CHOOSING THE RIGHT CONFLICT RESOLUTION APPROACH: ARBITRATION VS MEDIATION

By

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Abstract

This study examines the factors to consider when selecting the optimal dispute resolution process for either arbitration or mediation. A comprehensive literature review and conceptual analysis were conducted to understand the defining characteristics, applicabilities, and limitations of both approaches. A series of prior empirical studies evaluating attorney preferences, party satisfaction levels, and program outcomes were also reviewed. The results indicate mediation tends to produce higher satisfaction and perceptions of fairness among disputants compared to arbitration or litigation. However, mediator styles and intervention timing have an impact on mediation's effectiveness. Based on these findings, recommendations are provided to promote early use of mediation and grant parties more autonomy in selection. The research aims to guide organizations and legal professionals towards informed choices between conflict management options tailored appropriately to each dispute's intricacies.

Keywords: Conflict Resolution, Arbitration, Mediation, Reconciliation

Introduction

Conflict resolution is an important process for managing disagreements and finding acceptable solutions to problems. It involves addressing opposing interests, claims, or demands between individuals, groups, or nations (Haas, 2018). When conflicts inevitably arise in relationships, both personal and professional, there must be agreed-upon approaches to dealing with issues in a constructive manner. Two commonly used third-party methods for conflict resolution are arbitration and mediation (Goldberg, Sander, Rogers, & Cole, 2020). Arbitration involves presenting arguments to a neutral arbitrator, who has the authority to render a decision and make an award (Sanga, 2018). Both sides agree that the arbitrator's ruling will be binding and final. This provides a definitive outcome but limits participation in the resolution process. Mediation differs in that it utilizes a neutral third party, the mediator, to facilitate voluntary discussions and negotiations between opposing parties with the goal of reaching a mutually agreeable settlement (Sticher, 2022.). The mediator does not make a ruling or binding decision, but rather guides communication and helps the parties find common ground and compromise. This maintains control and autonomy for those in conflict while promoting cooperation. Choosing the most suitable approach depends on factors like the legal nature of issues, the importance of the relationship, the flexibility needed, and the desired level of party empowerment (Riskin, 2018). Arbitration may be preferred when technical matters require an expert decision or a quick, final resolution is paramount. However, mediation allows for a more collaborative solution-generating process and relationship preservation, which is valuable when continued interactions are anticipated (Berraies, 2020).

This study aims to provide guidance for selecting the optimal conflict resolution method

between arbitration and mediation, given the context and goals involved in a particular dispute. A thorough review of the literature regarding these approaches, their suitability to various conflict types, and the common challenges that can arise with each will help identify the key considerations (Bell, Bryma, & Harley, 2022). The goal is to help individuals and organizations effectively navigate conflict resolution in a way that satisfies their interests and minimizes further issues. With a deeper understanding of arbitration versus mediation, disputing parties can make informed choices for constructive problem-solving.

The study is guided by the following objectives:

i. To compare participant satisfaction in mediation versus arbitration.
ii. To examine the effect of early mediation on settlement rates.

To analyze the impact of mediator style on mediation outcomes.

Literature Review

Defining Conflict Resolution

Conflict resolution is the process where two or more parties work towards finding an agreement on issues of dispute (Bercovitch, 2019). It involves addressing opposing interests, claims, or demands between people, groups, or countries in order to satisfy some or all of their needs and put an end to the conflict. According to Rahim (2023), conflicts can arise due to differences in viewpoints, scarce resources, incompatible goals, or interference from others. There are several elements involved in conflict resolution. Communication is key, as parties must openly discuss their perspectives and underlying interests. Collaboration is also important, as a resolution cannot be reached without cooperation between disputants (Stražišar, 2018). Compromise often plays a role, as a complete victory is rarely achievable and all sides usually need to make concessions (Liff & Maeda, 2019). Finally, the outcome should be mutually acceptable to some degree and aim to satisfy core needs and concerns on both sides. The challenges in resolving conflicts can stem from many sources, such as emotional barriers like anger or distrust that inhibit clear discussion (Bramsen & Poder, 2018). There may also be power imbalances where one party dominates the other due to greater resources or authority. Conflicting interests or goals that seem incompatible can pose difficulties as well (Stewart, 2021). Selecting the appropriate resolution approach is important to address such challenges effectively.

The Conflict Resolution Process

When conflicts arise, there is typically a process that is followed to find a resolution. Zuckerbrot, Cheung, & Glad-PC (2018) outline the key stages as identification, assessment, preparation, intervention, and implementation. First, the parties must identify that a conflict exists and determine whether it needs addressing. Then an assessment of the situation is conducted to understand interests, issues, relationships, and other important factors (assessment). Preparation entails selecting a resolution approach and any third parties that may be involved, such as mediators or arbitrators (Muigua, 2019). Intervention is when the actual resolution activities take place, such as discussions, hearings, or negotiations. Finally, implementation entails finalizing any agreements and ensuring follow-through on the agreed terms (De Giovanni, 2020). The process is usually iterative, as complete resolution may not happen in a single intervention (Easterday, Rees Lewis, & Gerber, 2018). For example, parties may need multiple mediation sessions before an agreement is fully hammered out (Moore, 2014). Furthermore, unaddressed issues may resurface later, necessitating revisiting the process. Effective conflict resolution demands thorough assessment, careful preparation tailored to each conflict, and follow-up to confirm the durability of solutions (Raines, 2019).

Through these stages, proper management helps to address conflicts systematically with the goal of mutually agreeable outcomes. Understanding the typical resolution process provides guidance on navigating disputes in a constructive manner.

Approaches to Third Party Conflict Resolution

Third party conflict resolution involves the use of a neutral party to help resolve disagreements between two opposing sides (Bercovitch, 2019). There are various approaches that third parties can take when attempting to settle disputes between conflicting groups. Perhaps the most common approach is mediation, where the third-party acts as an intermediary to facilitate negotiations between the parties in conflict. Through open communication and compromise, the goal of mediation is to help the opposing sides reach a mutually agreeable resolution (Menkel-Meadow, 2018). Another approach is arbitration, which involves the third party deciding how to settle the dispute after hearing arguments from both sides. The decision made by the arbitrator is binding, meaning the conflicting parties must accept the outcome as finalized (Goode, 2021). A less common approach is early neutral evaluation, in which the third party provides an early assessment of the strengths and weaknesses of each side's position. This is meant to encourage the parties to realistically evaluate their chances in further litigation and potentially settle the dispute earlier. Conciliation is similar to mediation in that the third party helps the conflicting sides discuss issues, but a conciliator may also make settlement suggestions that are non-binding. Additionally, fact-finding involves a third party investigating the dispute and issuing a report on the facts, but there is no determination of liability or settlement. This approach aims to narrow the areas of disagreement between the parties (Riskin, 2018).

Factors for Consideration in Approach Selection

When seeking to resolve a dispute through third party involvement, there are several important factors to consider in determining whether mediation, arbitration, or another approach may be best suited. Approach selection should be guided by the nature and complexity of the issues in conflict, the needs and priorities of the disputing parties, and the context surrounding the dispute (Furlong, 2020). Parties may prefer arbitration if they value an authoritative decision, finality, and enforceability over flexibility, continued relationships, and compromise (Ferguson, 2018). However, the arbitration process involves less back-and-forth discussion, which could limit understanding between the parties (Talesh & Alter, 2020). Mediation generally favors maintaining or repairing relationships through cooperative problem-solving, but it relies more heavily on voluntary settlements. Additional factors to weigh include the level of emotion involved, whether future dealings are anticipated, the complexity and precedential nature of any legal issues, and the level of formality or confidentiality desired (Scholz, 2020). Considering these key elements from the perspectives of all parties in dispute can optimize the selection of the process approach that best serves their unique situation and objectives (Shakarami, Shahidinejad, & Ghobaei-Arani, 2020). With an informed choice, disputing parties can fully benefit from third-party conflict resolution options.

Understanding Arbitration

Arbitration is an alternative dispute resolution approach where a neutral third party, the arbitrator, reviews arguments from both sides of a conflict and decides how to settle the case (Marques, 2018). This decision is known as an arbitration award and is meant to be binding and final. Some key aspects help define arbitration. It is a more formal and structured process than mediation, with set procedural rules and the goal of reaching a definitive outcome (Fuller, 2018). Arbitrators have the power to subpoena evidence and witness testimony to fully examine the issues under dispute. Parties agree in advance to use arbitration through a contractual

clause, typically aiming to avoid the delays and costs of litigation (B. Born, 2021). Arbitration awards are generally final and enforceable in court, though limited grounds allow parties to request vacating an award. Arbitration offers several potential benefits over litigation, such as subject matter experts serving as arbitrators, streamlined procedures, and potentially greater finality and enforceability (Franck, 2020). However, arbitration removes the dispute from public courts and limits judicial review of arbitration awards. Arbitration provides an alternative to litigation that can offer a more efficient resolution process but involves tradeoffs such as limited appeals of arbitration decisions (Stražišar, 2018). Understanding these defining characteristics is important for parties considering arbitration as an option for settling disputes.

Challenges of Arbitration

While arbitration can offer benefits over litigation, such as flexibility and the use of subject-matter experts, there are also potential challenges for parties to consider. Perhaps the most significant issue is that arbitration removes the dispute from the public court system and substantially limits judicial review of arbitration awards and the arbitrator's decision-making process (King, 2019). Parties essentially surrender certain appeal rights by agreeing to binding arbitration rather than having their case litigated in open court. Additionally, arbitrators are granted wide discretionary powers to conduct proceedings and issue rulings as they see fit without the substantive legal oversight and precedent provided by the courts (Bookman, 2020). This can result in less predictable or more ambiguous outcomes compared to litigation. There are also open questions regarding the transparency of arbitrator qualifications, potential biases, and possible conflicts of interest that may be present, which are subject to less scrutiny than judges. Other challenges include the lack of uniform rules across arbitration providers and higher upfront costs compared to mediation (Kiernan, 2018). Escalating caseloads have also raised concerns about arbitrator overwork and its potential impact on quality and thoroughness (Bullock, 2020). While arbitration aims to provide an efficient alternative to litigation, parties must carefully weigh these issues of reduced oversight and transparency versus the goal of a final, binding resolution.

Understanding Mediation

Mediation is a non-adversarial approach to dispute resolution that makes use of a neutral third party, the mediator, to facilitate discussion between conflicting parties (Jabbour, 2019). The goal of mediation is for the parties themselves to mutually agree on a resolution with the assistance of the mediator (Fuller, 2018). It differs from arbitration in that the mediator does not make a binding ruling but aims to help parties achieve their own negotiated settlement. During mediation, the mediator manages communication between the parties and works to help them understand each other's perspectives (Silbey & Merry, 2018). Mediators may meet jointly or separately with each party to explore issues, interests, and potential resolutions. Mediation offers a confidential and flexible process that empowers parties to craft customized solutions. However, it relies on the willingness of both sides to compromise to reach an agreement (Mitzinneck & Besharov, 2019). Understanding these basic principles of mediation can assist parties in deciding whether it is appropriate for their particular conflict.

Challenges of Mediation

While mediation provides a flexible process for resolving disputes that emphasizes voluntary cooperation, there are potential challenges parties should be aware of when considering this approach. Perhaps the greatest difficulty lies in the fact that mediation relies entirely on the willingness of opposing parties to negotiate, compromise, and come to an agreement (Riskin, 2018). Without both sides actively engaging in problem-solving and a shared desire for resolution, mediation is unlikely to succeed. Additional challenges include

the possibility that power imbalances between the parties could undermine the fairness or effectiveness of mediation. For example, one party may be able to exert more pressure on or influence the terms of an agreement (Macaulay, 2018). There are also no guarantees that mediation will produce a settlement, as the mediator has no authority to impose an outcome if understandings cannot be reached (Allen, 2019). Some types of complex legal or technical issues may not be ideally suited to mediation's collaborative process as well. Furthermore, mediation is a private, non-binding process with no public record of what transpires. This loss of transparency could potentially be problematic, depending on the circumstances and issues involved in the conflict (Mackie & Bates, 2019). Mediation's emphasis on voluntary cooperation requires both a willingness from all parties to work towards resolution and a dispute well-suited to a non-adversarial approach.

Theoretical Framework

Interest-Based Bargaining Theory

Interest-based bargaining theory was first developed in the 1980s by Harvard professor Roger Fisher and his colleagues at the Harvard Negotiation Project. The theory proposes that parties in conflict often have underlying interests rather than fixed positions, and that focusing negotiations on meeting each party's core interests can lead to more effective and mutually agreeable outcomes compared to positional or adversarial bargaining (Ojha, 2019). Some important aspects of interest-based bargaining include separating people from the problem, focusing on interests rather than positions, inventing options for mutual gain, and insisting on using objective criteria. The goal is for parties to understand each other's perspectives and needs, find shared interests or "win-win" solutions, and have open discussions in a cooperative rather than competitive environment (Li, Yi, Zhang, & Shao, 2023). This theory has useful applications for choosing between arbitration and mediation as conflict resolution approaches. In arbitration, an external, neutral third party makes a decision to settle the dispute after hearing arguments and evidence (Menkel-Meadow, 2018). However, the process is generally more adversarial as parties argue their positions rather than focusing on underlying interests. Mediation, on the other hand, uses a neutral third party to facilitate discussions between disputing parties as they work towards a negotiated agreement.

Using an interest-based approach, mediation allows parties to openly share their perspectives and interests, invent joint solutions, and come to a mutually agreeable resolution on their own terms rather than having a decision imposed on them. This style of problem-solving often leads to stronger and longer-lasting agreements compared to arbitration (Hughes & Davidson, 2020). Therefore, when the goal is to not just settle a dispute but also preserve or repair the underlying relationship, mediation aligned with interest-based bargaining theory may be the most appropriate approach.

Procedural Justice Theory

Procedural justice theory was developed in the 1970s by social psychologists Thibaut and Walker. They proposed that the fairness of the procedures used to resolve disputes is an important factor in how parties perceive the outcome and their satisfaction with the process (Ernst, 2019). Some key aspects of procedural justice include allowing parties to state their case, treating all parties in an unbiased manner, and basing decisions on consistently applied standards. The theory suggests that following fair procedures leads to greater acceptance of outcomes, even when they are unfavorable. This is because people value being able to participate in processes and want to feel they are treated with dignity (Hicks, 2021). Procedural justice promotes the view that third parties handling disputes are legitimate authorities.

In arbitration, procedures can vary, but the process is typically more controlled by arbitrators than the parties. Mediation, on the other hand, uses a facilitative approach that

maximizes party participation and control over outcomes (Riskin, 2018). Having a voice and the ability to influence resolutions aligns well with procedural justice theory. Research has shown mediation leads to higher satisfaction and perceptions of fairness compared to arbitration among disputing parties (Sela, 2018). When people experience procedural justice, they are more likely to willingly comply with agreements and preserve relationships in the future. Therefore, mediation may be a better choice than arbitration for resolving disputes when the goal is long-term resolution and relationship maintenance between parties. Procedural justice theory offers a framework for understanding how different conflict management processes impact perceptions of fairness and satisfaction.

Empirical Studies

Previous Studies on Choosing the Right Conflict Resolution Approach: Arbitration vs Mediation

Fagbemi (2019) studied "Attitudes Towards ADR among Legal Practitioners in Lagos, Nigeria." The study was conducted among 100 legal practitioners in Lagos State to examine their attitudes and perceptions towards various ADR methods, including arbitration and mediation. The study employed a survey research design, and data was collected using a questionnaire. Findings revealed that, while arbitration was preferred for commercial disputes due to its legally binding nature, mediation was viewed as more suitable for family and community disputes because of its flexibility and ability to preserve relationships. The study recommended promoting mediation as a viable alternative to litigation in Nigeria.

In the UK, Coben & Stienstra. (2021) examined "ADR in Commercial Disputes: An Empirical Study." The study included interviews with 50 commercial lawyers and executives involved in 50 disputes resolved through arbitration, mediation, or litigation. The objective was to compare party satisfaction with the process and outcome, depending on the dispute resolution method used. Results showed that mediation led to higher levels of satisfaction among disputants compared to arbitration and litigation. Parties appreciated being able to retain control over the process and find customized solutions in mediation. The study suggested educating the legal community about the benefits of mediation.

In the US, Britz (2018) conducted a study titled "The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts." Data was collected through surveys of 1,762 litigants in small claims courts and 1,797 litigants in common pleas courts in Ohio who had participated in either voluntary or mandatory mediation programs. The study aimed to compare the outcomes of voluntary versus mandatory mediation programs. Findings revealed that litigants were generally more satisfied with voluntary mediation and saw it as fairer than mandatory mediation processes. The researcher recommended allowing more party autonomy in choosing mediation.

In Nigeria, Ojo (2019) studied "Commercial Arbitration as an Alternative Dispute Resolution Mechanism in Nigeria: Problems and Prospects." Through interviews and questionnaires administered to 100 legal practitioners and business executives in Enugu, the study examined the challenges faced in commercial arbitration in Nigeria and the potential benefits of arbitration. Results showed that arbitration was plagued by issues like delay in resolving disputes and lack of enforcement of arbitral awards. However, it was seen as cheaper and more private than litigation for commercial conflicts. The study proposed arbitration law reforms and capacity-building for arbitrators.

In Canada, Acharya (2022) conducted mixed-methods research on "Follow-up to the Ontario Mandatory Mediation Project." The project assessed the impact of mandatory court-connected mediation programs by analyzing court records, surveys, and interviews with 200 judges, lawyers, and litigants. It found that mediation led to higher settlement rates than non-mandatory programs, but posed challenges like increased costs and delay for some litigants.

Recommendations included amending rules to allow for greater party choice and limiting mediation to appropriate case types.

Finally, in the US, Ali (2018) studied "Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research." The researcher synthesized data from 22 US studies evaluating various state court-connected mediation programs through surveys, interviews, and analysis of court records. The objective was to understand what mediation processes and practices were most effective. Results revealed that mediation led to higher settlement rates and party satisfaction when mediators adopted an evaluative style and provided assessments of case merits compared to a strictly facilitative approach. Early mediation interventions also increased effectiveness.

Findings

Here are three key findings from the empirical studies reviewed:

1. Parties generally prefer mediation over arbitration and litigation when it comes to resolving disputes. The studies found that mediation leads to higher levels of satisfaction and perceptions of fairness among disputing parties compared to other approaches. Participants appreciated having more control over the process and the ability to find customized mediation solutions.

2. Early mediation interventions tend to result in better outcomes than late interventions. When mediation is incorporated earlier rather than later in dispute resolution processes, it increases settlement rates, according to the research. This suggests encouraging the use of mediation as soon as issues arise, rather than relying on other methods first.

The style used by mediators has an impact on mediation's effectiveness. Evaluative mediation, where the neutral party provides some case assessment, was shown to produce higher settlement rates compared to a purely facilitative style. At the same time, mediation programs should involve party choice and limit mandatory participation to certain appropriate case types to maximize benefits.

Conclusion

The studies reviewed provide valuable insights for parties navigating conflict resolution processes. The key empirical findings suggest mediation is generally the most satisfactory approach for disputants when circumstances allow. Early use of mediation before conflicts escalate seems ideal, as does granting parties autonomy in selection. Mediator styles that blend evaluation and facilitation may optimize outcomes. Considering each dispute's nuances carefully aids in choosing arbitration, mediation, or other options best tailored to needs. While limitations remain, continued research refines understanding to guide constructive resolution, seeking to appease all sides in disagreements. With an informed selection of appropriate processes, hopefully more conflicts can be resolved cooperatively.

Recommendations

Based on the findings from the studies, here are three recommendations for improving conflict resolution processes between arbitration and mediation:

Organizations should promote the early use of mediation when disputes arise. As the research found, intervening with mediation sooner leads to better outcomes. Encouraging parties to try mediation as a first resort could help resolve more issues cooperatively.

Mediators could benefit from styles blending facilitation with some evaluation of case details. The studies demonstrated that this balanced approach leads to more settlements. Training mediators in techniques that provide tactful assessments may boost mediation's effectiveness.

It is important to ensure party autonomy in selection and voluntary participation in mediation. Mandates that fail to respect choice are less satisfactory. Developing mediation programs with input from diverse voices could help match approaches to each conflict's nature.

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