediation is historically deeply rooted in the community sphere in Sri Lanka. However, with the recent enactment of the Recognition and Enforcement of International Settlement Agreements Resulting from Mediation (Act No. 5 of 2024), commercial mediation has become a favoured avenue. On the other hand, the Sri Lankan domestic legal framework for Arbitration is governed by the Arbitration Act No. 11 of 1995, which is modeled on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The commitment that Sri Lanka has shown at the international level proves the fact that as a country, it is obliged to adhere to international standards by creating a domestic legislative framework that facilitates both arbitration and mediation.

It is evident that both legislative frameworks have no direct bar to the use of MedArb. However, this paper argues that no major legislative reforms are required to adapt MedArb in the Sri Lankan landscape. Section 14 of the Arbitration Act encourages the use of other methods including mediation of a dispute even after proceedings are in place. However, Act No. 5 of 2024 in Article 03 excludes the settlement agreements that are enforceable as an arbitral award, and this would not be an obstacle since the award at the end is rendered as a consent award in MedArb. One of the greatest advantages is that Sri Lanka, as a signatory to the New York convention can enforce arbitration awards and the same could be applied to awards rendered at the end of the MedArb process. Therefore, the awards derived at the end of a med-arb process can entertain the privilege of being considered under a widely accepted enforcement regime under the New York Convention.

On the other hand, it is possible to recognise MedArb as a means of an optional route to enforce a mediated settlement agreement within the existing statutory framework in Sri Lanka. When international mediated settlement agreements are considered, the framework under the Singapore Convention provides a route for enforcement. However, such a framework is still not in force with regard to domestic mediated settlement agreements. Therefore, other than following a direct route of filing an action in the court and getting a domestic mediated settlement agreement enforced, parties may be comfortable in shifting it to a MedArb in which the final award can be subject to enforcement facilitated by the general legal regime under the Arbitration

Act because it facilitates enforcement of both domestic as well as international arbitration awards. However, one may also argue that this can delay the enforcement process, and lead to open up the case again for debate. In response to this, it can be argued that alternative dispute resolution processes are anyway based on voluntary compliance, and it is up to the parties to decide the level of formality that they require in terms of enforcement. It can be recommended that the best is to always stay away from the court and honour the award at the end of the process.

In commercial dispute resolution, Sri Lanka has developed its institutional framework and institutions such as the CCC-ICLP International ADR Center, ICLP Arbitration Centre, and Sri Lanka National Arbitration Centre play an important role. Though it has not yet been utilised to a great extent, the author believes that MedArb would be a better option that has prospects if the challenges discussed below are addressed pragmatically through the intervention of the institutions as well. Moreover, the role of the lawyers engage in this process is also crucial. There should be a delicate balance between the lawyers who draft the settlement agreements in handling the client because the intervention of the lawyers in MedArb process can make things better or worse.

Comparative analysis of the legal framework facilitating med-arb in Hong Kong

Hong Kong is a progressive Common Law jurisdiction that has statutorily accepted the use of MedArb. In general, Chapter 620 - Mediation Ordinance modified in 2017

governs the practice of mediation in Hong Kong while The Hong Kong Arbitration Ordinance (Cap. 609) regulates the arbitral practice. The Arbitration Ordinance updated in 2022 addresses both international as well as national aspects of arbitrations adhering to the UNCITRAL Model Law. It is important to note that the statutory framework specifically on arbitration in Hong Kong has been mindful of integrating MedArb into its landscape through its statutory provisions. For example, Section 33 of the Arbitration Ordinance directly recognises the authority of an arbitrator to act as a mediator and subsection 1 and 2 states,

- (1) If all parties consent in writing, and for so long as no party withdraws the party's consent in writing, an arbitrator may act as a mediator after the arbitral proceedings have commenced.
- (2) If an arbitrator acts as a mediator, the arbitral proceedings must be stayed to facilitate the conduct of the mediation proceedings. (Hong Kong Arbitration Ordinance (Cap. 609, Section 33).

Subsection 3 of this provision goes further into allowing the neutral to engage in discussion collectively as well as separately and mandates the neutral to treat the information gathered as confidential. Moreover, it takes precautionary actions to avoid the issues of confidentiality. Under this safeguarding mechanism, the

issues with regard to the same neutral are strategically addressed. According to Section 33 (4) an arbitrator exposed to confidential information during the mediation process that concludes without a settlement has a duty to disclose “as much of that information as the arbitrator considers is material to the arbitral proceedings” (Hong Kong Arbitration Ordinance (Cap. 609), Section 33 (4)) Though one may identify this as a backfire to the notion of confidentiality, a closer examination of the conditions can disprove it. This exemptional situation is possible only when mediation concludes without a settlement and thereafter moves for arbitration. This duty to disclose lays down parameters for the said mediators to facilitate the process for an efficient conclusion. It also reduces delays and makes the process efficient by avoiding the repetition of the same issue. Also, the yardstick decided by the section as to ‘the arbitrator considers is material’ controls the misuse of this section under confidentiality. Moreover, subsection 4 contains a prohibition on taking ‘the same neutral position’ as the only ground of objection against the conduct of the arbitral proceedings.

On the other hand, the Mediation Ordinance has explicitly stated that it does not apply in MedArb and that prominence is given to the Arbitration Ordinance (Cap. 609). As Nadja Alexander views, “From a practical perspective, this means that the confidentiality of mediation and admissibility of mediation communications as evidence are regulated differently, depending on whether the mediation is conducted independently or as part of a specified MDR process” (Alexander, 2013). This is significant in terms of the vision of the legislature to maintain a

healthy balance between the two processes of mediation and arbitration and also to facilitate MedArb as a better solution in a different manner. When considered in isolation, arbitration includes elements of formality and legality which can remedy the limitations and neutral's discretion on confidentiality that are recognised as issues in mediation. Therefore, it can be argued that it could be seen as realisation of the fact that it yields better results when a more advanced framework is mingled with a less formalised one, in other words arbitration legal framework applies to govern MedArb processes. Though the Mediation Ordinance is restricted from being applied to MedArb, in limited circumstances, it allows room for cross-fertilization from the provisions relating to the Third-party funding of mediation by applying Part 10A of the Arbitration Ordinance (Cap. 609). This has been formally recognised through the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Commencement) Notice 2018.

The decision on *Gao Hai Yan v Keeneye Holdings Ltd* ((201) HKEC 514) highlights some important aspects of the judicial approach towards the med-arb practice and its acceptance. It is noteworthy that the Hong Kong Court of Appeal overruled the first instance decision in June 2011 and showed a favourable response towards med-arb. In the first instance decision, Reyes Judge stated,

In principle, there is nothing wrong with med-arb and noted that the new Hong Kong Arbitration Ordinance Cap. 609 (as to which see below) expressly

allows med-arb with the parties' agreement, subject to certain safeguards. However, from the point of view of 'impartiality', the med-arb process runs into self-evident difficulties, particularly because of important differences between the two processes (Herbert Smith Freehills, 2011).

Comparing the role of a mediator who needs to consult the parties in private to excavate their real interests as opposed to an arbitrator who is supposed to avoid private interactions with each party, Reyes judge further mentioned that, "the problems inherent in med-arb result, in practice, in many arbitrators declining to engage in the process since they view the risk of apparent bias as an insurmountable difficulty" (Herbert Smith Freehills, 2011). However, in the Court of Appeal decision the judiciary had a favourable approach towards MedArb. The decision was twisted based on the principle, "that it is not open to a party to keep a complaint regarding an impropriety of bias "up its sleeve" for potential use at a later point" since the parties had moved into arbitration without making any objection (Herbert Smith Freehills, 2011).

Conclusions and Recommendations

Conclusions

The role of the MedArbitrator as well as the parties is crucial to achieving success in MedArb process because many of the challenges identified are not substantial, but rather procedural. It is pivotal that the

MedArbitrator maintains professionalism and integrity throughout the process. If he attempts to take advantage of his position in both stages, the objectives of the process will not be achieved. Further research in this area within the Sri Lanka context could expand into an empirical study in which the practical insights of both practitioners as well as clients are critically analysed in recommending reforms to the legal framework. It can also include research on the other comparative jurisdictions and their exemplary practices in MedArb.

Recommendations

When the Sri Lankan landscape is considered, MedArb could be a better option for small and medium (SMEs) enterprises who do not possess the financial capacity and expertise to follow a very formal and comprehensive process in litigation. The nature of this sector is that they do not refer their matters entirely to mediation because of the misbeliefs in mediation practice in Sri Lanka. However, in MedArb the element of arbitration enhances credibility through the enforcement mechanism and the involvement of arbitrators with adjudicatory powers compared to the mediators. Therefore, this hybrid process can guarantee them the required flexibility and the formalities within a party-centric approach. This can also be practically important for the institutions in promoting ADR by highlighting the special features.

Furthermore, it is also vital to draft an adequately detailed 'MedArb' agreement at an early stage to avoid issues during the process. Carol A Ludington believes it could smoothen the process with proper instructions to the neutral, mitigate dissent, and enhance

enforceability (Ludington, 2017, p. 321). The practitioners who engage in drafting agreements could encourage the parties to utilise this in order to yield the benefits it receives.

In terms of professional interactions and development, drafting a guide on the role of the MedArbitrator including professional ethics and best practices would be beneficial. The MedArbitrators should possess the necessary skills and be knowledgeable of the techniques. He must be well-versed in both mediation and arbitration (Weisman, 2013). Even those who had been already trained in mediation and arbitration could be trained under such an initiative to embrace this new development without a hostile approach. Especially arbitration is based on a comprehensive legal basis compared to mediation, and this distinct nature should be well identified. Therefore, a MedArbitrator should also be able to learn and unlearn certain facts in playing the different roles in order to preserve the trust of the parties (Weisman, 2013, p. 40).

Addressing some of the substantive challenges within the process is also a major concern. For example, as Weisman explains, the issue of confidentiality can be overcome by explaining the strategy and position of the neutral in dealing with the information exposed in the caucus sessions (Weisman, 2013, p. 40). Therefore, parties should be informed about the process, and a voluntarily chosen MedArb can be a suitable, efficient method of dispute resolution. Furthermore, one way of methodically addressing this issue could be by introducing protocols as Abramson did in his 12 for protocols for international arbitrators and adopting them both by the parties and

the neutral (Abramson, 1999, pp. 8–15). This type of protocol must address the aspect of all stakeholders, including willful consent to utilise the same neutral, preserving party autonomy, honouring the resolution derived from the process, etc. (Sussman, 2009, p. 73). In a practical sense, many of these are possible if all stakeholders in the MedArb process have realised the true meaning of it. For example, a neutral who knows the objective of it would never allow undermining the party autonomy which is upheld in the arbitration to be destroyed in mediation as well. And also, a protocol that mandates to honour of the decision at the end should be embraced and enforced by the parties of the dispute who value the decision at the end voluntarily even before enforcement.

According to Alexander, mediation conducted within an arbitration framework, especially where the mediator also acts as the arbitrator, takes on a unique dynamic. Rules are required that specifically deal with issues that emerge around confidentiality, natural justice, and other matters as one process transitions into the other (Alexander, 2013).

In addressing concerns relating to confidentiality, Edna Sussman suggests having the mediation without the caucus sessions, conducting the arbitration separately and keeping it under seal until the mediation finishes, having two party-appointed arbitrators to co-mediate the dispute and a chair to be involved in the arbitration especially if the dispute is not solved at the end, allowing parties to appoint separate mediator and arbitrator (Sussman, 2018). She further highlights the importance of maintaining the same issues of neutrality in

both aspects to achieve a high efficiency level (Sussman, 2018). As observed, many of these recommendations can best be implemented through the intervention of the institutions. The institutions of IADRC, ICLP, and SLNAC have a huge role to play in reshaping the ADR landscape for a better future. Therefore, this paper recommends the above changes within the landscape in terms of institutional, professional, and disputant engagement and management rather than merely crafting statutory reforms in utilising MedArb in Sri Lanka.

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