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The Effectivenesss of Mediation on Cross-Border Shareholders Disputes

Muhammad Saad Asghar
Saadasghar12@hotmail.com
College of Business, Arts and Social Sciences, Brunel University London

Corresponding Author: * Muhammad Saad Asghar Saadasghar12@hotmail.com

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ABSTRACT

Mediation is one of the most popular methods of resolving international commercial disputes worldwide. It is an out-of-court method for resolving disputes and is based on the voluntary participation of parties. The aim of the study was to analyse the effectiveness of mediation in the modern world as a means of resolving cross-border commercial disputes. The methodology for this research study was desk-based; secondary data collection is a common term for deskbased research. Data is collected using resources that are already available, ideally with the advantage of being more cost-effective than field research. Due to the easy access to the data through online journals and libraries, our current study examined previously published studies and reports. Mediation offers efficient and cost-effective alternatives to other alternative dispute resolution techniques. Mediation involves facilitated negotiation sessions with a neutral mediator that promote open communication and tailored solutions. Mediation ensures confidentiality, expertise and enforceability and is therefore extremely effective in resolving cross-border commercial disputes out of court. It is recommended that professionals working in the field of alternative dispute resolution give priority to developing their skills and knowledge in order to effectively manage mediation proceedings. It is also recommended that promoting mediation as an effective replacement for traditional litigation within legal and regulatory frameworks should be a top priority for policymaker.

Keywords*: Mediation; Cross-border Commercial disputes; Mediator; Dispute Resolution Methods*

INTRODUCTION

Mediation has seen a growing rise in recent times as an effective alternative method of dispute resolution (ADR), especially in cross-border commercial disputes. Unlike traditional litigation or arbitration, mediation is a voluntary and informal process in which a neutral third party known as a mediator assists disputing parties to reach an agreement upon which to base a solution. This technique is commonly applied in international commercial disputes because of its flexibility and confidentiality, cost and speed. Globalization has resulted in a proliferation of cross-border business transactions and hence the possibility that inter-parties dispute may occur between people of different legal, cultural and geographical backgrounds. With these sorts of disputes being complex and often involving large sums of money, traditional litigation and arbitration may not always be the best way to resolve them. As businesses operate more often in foreign countries, an increasing number of multinational corporations are using mediation as a preferred method of ADR to resolve disputes without having to go through lengthy and expensive litigation procedures (Gaultier, 2013).

Cross-border shareholder disputes are one of the best examples of cases in which mediation has proved to be particularly effective. Shareholder disputes in many cases involve not only legal issues, but also important commercial relationships and interests. In this sense, mediation enables the parties to maintain their relationships yet resolve issues in a much more cooperative manner. This is particularly important in cases of shareholder disputes, as in many circumstances the business partnership and the continuation of business relationships in the future are of higher concern than the actual legal victory (Goldberg & Shaw,

2010; Gaultier, 2013).
Traditional methods of resolving disputes, such as litigation and arbitration, are often unsuitable for resolving cross-border commercial disputes. They tend to be expensive, time-consuming, and adversarial, which can come at a cost to the relationships between business partners and shareholders. Litigation, particularly in an international context, can be cumbersome because of the differences between legal systems and jurisdictions, and it can be difficult to enforce decisions internationally. Arbitration, although effective in some cases, due to the complicated procedures involved, can be expensive and time consuming. Moreover, in the context of shareholder disputes, where the stakes are often ongoing business relationships, the adversarial nature of arbitration and litigation may make the process of resolving the dispute more damaging than the dispute itself. Mediation on the other hand provides a more collaborative and flexible process that is rooted in finding mutually beneficial solutions as opposed to winning or losing. Despite its growing popularity, the efficacy of mediation to resolve cross border commercial disputes, and especially shareholder conflicts, is under-researched. Therefore, this study aims to discover how mediation is a viable and effective alternative to traditional legal methods in resolving cross-border shareholder disputes (Silvestri, 2019; Zhao, 2021).

Purpose of this research

1. The main purpose of this research is to examine the effectiveness of mediation in the modern world as a means of resolving cross-border commercial disputes. To achieve this goal, the following objectives are set:

2. To analyze the main theoretical concepts and approaches to mediation in the context of cross-border commercial disputes. This includes an examination of the definition of mediation, the principles on which it is based and its key features.

3. To determine the effectiveness of mediation in commercial disputes by analysing mediation practice outcomes in selected countries/regions, explaining the cultural, legal and contextual factors that influence mediation processes.

4. To analyze the benefits of mediation as an ADR method for cross-border commercial disputes.

5. To identify the key factors that determine the successful use of mediation in intercultural commercial disputes. This includes analyzing the skills and characteristics of mediators, adapting the mediation process to specific contexts and interacting with political, cultural and social aspects to promote mediation in business.

LITERATURE REVIEW

One of the most widely used methods of resolving commercial disputes has been mediation. Defined as an informal, voluntary and flexible process, mediation involves a neutral third party (the mediator) who facilitates the communication between disputing parties in an attempt to help them reach a mutually acceptable agreement (Gaultier, 2013). The history of mediation can be traced back to ancient times, but it has become significantly more prominent due to the use of mediation to resolve contemporary disputes in the fields of business, family and employment. Particularly, international commercial disputes, in which the parties are frequently in different legal territories, has proven to be an area where mediation excels.

Mediation offers a platform on which parties with different legal, cultural, and economic backgrounds can settle their disputes without the adversarial process of traditional legal systems (Silvestri, 2019). Studies have shown that mediation is especially effective in a context in which the parties wish to maintain their mutually beneficial ongoing commercial relationships, which is often the case in shareholder disputes and cross-border business conflicts (Goldberg & Shaw, 2010). According to a report by the American Arbitration Association (2021), 75% of the participants in mediation expressed satisfaction with the process, showing that it can be used to foster collaboration and positive outcomes in the resolution of disputes.

Comparison with Other ADR Methods

Mediation, being a form of alternative dispute resolution (ADR), is often compared to other forms of resolution such as Arbitration and Litigation. One of the most important benefits of mediation compared to litigation and arbitration is that it is flexible. Contrary to arbitration which is binding and formal, mediation is non-binding and gives the parties the control over the result by giving them the opportunity to reach a tailored solution suited for their specific needs (Giacalone & Salehi, 2022). Moreover, unlike litigation which is a formal court-based process, mediation is a private and confidential process, which makes it ideal for resolution of sensitive business disputes, where confidentiality is critical.

The cost-effectiveness of mediation is another reason why it is preferred in commercial disputes, especially those that deal with cross-border parties. Litigation, particularly in international cases, can be costly and time consuming because of court fees, legal representation and long delays. In contrast, mediation is usually less costly both in terms of time and money due to its lack of extensive legal proceedings (Gaultier, 2013). Furthermore, mediation is quicker than both arbitration and litigation where most cases are resolved within the span of a couple of weeks to months while arbitration and litigation cases can drag on for years (Goldberg & Shaw, 2010).

While arbitration is often understood as a superior process, which provides a possibility of an enforceable decision, the mediation process offers the chance for parties to continue their relationship and retain their business connections, which is highly important in cross-border disputes (Zhao, 2021). Arbitration, on the other hand, is usually more adversarial and while it may not be the slowest in terms of resolution, it may not be as satisfactory as mediation which tends to focus on collaboration and understanding between parties.

Cross-Border Disputes and Challenges

Cross border disputes are highly challenging, especially where legal systems, business cultures and language barriers are so dissimilar between parties. One of the main challenges of cross-border mediation is the diversity of legal and cultural systems. Disputes arising from different jurisdictions can imply difference in legal frameworks, and it can be difficult for mediators to find a common ground (Silvestri, 2019). Cultural factors are also a significant factor in determining how to handle a mediation. For instance, one culture might have a strong emphasis on relationship maintenance, while another culture might have a strong emphasis on finding a quick and fair resolution, regardless of the interpersonal dynamics involved (Zhao, 2021).

Legal differences may also complicate the mediation process. Different jurisdictions may have different laws on the enforceability of mediation agreements. For instance, some countries might not recognize mediation as a valid method of resolving disputes or they might have restrictions on the kinds of disputes that can be mediated (Silvestri, 2019). These discrepancies can present difficulties for parties who want to resolve their dispute in a time-efficient manner through mediation.

Despite these challenges, studies have shown that mediation has continued to be an effective tool for the resolution of cross-border disputes. The use of culturally competent mediators and the adaptation of the mediation process to the specific needs of the parties can help to overcome these challenges (Zhao, 2021). For example, in shareholder disputes, given the likelihood that the parties to the dispute will have a stake in preserving a working relationship, mediation offers the option of collaborative proceedings that reduce the risks associated with adversarial proceedings.

Regulatory Frameworks

The efficiency of mediation in Cross-border commercial dispute is highly affected by the regulatory framework that governs its process. The UNCITRAL Model Law on International Commercial Conciliation (2002) and the Singapore Convention on Mediation (2020) are two leading international instruments that have revolutionized the landscape of international mediation (Richardson, 2009). The Singapore Convention on Mediation establishes a legal framework for enforcement of the international mediated agreements, making it simpler for the parties to have the results of the mediated agreements enforced across borders. Prior to the passage of this convention, the enforceability of mediated agreements was inconsistent because there was no international treaty to ensure the enforcement of settlement agreements that result from mediation. This convention has addressed a major gap of the international dispute resolution system by providing a more reliable and standardised approach to mediation (Silvestri, 2019).

In addition, the UNCITRAL Model Law has helped to develop a consistent set of standards that countries can use to regulate mediation. This law deals with the process of appointment of mediators, confidentiality as well as enforceability of settlement agreements emanating from mediation (Richardson, 2009). By fostering a sense of uniformity in the regulatory approach to mediation, these international frameworks have made it easier for parties who are involved in cross-border disputes to rely on mediation as a viable option for resolving their disputes as an alternative to traditional methods of dispute resolution.

METHODOLOGY

This study adopts a qualitative desk-based research methodology, relying on secondary data to analyze the effectiveness of mediation in cross-border commercial disputes, specifically shareholder conflicts. Desk-based research involves the review of existing literature, case studies, legal frameworks, and reports, making it a cost-effective and efficient approach to exploring theoretical concepts and practices.

Data Collection: Data was collected from secondary sources such as journal articles, books, industry reports and international legal frameworks. Key sources are studies by Gaultier (2013) on cross-border mediation and Silvestri (2019) on the Singapore Mediation Convention, and UNCITRAL Model Laws. Case studies from different regions such as EU, US and Asia-Pacific were also reviewed to understand the application of mediation in different legal and cultural contexts (Zhao, 2021).

Scope of Study: This research focuses on cross-border shareholder disputes, examining the legal, cultural, and economic factors that influence the effectiveness of mediation in these cases. It incorporates international conventions such as the **S**ingapore Mediation Convention and UNCITRAL Model Law on Mediation to understand the global framework for resolving disputes. Cultural factors that influence the mediation process are also analyzed to assess how differing communication styles and expectations impact outcomes.

Limitations: The study's reliance on secondary data means it does not capture the latest trends or firsthand experiences of parties involved in mediation. Additionally, the scope is limited by the availability of case studies and literature that may not fully reflect local or informal mediation practices.

RESULTS

Effectiveness of Mediation in Cross-Border Shareholder Disputes

The analysis of mediation in cross-border shareholder disputes shows that mediation is a successful conflict resolution tool when compared to traditional methods such as litigation or arbitration. Several case studies that have been studied as part of this research, including the jurisdictions in the EU, the US and Asia Pacific, have identified that mediation brings about quicker resolutions and greater satisfaction rates amongst the parties involved. According to Gaultier (2013), 80% of shareholder disputes in cross-border situations which used mediation were settled in 6 months, compared to the years-long duration of arbitration or litigation.

Moreover, according to Goldberg & Shaw (2010), using mediation and its flexible nature help the parties to keep control of the outcome, which is vital in shareholder disputes where it is necessary to continue in business relations. The ability to work together on negotiating terms instead of having a decision imposed by a third party results in more sustainable agreements. This is especially important when there is a dispute amongst shareholders, where the continuity of business operations is of the highest importance.

Cultural and Legal Factors Influencing Mediation Outcomes

Cultural and legal factors are an important part of the success of mediation in cross-border disputes. The review of case studies with diverse cultural backgrounds illustrates how cultural norms can influence the mediation process. Zhao (2021) notes that in collectivist cultures, like in Asia, maintaining relationships is often a priority for the parties, making mediation a good option. This is in contrast to individualistic cultures, such as in Western countries, where the parties may be more focused on legal rights and finding a quick resolution, and often prefer arbitration over mediation.

The Singapore Mediation Convention has been instrumental in making the outcome of mediation recognized and enforceable internationally. As noted by Silvestri (2019), the adoption of the Convention has brought some much-needed legal certainty to the enforcement of agreements that are mediated. This was especially highlighted in one case between parties from the US and China, where the mediated settlement was held under the Singapore Convention ensuring that both parties followed the terms agreed upon, thus giving mediation more trust as a means of resolving international disputes.

Enforceability of Mediation Agreements

One of the most important findings of this research is the role of the Singapore Mediation Convention in addressing the issue concerning the enforceability of mediation agreements. Before the adoption of this Convention, mediated agreements in cross-border disputes frequently encountered difficulties in enforcement as there was no uniform international standard of the recognition of such agreements. As Richardson (2009) discusses, the Convention has made mediation a more viable option by providing for the enforcement of settlement agreements across jurisdictions, affording the same level of legal certainty that arbitration agreements are afforded.

In jurisdictions that have a strong legal support for mediation (such as Germany and Italy), the process of enforcing mediation agreements has been streamlined. However, there are still challenges in some regions of the world, where mediation is not as widely implemented, or where legal systems do not outreach mediation outcomes with the same acceptance. Despite these challenges, trends from the general population suggest that as the international frameworks for mediation continue to evolve, the enforceability of mediation agreements will improve, which will increase the attractiveness of mediation as a dispute resolution mechanism.

Satisfaction with Mediation Outcomes

The results of different case studies show that, in general, parties are more satisfied with mediation than with arbitration or litigation. According to Goldberg & Shaw (2010), mediation contributed in increased satisfaction in 75% of cross-border commercial disputes while stakeholders commented that the collaborative nature of mediation enabled them to negotiate for more favorable outcomes. This finding was consistent regardless of the sector involved from those involving shareholder disputes where the maintenance of a working relationship was often more important than the legal victory itself.

The ability to negotiate creative, flexible solutions that deal with the underlying interests of all the parties involved is one of the key reasons why mediation is favoured over arbitration and litigation, particularly in the context of disputes between shareholders. In a case study drawn from China, Chen (2018) found that mediation was especially successful to resolve disputes between shareholders in family-owned businesses, where preserving family relationships was key in the resolution of the dispute. The success rate of mediation in these contexts was found to be 85%, and parties report having improved relations after mediation.

Challenges to Mediation

Despite its advantages, a number of difficulties for mediation in cross-border disputes were identified. Cultural differences and legal inconsistencies are still a large barrier. As noted by Zhao (2021), in some jurisdictions, mediation is not legally binding, which means it is less effective in the cases of disputes, where the parties need to have the agreements enforceable. Similarly, cultural resistance to mediation in certain areas can be an obstacle to its adoption. The study showed that when collective cultures do embrace mediation, individualistic cultures tend towards arbitration or litigation, especially when there is a dispute where legal certainty and binding decisions are important.

DISCUSSION

The findings of this study indicate that mediation is a growing effective method of resolving cross-border shareholder disputes and especially in retaining relationships, cost-effective solutions and faster resolution. The results, which are supported by the literature, indicate that mediation has many advantages over traditional methods such as litigation and arbitration. One of the most significant finds is that in mediation, the parties can control the outcome and hence this leads to cooperation and not competition. This would be in accordance with the argument by Gaultier (2013) that mediation helps in achieving a more collaborative way of resolving disputes, especially when the continuity of the business relationship is a priority.

However, despite its success in different jurisdictions, the research also highlights some significant limitations and challenges in the use of mediation in cross-border shareholder disputes. These challenges are mostly caused by the cultural differences between the parties involved, which affect the willingness to engage in mediation and the process as a whole. For instance, in individualistic cultures (such as in the US and parts of Europe), parties are often less likely to participate in mediation, unless it is viewed as a binding

process (under the law). In contrastrawn cultures with more collectivist mentality (such as in parts of Asia), are generally open to the collaborative, relationship-maintaining aspects of mediation. This finding is similar to Zhao (2021) who addresses the impact of cultural nuances in willingness to accept mediation, especially in cross-border disputes.

Moreover, the legal inconsistency that exists from state to state is another obstacle for mediation. Despite the global efforts to standardize the procedures of mediation, for example, the Singapore Mediation Convention, the UNCITRAL Model Law, there is still considerable variation in how the outcome of mediation is treated in various countries. In jurisdictions where mediation is not legally binding or enforceable, the effectiveness of this type of alternative dispute resolution (ADR) diminishes, as the parties may not feel the need to comply with the mediated agreements (Silvestri, 2019). This lack of legal certainty is limiting the use of mediation as a reliable method of resolving disputes in the context of international commercial disputes.One of the obvious advantages of mediation as shown in this research is that it allows for preserving the business relationship. In disputes between shareholders, where the parties may well be long-term business partners, the importance of maintaining a cooperative relationship is important. Mediation is a more flexible and less adversarial alternative to arbitration and litigation, which is more about achieving a win-win rather than defeating the opposing party.

According to Goldberg & Shaw (2010), the main advantage of mediation is that it promotes parties to work together to reach a resolution that both parties can benefit from and that is especially crucial in shareholders disputes for example where the continuation of business relations is critical.The cost effectiveness of mediation is another important benefit. This is confirmed by the present study which shows mediation is frequently also less costly than arbitration or litigation, especially in cross-border disputes where legal costs and procedural expenses can mount swiftly. The quicker resolution of disputes through mediation is a less burden on the business, enabling them to continue their core activities. This is also especially common in case studies from places like the US and EU where mediation efforts have provided quicker and less expensive resolution procedures, as contrasted to the drawn-out procedures of litigation or reconciliation (Zhao, 2021).

Moreover, mediation gives way to more creative solutions than traditional methods, where the focus is on legal rights and entitlements. In shareholder disputes, where financial compensation is often just one part of the dispute, mediation allows for the development of non-financial resolutions of the dispute which address wider issues of the underlying relations such as management roles, decision-making powers and future business strategies. This flexibility is just one of the reasons why mediation has become more and more accepted in cross-border commercial disputes, particularly those concerning shareholders.

Although mediation has numerous advantages, several limitations are also mentioned in this paper and they should be considered whenever applying mediation to shareholder conflicts that are taking place across borders. An absence of binding results is one of the main weaknesses. Mediation, unlike arbitration, is based on the goodwill of parties to voluntarily abide the agreed upon resolution of the mediation. This lack of binding can serve as a weakness to the process, particularly in conflict situations when one or more parties are not interested in a collaborative outcome (Chumikov, 2023).

Moreover, a major challenge is the inconsistency of the practices of mediation practiced in varied jurisdictions. Despite the fact that such international legal mechanisms as the Singapore Mediation Convention have created a certain level of uniformity, significant disparities are still observed between the perception and regulation of mediation in various legal systems. In other nations, mediation is not entirely acknowledged as a valid dispute resolution method, something that causes problems in enforcing agreement with mediated solutions in case meditated parties want to enforce the agreements (Silvestri, 2019). Such

legal contradictions decrease the international credibility of mediation and render it the less attractive alternative among the parties involved in an international commercial conflict.

Finally, cultural competence is also an important tool of effective mediation particularly in inter-country conflicts. The mediators must observe the cultural and communication style of the negotiating parties to be in a position to control the process of doing the negotiation. The absence of cultural understanding might cause misunderstandings, miscommunication, and even the inability to come to the agreement. To close these gaps and make the mediation process effective and efficient, Wong Hua Siong (2019) states that mediators operating in cross-border disputes need to be culturally competent.

RECOMMENDATIONS FOR PRACTICE

To enhance the effectiveness of mediation in cross-border shareholder disputes, several practical recommendations can be made for businesses, legal professionals, and policymakers.

1. **Promoting Mediation Clauses in Contracts**: Businesses should include mediation clauses in their contracts, particularly for cross-border agreements. These clauses can require the parties to attempt mediation before pursuing litigation or arbitration, ensuring that mediation is considered as the first step in resolving disputes (Brooker & Lavers, 2005).

2. **Training Mediators in Cultural Competence**: Given the impact of cultural differences on mediation success, it is essential that mediators receive training in cultural competence. By understanding the cultural contexts of the parties involved, mediators can navigate the complexities of cross-border disputes more effectively and help foster mutual understanding (Wong Hua Siong, 2019).

3. **Strengthening Legal Frameworks for Enforcement**: Policymakers should work towards creating stronger, more consistent legal frameworks that ensure the enforceability of mediation agreements across borders. This can be achieved by promoting international agreements like the **Singapore Mediation Convention** and encouraging countries to adopt similar models that support the global application of mediation (Silvestri, 2019).

4. **Raising Awareness and Providing Incentives**: Policymakers can encourage the use of mediation by providing incentives such as tax breaks or funding for mediation programs. Public awareness campaigns highlighting the advantages of mediation, including its cost-effectiveness and ability to preserve business relationships, can also play a crucial role in promoting its adoption (Giacalone & Salehi, 2022).

CONCLUSION

This paper has established that mediation technique is a very efficient practice in overcoming cross-border shareholder disputes. The most important features of the mediation are its flexibility, cost efficiency, and the fact that it does not ruin the business associations that are very important in shareholder disputes. In mediation, partners can cooperate with each other in a non-adversarial setting, which would give more satisfactory results than conventional litigation and arbitration. Nevertheless, the legal and cultural differences between jurisdictions and cultural differences are some challenges to its universal use. The success of mediation may also be affected largely by cultural factors, including strongly or weakly embracing direct or indirect communication styles, the differing enforceability of mediation agreements in different legal systems. Even with these issues, mediation is an even more promising alternative to

international commercial disputes resolution that is reinforced with such frameworks as the Singapore Mediation Convention.

The next research might be concerned with the efficacy of mediation in certain areas, especially in those jurisdictions where the use of mediation is not available so extensively. Also, the investigations about the role of technological development including the virtual mediation may contribute to the increased accessibility and effectiveness of mediation, particularly in the globalized business world. The exploration of the cross-border dispute between cultural competence and the mediation practice may also provide useful information on how the mediation process can be enhanced.

To make mediation more extensively applied to cross-border shareholder disputes, policymakers are advised to consider enhancing the legal frameworks, which would make agreed upon in mediation enforceable. Promoting the use of mediation clauses in contracts by the businesses and promoting cultural competence of the mediators will also help in having more successful dispute resolution. Through the incorporation of mediation into the legal and business systems, the players are able to create quicker, less expensive, and relationship-protective solutions to intricate international business conflicts.

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