RECENT TRENDS AND CONTEMPORARY ISSUES IN INTERNATIONAL COMMERCIAL MEDIATION

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Abstract

"The business of Business is Business, not litigation" as has been rightly put in words by an American Judge. International Mediation in commercial disputes is a promising premise, beyond commercial arbitration. The purpose of this paper is to identify the distinctive characteristics of International Commercial Mediation and its expediency in diverse cases to encompass judicial infallibility.

The paper employs an exploratory method of research to study the growth of Mediation as a preferred form of Dispute Resolution over Arbitration attributable to its cost effectiveness, confidentiality, flexibility and numerous other factors. However, mediation is still met with profound ignorance and considerable suspicion by commercial organizations owing to a lack o International Legal regime pertaining to Mediation, unlike International Arbitration. Nevertheless, the imaginable route to an acceptable solution provided by Mediation makes it a favored dispute resolution method. Interest-based mediation has been described as the life's-blood of commercial dispute resolution in common law countries such as the United States and the United Kingdom, lies like a sleeping giant in most of Europe, China and the Indian subcontinent – markets that literally define the future of global commerce

The study aims to study the challenges posed to Mediation in the race of the 'Most preferred form of ADR method in International Commercial Disputes'. Paper discusses the complexities arising due to lack of enforcement measures in the system, which proves to be a bane and a boon. Dearth of 'concrete' precedents in commercial mediation also detracts parties in disputes. The paper also studies practical challenges in the way of commercial mediation with respect to the strategies, training of mediators and mediation facilitating organizations.

Conclusively, the paper is also suggestive of a new legal framework in the International Commercial Mediation with respect to Enforcement of Settlement Agreements. Proposal for convention to enforce settlements in Cross border disputes including its scope, diversity in practices.

Keywords: *Mediation, Commercial Disputes, International Arbitration, Legal framework*

INTRODUCTION

Disputes in cross border context have been resolved by application of International commercial arbitration since long. However, the international corporate community has become disillusioned with the preferred method due to multiple concerns involving enormous expenditures, time laches and procedural formality. Consequently, the parties are constantly looking for other alternative modes of dispute resolution, of which the next most popular medium is Mediation.

The corporate community is resorting to traditional consensus based mechanisms to resolve transnational business disagreements, which involved mechanisms like Mediation and Conciliation. These were often the most preferred methods in the first half of the twentieth century, until World War II , after which arbitration turned out to become a more popular and accepted method of resolving cross-border business disputes.

The clear reason for the clear shift from Mediation to Arbitration was earlier attributed to lack of institutional support for accord based resolution of disputes during twentieth and early twenty-first century. However, it was further observed that rules relating to International commercial conciliation and mediation have been continuously in place as provided by International Chamber of Commerce (ICC), which recently came into effect in the Year 2014. UNCITRAL (The United Nations Commission on International Trade Law) Conciliation rules have also been in place, but have not been adopted by parties with approach similar to Arbitration. Thus, it can be deduced that the shift in preference to arbitration is not an outcome of dearth of institutional or structural support.

However, there are larger factors involved in this reposition which comprise of the elaborate schemes of international treaties premeditated to advance International Commercial Arbitration in the years followed by World War II. However, rules relating to International Commercial Mediation principally survived as a form of 'Soft Law'.

An edifying inclination towards adjudicative modes of dispute resolution mechanism has been a considerable issue, at least in Western Legal systems. Identification of concrete reasons for preference of Arbitration by parties in commercial disputes has still not been done comprehensively, but there are certain issues which drive parties and practitioners to prefer Arbitration over Mediation.

The significance of Mediation can be explicitly understood by studying its crucial advantages over litigation techniques. The cost-effective nature of Mediation as against litigation has been proved time and again as was also observed in the *Halsey* judgment. The wide plethora of solutions available in the process of mediation than those in litigation, like an apology, an explanation, most important factor in a business relationship involving continuation of an existing professional relationship or an agreement by one party to perform certain function without any present legal obligation to do it.

In terms of International commercial disputes, a need to raise awareness among international organizations, lawyers in the global scenario is observed and it is to be further concluded that costly litigation or arbitration are not the only effective ways to resolve disputes, rather clarifications provided by Mediation are quicker, less costly and obtained through more imaginative routes.

STRUCTURAL ASPECTS OF INTERNATIONAL MEDIATION

Like a Mediation process for any other category of dispute, a commercial mediation is initiated with the signing of a confidentiality agreement, also including a basic introduction of the Mediator and all the parties and their representatives. A discussion relating to the format of Mediation and the limitations to which the parties have agreed, and a confirmation with respect to understandings from all the parties is obtained.

Each party is required to present an opening statement which is to include common facts, areas of dispute, legal theories, narration of damages, production of evidence, theories of liability and debate relating to the negative impacts of the problematic situation on both the parties. An opportunity is provided to both the parties to submit the given statement or direct the representative to do so. After both the statements, the mediator usually recapitulates the gathered information, neither agreeing nor disagreeing with any of the elements, simply understanding the positions of the speaker. This stage usually focuses on precise understanding of the presented information and not with the accuracy of the analysis of the information.

The subsequent stage comprises of process where the mediator initiates a procedure of caucusing confidentiality with each side to the dispute, in isolation. The parties, at this stage have already presented their rights, liabilities, obligations and damages and have heard the same from the other party. They are aware of their strengths and weaknesses in the situation and are also aware of the hurdles in the evidences and are equipped at this stage to draw up preliminary conclusions about the same. This increases their receptivity to absorb in new information and opposing perspectives. This holds true with respect to simpler two-party disputes as well as highly complicated multiple party cases.

At this stage, the Mediator gains additional information from both the parties, providing them a second tier of confidentiality where the mediator cannot disclose this piece of information to any other party without their consent. This information makes the mediator, a broker of perspectives and not of information. Consequently, the Mediation reaches a stage of risk analysis, the most difficult, resisted and most useful part of Mediation.

Consequently, the Mediator discusses the available options with the parties, and makes them aware of their agreeability, in the given scenario by the different parties in the mediation. The parties are always equipped with the option of leaving or receding, if none of the resolutions provided are palatable by either of the parties.

It is of due consideration that the Mediation serves a dual objective where closure of the matter is the ultimate purpose of the process. However, where the parties are unable to conclude the matter, the mediator can schedule a second mediation with the parties' consent. Subsequently, after reaching a decision, an agreement is memorialized, the parties start carrying out their

obligations as provided by the new agreement which may also make available a mode of resolution in case of any further misunderstanding or dispute between the parties.

Mediation- Less Preferred Element of International Policy:

It is unfathomable that the approach of Mediation is a rare usage in international business relations and international commercial relationships. A speculated reason is a common belief among the international policy makers that a third party will prove as a hindrance to their self-sufficiency. However, some shun this reason stating the obvious controls of safeguards of confidentiality binding the mediator, non-dissemination of strategic information and control of the outcome ultimately lying in the hands of the parties.

Another conjecture revolves around the issue of perceived lack of neutrality of the third party. However, this issue takes a more serious turn in case of International Arbitration around the arbitrators, who are burdened with the responsibility of not just facilitating discussion but also delivering decisions and awards. However, the way to overcome these concerns, the trainings can be imparted to help achieve specialized skills in the area of impartiality, objectivity and neutrality, much like the training received to gain expertise in law, medicine and various other professions.

Modes of settlement like Mediation, negotiations provide a medium to nip problems at the budding stage, prevent intergovernmental sanctions, armed conflicts, diplomatic punishments or any other forms of retaliations. It still remains inexplicable that such a peaceful method is not often called into usage to provide the given benefits in international disputes.

Relevance of Mediation in International Commercial Disputes:

It is established that not all disputes are suitable for resolution by Mediation[1]. However, mediation turns out to be appropriate in certain situations like where there is a prospective for conserving an ongoing commercial relationship; where the main issue revolves around the determination of damages or a critical dispute relating to liability or an issue of principle;

[1] Barry Edwards, Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs, 18 HARV. NEGOT. L. REV. 281, 295–303 (2013); Nolan-Haley, Mediation, supra note 3, at 63–64; see also INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION (CPR), ADR SUITABILITY GUIDE (2001), available at http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Tools/cpr%20suitability%20guide. pdf.

requirement of a legal precedent is done away with; stakes are huge; the settlement is a better option than unreasonably expensive litigation; or an imaginative solution is required in the situation.

Case studies point to the fact that behavior of parties and counsels to commercial disputes differ in their behavior from the parties in other kinds of matters of disputes. Further, contentions have also been put forth pointing that parties are often unable to put aside their adversarial inclinations in international commercial disputes. Cross boundary issues in International Commercial Mediations distinguish them from other domestic matters due to cross culture concerns. Solution to this is found in expert, experienced and knowledgeable mediators, who are totally competent to overcome these discrepancies in cultural backgrounds.

The number of participants in International Commercial Mediation is usually greater than in domestic matters. It is a subject of debate where it is still in question that whether this increase in complexity of number of participants is an impediment or an inducement to the process of mediation. The issue poses an obstacle in terms of conclusions relating to choice of law, cross border regulatory issues, jurisdictional matters, extraterritorial application of evidentiary benefits and also relating to enforcement of final awards or verdicts. The ever-increasing prevalence of multiparty and multi contract transactions in the international realm add to the increasing complexity[2].

Aforementioned factors act as a deterrent[3] in the vision of many international parties for preferring Mediation over other fast, simple and inexpensive methods of dispute settlement. However, this does not indicate towards inappropriateness of mediation in international commercial disputes, it simply points to existence of other rationale of parties involving themselves in complex, multiparty mediation matters.

[2] Irina Balytsky, Kyle Gibson, Miles Painter, Lyndsey Romick, Adrienne Toumayan, Literature Review and Report, Pathways to Sustainable Mediation: Challenges and Opportunities

[3] David A. Hoffman, Mediation, Multiple Minds, and Managing the Negotiation Within, 16 HARV. NEGOT. L. REV. 297, 302 (2011) (suggesting that mediation of some kinds of complex disputes may take months, even years)

CHALLENGES FACING MEDIATION IN INTERNATIONAL REALM

Mediation practice in international relationships has undergone significant transformations[4]. International mediation is a massively important activity in terms of its potential effects on social, political and humanitarian aspects. Often, it serves as the only viable option to bridge the gaps between hostilities and peace, and sometimes even provide a platform for reconciliation between the parties, reconstruction of contracts/ agreements and even state-building.

Challenge of complexity:

The most essential elements of mediation include consent and cooperation[5] among the parties in dispute and are the ingredients of a productive mediation process and a positive outcome. This cooperation is not just between the parties, but also with the mediator. The skillfulness of a mediator is complimented with an amalgamation of these factors. It is significant to note here that in international civil disputes, mediators are met with uncooperative, intransigent, adversarial and bellicose parties and leaders. They often come with the mindset of irreconcilable differences and non- negotiable demands, and envision the negotiated settlement as unimaginable.

The challenges posed to the mediator are further complicated by the clouding of the issues by ideological or religious dogma and various decisions of the parties are made on their basis. This amalgamation of hardheaded, emotional, ideological and existential considerations poses as an impediment in the decision-making ability of the mediator.

Multiplicity of Actors:

Addition of regional and international dimensions, the task in the hands of mediator becomes seemingly difficult due to the unattainable charge to convince the parties to act contrary to their earnest convictions and perceived best interests. The presence of multiple actors, which are not the parties to the conflict but have considerable influence and involvement in the situation,

[4] S. I. Strong,Beyond International Commercial Arbitration? The Promise of International Commercial Mediation, 45 Wash. U. J. L. & Pol'y 011 (2014), http://openscholarship.wustl.edu/law_journal_law_policy/vol45/iss1/7

[5] The UN Secretary-General ,UN, 2012, Guidance for Effective Mediation, New York, pg. 4.

imposes upon the mediator, the obligation to traverse diverse diplomatic channels to dissuade these players from reinforcing hostilities.

In civil conflicts, secondary actors including local civil society groups, religious formations, traditional leaders, women's associations come into play and often hinder the process of mediation by demanding attention and participation. United Nations has also recognized that this imperative of inclusivity of these secondary actors makes the mediation process more complex and overloaded[6].

Adding to the aforementioned factors, the mediator is also concerned with the constant interference of 'friend' states, which are present due to economic, strategic and political reasons. A divided principal poses a severe predicament for the mediator, which savvy parties are bound to manipulate, diminishing her authority and leverage.[7]

A set of donor countries, in return to the invaluable aid to the peacemaking process, force the mediator to speed up the procedure, not paying consideration to its impracticability and its counter- productive nature. This group of governmental, non-governmental, regional organizations is always jostling around to become a part of the process. These selfish motive driven parties are difficult to be managed by the mediator, without losing the sight of the primary actors of the play.

Structural Disabilities:

Unlike mediators in political and community disputes within a stable democratic country, mediator in an international dispute has to steer through turbulent and uncontrolled environment. Reliance cannot be placed on domestic legislations, authorities and precedents for this resolution. The role of an impartial referee is bestowed upon the mediator, which is often viewed as spectatorship by the participating countries. Presence of international and regional conflicts often requires the mediator to employ different strategies and approaches which suit them.

[6] UN, Guidance for Effective Mediation, pg. 12.
[7] J. Michael Greig, 2013, 'Intractable Syria? Insights from the scholarly literature on the failure of mediation', Penn State Journal of Law and International Affairs 2(1), pp. 48-56. 10.

The international mediator is frequently required to reconcile the adversaries, cater to their diverse perspectives, and also facilitate tough bargaining, bring technical expertise from other countries.

SUGGESTED AMENDMENTS IN THE CURRENT LEGAL FRAMEWORK

The current scenario with respect to International mediation is not entirely satisfying. The aforementioned obstacles to contemporary mediation process have to be overcome to make Mediation, the most preferred method in international disputes. Following key suggestions have been provided to be made in the current legal construction:

Outreach and Mediation in the Media:

The key to changing preference is to increase popularity of mediation services. Abysmally low awareness among the public acts as a bar to greater utilization of mediation. Organization of outreach campaigns to motivate this culture of alternative dispute resolutions through mediation in international realm will act as a catalyst to achieve the set goals. Development of outreach strategies by international bodies like UN may serve as a stepping stone towards the objectives.

Mediator Quality and Credibility:

The qualitative aspects of a mediation service entirely depend on the credibility and quality of the mediators. The failure of mediation to gain its due official recognition and support from established international institutions has failed in providing the requisite credibility and effectiveness to Mediator and mediation services respectively.

There exists a need for establishment of a legal institution to officially grant the training for expertise in mediation of international dispute by setting quality assurance standards and other practices. A progressive approach towards establishment of these high standards in terms of training and skills needs to be adopted.

Engaging Judiciary and Legal Professionals:

Members of judiciary often act as gatekeepers to the services of mediation. However, in majority of cases, they often present retaliation to the usage of mediation. This may be a result of misinformation of the judicial professionals; hence instead of promoting and advancing mediation, they offer resistance to it.

Monitoring and Analysis:

To manage the complexity of mediation in an international conflict, a proper structural monitoring and analysis of the mediation system is required. Mediation teams of countries in dispute should have devoted definite units for monitoring and analysis, where their priorities, expertise and methods should be defined in consultation with UN peacekeeping operations.

Using Public International Law to promote International Commercial Mediation:

The usage of Public International Law includes two main aspects which make mediation as a process of dispute resolution a failure- Enforcement of a Mediation Agreement and Enforcement of settlement agreement.

Conventions should pay heed to the enforceability of mediation agreement. Following the footsteps of the Arbitration realm, it is necessary that the domestic, national and regional laws are in consistence with the international laws, hence the new legal framework enforcing the mediation agreement should be made keeping the same in consideration.

Secondly, formation of a new convention should be done to address enforceability of a settlement agreement in international commercial mediation. Opposing views are also in the air, against the mandatory enforcement of settlement agreement, as it is a consensual process and voluntary nature provides it the uniqueness.

CONCLUSION

Interest in International mediation seems to be growing more than ever, in developed and developing states alike. However, the distinguishing features of domestic and international disputes and in their modes of resolution are to be taken into account by the participants. These

features including complexity of the matters, cross-cultural issues are to be considered before opting for mediation in these situations.

The paper also conclusively suggests that preference for mediation over international arbitration and litigation may increase if enforcement of mediation and settlement agreements is made mandatory. The article also suggests some changes in the international treaty for shaping International mediation.