Mediation in Resolving International Commercial Disputes

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Abstract

This research paper talks about the impact of mediation on international commercial disputes. The study covers several sections of the topic. The first section is the introduction, followed by the importance of the study. The third and fourth sections are the target of the study and the research method used. Lastly, the study concludes with a discussion and conclusion. The subsections include a research plan, an introduction, an understanding of mediation, which includes the characteristics of mediation and the advantages and disadvantages of mediation. The section that follows is on mediation in international commercial disputes, which has a literature review and a conclusion that summarizes the impact of mediation in international commercial disputes. The sources were selected according to relevance, dates, and credibility. Finally, the study is organized in a manner that allows the ideas to flow from one point or topic to the next.

Key words: Mediation, mediator, disputants, international commercial disputes, resolution of disputes, negotiations,

Research Plan

The title of this research paper is mediation in resolving international commercial disputes. The research paper will be guided by the following hypothesis: To understand what mediation is, how the process is carried out, and the impacts of mediation on international commercial disputes. Within this hypothesis, the study will cover some other targets, which include: The characteristics of mediation, the advantages and disadvantages of mediation, and a literature review covering the current literature on mediation resolution in international commercial disputes. The research method that has been used in this research paper was a study of case studies using the Delphi method. This method includes collecting information from preexisting opinions from already documented information on the subject.

Mediation in Resolving International Commercial Disputes

1.0 Introduction

The need for alternative dispute resolution has been evident for a long time. Business partnerships are being affected by the decisions that are handed out in court. More often than not, these cases drag on for longer than any of the parties wished. Eventually, the relationship between the two parties is shattered. The importance of this research paper, therefore, is to show how mediation as an alternative dispute resolution that covers the areas where court systems fail. It is quick, cheap, and the outcomes are often agreeable between the two disputing parties. Mediation, therefore, is one of the alternative dispute resolutions that parties involved in a dispute turn to for resolution.

The target of this research paper will be to explain what mediation is, how the process is carried out, and the impacts of mediation on international commercial disputes. This research paper will begin by reviewing mediation in general as a process. It helps the reader understand what is meant by mediation, then goes ahead to point out the characteristics of the process. After this step, the article will analyze the advantages of mediation. These advantages help the reader understand why the process is preferred to others in its category.

This research paper will also cover the research method and plan used in finding the information within this research paper. This section includes a literature review that covers the current knowledge about mediation. Finally, the study will cover the results and discuss mediation as it concerns international commercial disputes, which also ties into the discussion on the impacts of mediation in this field.

2.0 Understanding Mediation

Mediation is a conflict resolution strategy that has been covered by a host of scholars over the years. According to Abramson (1998), mediation has been a tool at the disposal of many lawyers for a very long time. However, the author continues to state that even though mediation is a viable option in settling disputes, its application has been limited. The benefits of mediation are also documented in several articles and reviewed by conflict resolution experts. According to the author, the settlement rate for mediation in cases, especially those involving domestic conflicts, is 70%, a record higher than all other conflict resolution strategies. Despite these numbers, mediation has not been applied as much as one would think.

While mediation is an effective tool in resolving non-violent conflicts, it has been extensively used in resolving interstate conflict. Gartner (2014) reviews the use of mediation in resolving interstate conflicts and comes up with the conclusion that, in non-violent conflicts, arbitration and adjudication are the most common tools applied in resolving conflict. However, the author notes that in the case of violent interstate conflict, mediation has become the more prevalent tool in conflict resolution. A good example of the successful application of mediation is the Egypt-Israel Peace Treaty mediated by United States' President, Jimmy Carter (Berenji, 2016). The mediation process lasted for 16 months. This lengthy period proved to be worth it when weighed against the over 30 years of peace that the two nations have enjoyed due to the treaty.

Mediation also fails. The United Nations (UN) Security Council Resolution 47 failed in the application of mediation techniques when it was called upon to resolve the Indo-Pakistani War over Jammu and Kashmir (Westcott, 2020). According to the author's analysis, the negotiations failed because the United Nations Security Council limited the choice of the two

parties in the war to ascend into either Pakistan or India. The indecisiveness and lack of enthusiasm and effort on the part of the UN were partly due to their restrictions on interfering with state affairs. Every party in mediation is allowed self-determination; the freedom of one to make choices, which can be counterproductive as was experienced in this case.

Therefore, these two instances bring out some interesting perspectives of mediation. At the same time, they begin to explain to the reader how mediation functions. In both cases, there is a third party that helps to bring both parties to the table. U.S. President Jimmy Carter helped to broker peace between Egypt and Israel, while the U.N., despite failing, was the third party in the negotiations for peace. The other aspect that is common between the two is that no party dominates the other during these negotiations; the principle of self-determination is upheld during negotiations. The third-party acts as a balance between the two but does not force them into anything. These are some of the characteristics of negotiation.

2.1 Definition and Characteristics of Mediation

Mediation is a process of resolving conflict in which the decision-making process is a joint effort that is controlled by an outside party called a mediator. According to Gartner (2014), the powers of a mediator are very limited in that they do not have the authority to dictate the final decision or outcome of the negotiation. Their job, as the author states, is to facilitate. Mediation is a process that may prove to be very difficult or simple, the governing factor for the scale of difficulty is the context of the dispute. Each dispute is unique in that the circumstances surrounding it vary. These circumstances include the “actors, their communication, expectations, experience, resources, and interests” (Gartner, 2014, p. 273). Therefore, while all these factors may affect the process, the final decision must be made by the disputing factors.

A proper definition of mediation, therefore, must encompass all these aspects. Bercovitch's definition of the term mediation thus encompasses all these factors. He says that mediation is:

"process of conflict management, related to but distinct from the parties' own efforts, where the disputing parties or their representatives seek the assistance or accept an offer of help, from an individual, group, state or organization to change, affect or influence their perceptions or behavior, without resorting to physical force or invoking the authority of the law"(Bercovitch, 2003, p. 7)

This definition covers a range of factors that influence the process and the outcome of any mediation. Additionally, the definition also highlights a few of the characteristics of mediation.

2.2 Characteristics of Mediation

The mediation process has one unique characteristic; the process is voluntary. The process of mediation is governed by the goodwill of the disputing parties to come to an understanding. The disputing parties have ultimate control over the negotiations, which means that a party can choose to walk away from the negotiation table at any one point (Tarman, 2016). Additionally, the parties have no duty to uphold the agreement that they reach during the negotiations since the process is entirely voluntary. They can, therefore, go back on their word or choose to uphold the agreement. This value in letting the parties decide their outcome is self-determination, which is a right that the mediator should exercise over the proceedings.

Thus, a mediator forms the other characteristic of mediation. A mediator is a skilled professional, often a lawyer, who oversees the proceedings of the negotiations. A mediator has no power to adjudicate. Their sole responsibility is to try and help the parties come to a reasonable agreement where both parties feel satisfied with the outcome. A mediator, therefore, must have a particular set of skills to help them in carrying out this task, the most important ones being people skills, patient, persistence, negotiation techniques, and the ability to articulate. All

of these become an arsenal of tools that the mediator will need to apply when they are overseeing mediation proceedings. The type of mediator changes according to the disputing parties' wishes. One can choose an individual, for example, Jim Carter in the case of Egypt and Israel, a state, a regional organization, or an international organization, for example, the United Nations in the Indo-Pakistani War.

Disputants are also a characteristic of mediation. The kind of disputants is also not limited to states only. One case may have a state and non-state actor as the disputants, while the other may have two states as the disputants. Individuals too may be recognized as the disputants if they willingly participate in a mediation process. Disputes may also arise between more than two parties, in which case, the process of mediation becomes more complex. Third parties may be called in as either mediators or allies. Allies often come in to support their allied party, offering points to try and get a better deal for the participants.

2.3 Advantages of Mediation

One of the most significant advantages of mediation is the ability to retain their relationship. Many disputes arise from parties that had a pre-existing relationship that was beneficial to both parties. Mediation is a tool that benefits such relationships in that they are maintained after the process is complete. The reasoning here, as Tarman (2016) puts it, is that the conclusions to the disputes are arrived upon voluntarily, which means that both parties feel satisfied with the outcome. In different words, one would say that almost all disputes resolved through mediation end up in a win-win situation since no one would willingly enter an agreement that does not benefit them. Therefore, the disputing parties leave the negotiation table feeling satisfied with the outcome, and since no party is forced into the negotiations, or forced to comply with the agreement, then the gesture of good faith between the parties helps maintain and

create better relationships. Avoiding public court cases and disputes also help to hold down these relationships.

In the description of mediation, this research paper covered a complex interaction of factors that influence the outcome of a mediation process. Among these factors was the influence that each party holds over the situation. States influence each other and, in the process, influence the process of mediation, which means that every party can decide where and how the talks will be held. This is an advantage in that the parties enter the negotiations with the peace of mind that their demands will be met. Aside from selecting the location, parties also have the freedom to select a mediator and other parties that will be allowed to attend the negotiations. Having control over the process contributes to getting a satisfactory result.

Another advantage that is often overlooked is the cost of proceedings of mediation as compared to other adjudicative methods. Cost sums up several variables, among them being monetary expenses and time factor. Mediation allows the parties to present their cases in an informal setup, which means that it does not follow any legal proceedings (Tarman, 2016). Several costs are eliminated by not having an adjudicative procedure, for example, using expert witnesses, preparing for a court case, and paying for legal counsel. Furthermore, the mediation process can be very short or very long depending on the disputing parties. In most cases, the procedures are shorter than most court proceedings because there are no representatives, just the mediator and the disputing parties (Tarman, 2016). Therefore, the resources used are considerably less than in other conflict resolution problems.

In addition to being an informal setup, mediation mostly deals with non-litigious disputes, therefore, the resolutions can be in different forms. Judges and juries often think of compensation in monetary terms for civil cases, which is often according to the law. However,

what dealing with an informal setup, the resolutions are limited only by the imagination of the disputing parties and the mediator (Tarman, 2016). Since the parties have to agree, then they can decide on anything that they see fits the situation. Everyone's opinion is considered, which is unlike other modes of negotiation.

One other advantage that can easily be overlooked is the avoidance of arbitration and litigation processes. Mediation often ends in a settlement, which removes the need to seek legal intervention. These processes often damage relationships, but since the mediation process is entirely voluntary, the parties are not any worse than when they started the negotiations. Furthermore, if mediation was to fail, the parties still would have an option to seek arbitration or litigation. These other processes, on the other hand, are the final step, which does not always provide a satisfactory outcome, meaning that the source of conflict may not be resolved. Mediation, however, even in the case of failed mediation, offers some answers to the disputants, which can be used to either maintain or build relationships.

2.4 Disadvantages of Mediation

The main disadvantage of the mediation process stems from the lack of formalized procedures and rules. This set of practices are designed to act as a system of checks and balances that are meant to protect the parties involved in the process or conflict resolution. For example, the parties involved in a mediation process do not have any form of recourse in case they discover tampering of a case (Tarman, 2016). The process is confidential and no records are kept, which means that one cannot seek any further intervention. Ruling out an agreement because it was reached upon by fraud, duress, or other legal defense to a contract is not possible since the resolution is reached upon through an agreement, which cannot be appealed. This means, therefore, that the outcomes of mediation are inconsistent, unpredictable, and unreliable

(Tarman, 2016). This can be explained in that the rules set out in other formal proceedings are made to create some form of order, which then makes the predictability of the outcomes almost possible to predict and within a reasonable bracket. Furthermore, even though the mediation process consumes fewer resources as compared to other conflict resolution strategies, the process of appeal means that these total costs become more than one would initially have accounted for.

Finally, the question of enforcement due to jurisdiction comes into question. International mediation and litigation both suffer from enforceability issues since the matter of jurisdiction is not applied when making agreements. One, thus, questions whether the resolutions made can be enforced in another without legal issues.

3.0 Target of the Study

3.1 Mediation in International Commercial Disputes

Recent statistics have shown a rise in the number of disputes being resolved through mediation. According to Vanisova (2019), the number of steps and initiatives being put in place to increase and improve the use of mediation in commercial disputes has increased. International organizations such as the International Criminal Court (ICC), China International Economic and Trade Arbitration Commission, and the World Intellectual Property Organization that previously relied on international arbitration are now focusing their efforts on creating a system that promotes mediation across borders.

Historically, the practice of trade has always been tied to legalities and contract law. This can be established from the term “negotia” which in Latin, means business. The practice of enforcing the law when it comes to business was adopted from Ancient Greek and Roman culture, resulting in the Magna Carta’s guarantees and later the English common laws, which ensured commercial certainty, good faith, fair dealing, and the enforceability of seriously

intended promises. The world today, however, is switching trends to a quicker, less strenuous way of resolving commercial disputes that do not include the need for court proceedings.

Currently, nations in Europe, the United States, and the United Kingdom are taking up mediation as part of legal practice. In the United States, for example, the Model Law of the United Nations Commission on International Commercial Mediation became decisive in 2002 after the first alternative dispute resolution laws were passed by the European Union in the 1990s (Mayurov et al., 2019). The employment of mediation as a method of solving disputes was classified as an alternative dispute resolution method under the Joint Commission on Alternative Dispute Resolution in 1970, and later in 1972, the "Society of professional mediators in the field of dispute resolution" was formed. However, despite these advancements, some nations still fail to employ the use of these techniques.

4.0 Research Method and Plan

As earlier stated, this research paper uses case studies to try and cover the information gap about the topic. This research paper will analyze information from different articles, websites, books, and other credible material that have talked about the varying aspects and areas of the topic. It does this through a review of the existing literature on the topic.

4.1 Literature Review

A literature review will help one understand how much is known about the place of international mediation in commercial disputes. One common theme that turns up among several articles is the success that has been attached to the process of mediation. Many authors, who work in different fields, attest to the brilliance of using mediation as an alternative dispute resolution technique (ADR). One of these authors is Professor Harold L Abramson. In his lecture on "Time to Try Mediation of International Disputes," he offers several reasons that propose

why lawyers should focus on using mediation. Granted that this article was written in 1998, it is astonishing how fast mediation has been incorporated into solving international commercial disputes.

As earlier stated, the United States recognized mediation as a viable option for commercial dispute resolution in the 1970s, which was followed by the EU in the 1990s. This means that in the few years that the process had been tested, it produced viable results that warranted the attention of professors such as Harold L Abramson in 1998. According to Abramson, mediation in commercial disputes has resulted in a 70% settlement rate, which is higher than the other forms of settling disputes (Abramson, 1998). The value of mediation in trade is recognized by its ability to keep trade running.

Take, for example, trade between the United States and Xssanzou Iron and Steel Company in China. The Chinese import microchips from the United States and uses them in the manufacture of several devices. If on one occasion the chips imported from the United States were faulty, then Xssanzou Iron and Steel Company noted this fault after recording a loss, and the United States denied supplying faulty chips, the next step in such a situation is often to close down trade and prepare for a legal battle. In such a case, the losses that would accumulate during the process of trying to get their case heard and preparing their cases would often leave the relationship of the two international companies disrupted. Additionally, no one would want to reach into their pockets to pay for the fees associated with a legal battle.

Such situations and the adverse effects of legal battles are what many authors have attributed to the rise of mediation as an alternative dispute resolution. Alternative dispute resolution (ADR) has come up as a way to avoid many of the issues that are associated with legal disputes. However, the World Bank has come out to clarify some of the assumptions that many

people have made when talking about mediation. The first thing the World Bank does is to clarify the definition of ADR. ADR is any process other than adjudication by a presiding judge in a court in which a third party comes in to assist in the resolution of an issue (Rozdeiczer & de la Campa, 2006). The authors, however, go ahead to point out that rather than providing an alternative to litigation, mediation should be seen as a process that seeks to enhance or modify the existing processes. Mediation does not replace arbitration and litigation completely.

The end goal of mediation in commercial disputes is not to replace the legal system that has been set in place, rather complement what is already there. Mediation provides a choice for the user. In the example stated above, one option for the two parties, Xssanzou Iron and Steel Company and the United States, would be to try and find a solution in court. However, the fallout from a court battle will lead to the loss of more business than any of the two parties would want. It would also cost them far more than the losses that both had already accumulated. Rozdeiczer & de la Campa (2006) and Tariq (2012) would suggest mediation but not as an alternative to the justice system, rather an appropriate dispute resolution. This means that mediation is not a process to come in and take the place of arbitration and litigation, it only offers a more suitable solution to the current problem. This is the reason why many articles state that in solving international commercial disputes, mediation is the more appropriate dispute resolution (ADR).

With many business ventures collapsing between five to ten years, it is important for international parties going into such a venture to include a dispute resolution clause. Without such a clause, the legalities of dealing with foreign courts become a challenge. In local business partnerships, the court structure is well established, which means that an application for a court

hearing is straightforward in the case of a dispute. For such a clause, therefore, Abramson (1998) set out five provisions.

The first provision is in regards to mediation. The difference in cultures between different nationalities and company policies should be taken into consideration when negotiating a mediation clause. Every business enterprise may have a varying meaning of mediation, which may not exactly fit in with the definition of the other. These differences are common in local commercial disputes, and the range of differences is even greater in an international community. One variation as Abramson (1998) notes is in the number of mediators present. Some assume that each party calls in a mediator, who then agree on a settlement. Such issues need to be ironed out even though the international recognition of mediation as a valid ADR has helped in clearing up this definition.

Secondly, parties should put it in writing that mediation would be the first step before moving on to arbitration. This clause, however, can be abused or undermined in two ways. One party may decide to unduly delay the adjudication, and the second is a party trying to avoid mediation (Abramson, 1998). Promising to participate in good faith is not satisfactory in this case since it will lead to an argument of whether one party participated in good faith or not. Therefore, a proper structure needs to be set out. For example, each party has to attend at least one mediation seating, after which the process is voluntary, setting out a timetable, or having rules for breach of contract. All these, however, are also voluntary.

Thirdly, while international rules prohibit a mediator from serving as the arbitrator for the same dispute, parties can agree whether they would allow it. The challenge in having an arbitrator as the mediator is that these roles are very different, which means that the confidence of the parties in the mediator will waver. Additionally, the mediator may find it difficult to

differentiate between the two roles, thus compromising the process. However, having the same person as an arbitrator saves time and resources that would be used to educate an arbitrator on the situation should mediation fail.

Fourth, the parties are allowed to create or modify the rules set out in mediation to fit their needs. Many delegations have a fixed system in which parties are supposed to fit into and find a solution. However, in the case of an international commercial conflict, the parties should agree that at the point of mediation, they would be able to change the system to fit their specific problem. Additionally, in merchant and state commercial, the parties can create a solution that fits their needs. The solutions to such negotiations can be creative, to cater to the needs of each merchant. This point ties into the last clause that requires that mediation be part of a broader dispute resolution clause. This ensures that there are other measures to be taken when mediation fails.

5.0 Discussion and Conclusion

From the analysis on mediation and mediation in international commercial disputes, one can derive some impacts of the whole process. The first and most evident impact is that mediation is a more viable ADR in international disputes as compared to other forms of resolving disputes. It is evident from several authors that mediation is the more appropriate ADR. The settlement rate of mediation has proven to be higher in commercial disputes as compared to other forms of settling disputes. Additionally, the malleability of the process has made it so that the parties involved in a dispute can come up with a solution that does not conform to the normal monetary settlements and compensations that are rampant in court cases. This has been explained in that the solution to a dispute between merchants and a state would be fashioned to serve the interests of both parties. More to that, mediation is also a popular ADR

since it helps repair, maintain or grow business relationships. This is evident from the voluntary participation clause that governs any mediation. The simple gesture of mediation out of good faith goes a long way in mending and strengthening business relationships.

The other impact that is present from this analysis is that mediation has reduced the overreliance on courts. One of the most significant issues raised in this research paper with regards to adjudication is how long it takes to get a court docket. Courts are overburdened, which means it will take longer for international cases to be heard. Additionally, the complexities of trying an international commercial case in foreign courts are numerous. Mediation, on the other hand, does not rely on court proceedings; the process is informal and is held in an informal setup that is decided by the disputing parties. Additionally, there is no judge; the resolution is reached by an agreement between the two parties through the guidance of a third party. This independence has been adopted in several nations across the world and has made mediation a universally acceptable ADR. The impact, therefore, is that disputes can be resolved much faster and cheaper as compared to when disputants have to rely on adjudication.

These two impacts cover the thesis of this research paper; they explain what mediation is, how the process is carried out, and the impacts of mediation on international commercial disputes.

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