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Mediation in Commercial Transactions – Is there sufficient engagement with mediation in the context of commercial transactions in the UK?

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Chapter 1 Introduction

Mediation is a form of alternative dispute resolution alongside arbitration and conciliation, the origins of which, can be traced back to the Magna Carta. In practice, mediation is used as a tool in a variety of sectors of law such as family law or employment law.[1] However, this paper will focus on the importance of mediation in the sphere of international commercial transactions. I believe it is important to better to use mediation in this area of law having in mind the financial climate which influences international commercial transactions at the moment. By using mediation, some of the costs to big and small organisations could be reduced drastically.

Despite the positive feedback that mediation has received from international organisations in the commercial arena (such as UNCITRAL, ICC or the EU) and the governments of countries such as the UK and the US[2], mediation still does not receive the accreditation which would deserves.[3]

The distinction between mediation and litigation is further emphasised by the advantages and disadvantages between them. In addition, litigation, unlike mediation, is a constitutional right having a heavy impact in relation to the rule of law. This is probably the most important distinction between the two since people have the constitutional right to refuse to mediate and prefer to have their day in court.

The paradox is the fact that mediation is soundly welcomed from all quarters. It is important to analyse why the practice does not meet the theory because of the potential usefulness of using this tool. The amount of support mediation gets from international organisations, academics and NGOs, however, is not marched by practical support. This can especially be seen in the context of international commercial transactions and consumer protection. This is why this paper will explore first of all why mediation is not in use and will then consider the arguments in favour of and against its use in international commercial contracts, before reaching a conclusion on whether mediation ought to be used and what might

[1] Carlos Esplugues, Louis Marquis, *New Developments in Civil and Commercial Mediation,* Valencia, 2015, p295
[2] K Williams, *State of Fear: Britain's 'compensation culture' reviewed,* 2005 25 J. Legal Studies 499-515
[3] Ridley-Duff, R.J, Bennett, A.J., *Mediation: developing a theoretical framework for understanding alternative dispute resolution,* 2010 www.shura.shu.ac.uk/2617/1/28_-_Mediation_-_Development_a_Theoretical_Framework_(BAM_Submission).pdf last accessed 29/09/2015

encourage the UK government to use it more in the context of international commercial transactions. It is helpful to briefly outline the structure of the dissertation.

The purpose of Chapter 2 is to provide an overview of what is meant by mediation in order to understand what mediation entails and to clarify the circumstances in which it will be appropriate to use it. It is essential to provide this information in order to critically evaluate the pros and cons of mediation in the context of international commercial contracts. Chapter 3 will outline the support mediation receives from international organisations such as UNCITRAL, ICC, EU, World Bank. In doing so, it will be ascertained that the international arena supports the use of mediation in commercial transactions and for the protection of the consumers. This point will be reinforced by the analysis of the approach which different jurisdictions have taken towards mediation and the different ways in which they support and encourage the use of it.

Chapter 4 will examine potential reasons which may have led to reluctance on the part of the UK to enact legislation on mediation in the context of international commercial transactions. There is also reluctance from both big and small businesses as well as individuals.[4] The cause of this could include the lack of information and credibility at the international level. In this analysis, case examples will be put forward from the UK jurisdiction in order to look at their approach since it is one of the most important countries when it comes to commerce.[5] This dissertation will examine how mediation has already become a compulsory step in a number of other areas of law, for example in the area of Family Law and routine use can also be seen in the small claims court.[6] The question which this paper is trying to tackle is whether there is a reason why mediation might be readily used in these areas of laws but not so much in international commercial transactions. This chapter will also critically analyse how some human rights advocates believe that through mediation there is the potential for individuals to lose their right to self-determination and be pressured into decisions which they are not happy with in the context of international commercial transactions.

Chapter 5 will conclude by synthesising the points made in this dissertation. It will recap why mediation is not being used as much in international commercial disputes as it is in other areas and, also, what are the reason for and against using it. This dissertation will also

[4] Primarily, when it comes to online purchases.
[5] Gary B. Born, *International Commercial Arbitration,* 2009, p217
[6] www.gov.uk/make-court-claim-for-money/overview

conclude that the benefits of mediation necessitate taking measures which might encourage the usage of it.

Chapter 2 Mediation Overview

What is mediation?

Mediation is one type of alternative dispute resolution (i.e. a form of solving disputes between parties without the need of going to court). Generally, a neutral third party, the mediator, helps the parties to come to an agreement and negotiate a settlement. Due to its flexible process, mediation is used in many areas of law, for example in commercial, civil, community, workplace, or family matters, in order to avoid costly and lengthy litigation procedures. It is important to mention that the mediation process is private and confidential, and everything discussed during this process is done without any prejudice. Furthermore, taking part in a mediation is a voluntary action; parties should not be forced to mediate.[7] In the event that the parties do not reach an agreement, they can still go to court and the details discussed during the mediation will not be revealed during a court hearing. Another important aspect of mediation is that the costs are shared between the parties involved in mediation and vary according to the complexity of the case. [8]

Background

As previously stated in the introduction, mediation has been around since the Magna Carta has been enforced. Mediators often compare it with a settlement agreement. This is because, although is not so well known by the general public, the compromise which was reached though this Charter was mediated.[9] Even before the Magna Carta has been established, in the 11th century or earlier, there is evidence that mediation was very common in England and used generally in every area. The Church gave instructions to all the people to avoid litigation threatening all of the people with exclusion if they did not use mediation in their disputes.[10] Furthermore, legislation which was in place during the time of Henry I shows support for

[7] www.dse.vic.gov.au/effective-engagement/toolkit/tool-mediation-and-negotiation
[8] Ibid no 1 p 294
[9] Bill Marsh, *Gratitude for the law,* 03 April 2015, www.kluwermediationblog.com/2015/04/03/gratitude-for-the-law/ (29/09/2015)
[10] Derek Roebuck, *The Charitable Arbitrator: How to Arbitrate and Mediate in Louis XIV's France (2002*), p19

mediation known at the time as 'settlement by love', especially used in partnership disputes which are based on romantic relationships.[11] History also shows that during medieval times, English judges would close cases in order to give the parties the chance to reach a settlement.[12] So, it can be seen that mediation is not a new concept in the English legal system but for some reason it has not been used for the past centuries until the late 1990s when it was reintroduced.

Overview of the process

Around the time the Magna Carta was enforced coincided with the time when the structure of mediation was established. Back then, an archbishop had the role of the mediator who held separate talks with each party and in the end brought both parties together and held a negotiation meeting which brought back the peace.[13]

Nowadays, the structure of mediation is much more clearly defined and, although it is not universal, the process follows the same principles. The mediator is the neutral third party in a mediation which primarily has to make sure the discussions between the parties run smoothly. Furthermore, he ensures that the process is followed and that all the preparations for the mediation itself are completed. The most important role the mediator has is to ensure that the parties are in a safe environment and that they do not feel pressured or intimidated by the situation or by the other party.[14] Furthermore, a mediator should also have good communication and inter-personal skills in order to guide the conversation between the parties in the direction of a settlement and ensure that both parties focus on the issue at hand and do not attack each other.[15] Thus, it can be said that:

> "The task of the mediator is to help the parties to open difficult issues and nudge them forward in the peace process. The mediator's role combines those of a ship's pilot, consulting medical doctor, midwife and teacher." [16]

The role of the parties involved in a mediation could vary from one style of mediation to another i.e. they can be the people affected and are having the dispute or their legal representatives.[17] This will be detailed in the following sub-section. The preparation is a very

[11] *Leges Henrici Primi* p173, 54.2 and 3
[12] Derek Roebuck, *Mediation and Arbitration in the Middle Ages England 1154 to 1558* (2013), p 29ff
[13] Ibid no8
[14] Ibid no 1 p 298-301
[15] Lisa Nelson, *What is A Divorce Mediator* 29 July 2012
[16] Martti Ahtisaari, *Noble Lecture,* 10 December 2008
[17] In New South Wales the Law Society has published a *guide to the rights and Responsibilities of participants*.

important step in the mediation process. The first step is for the parties to agree to mediate. The factors which parties take into consideration when choosing a mediator is not a fixed set of rules. On the contrary, is quite a disputed topic because on the one hand it might be considered important that the mediator has the knowledge and the experience in dealing with that particular type of dispute but, on the other hand, it can be said that the objectivity of the mediator is a better factor to consider when choosing a mediator.[18] After the parties agree on a mediator, the mediator needs to make sure that the parties fully understand what mediation is and what it entails. After this step is fulfilled, parties will put together a bundle including papers which they believe are evidence to sustain their position. These bundles can include a position statement, correspondence between parties and valuation reports which will be handed to the mediator prior to the actual mediation in order for him to have a thorough understanding of the issue at hand.

Since mediation is a procedure undertaken without any prejudice, disclosure is an important point in the process. There are circumstances where the mediator might require the disclosure of certain reports, documents or other material. For example, in court-referred mediation, the parties automatically exchange all of the paperwork. Also, another important factor in the mediation is that parties need to be involved and committed to the process in order for the mediation to be successful. This means that parties need to bring in their input in the negotiation.

The actual meeting is the most important step in a mediation since here the parties come together to fulfil the purpose of mediation i.e. reach a settlement and finish a dispute. Although it is not a fixed process, certain steps tend to repeat themselves at these mediation meetings. Usually, some general rules are being established in order to give some boundaries for mediation. Next, each party tells their version of the story in detail which will help in identifying the issues which led to the dispute. Each party needs to make sure that their interests are known by the other party as well as what they are intending to obtain though the mediation. The mediator will try and find objective criteria in order bring the parties up to speed with one another. The parties will find a number of options and will proceed in discussing and analysing these solutions and balance them with their issue. They will continue the discussions in order to customize the best solution for their problem and, if they reach an agreement, they will record it in writing. Because there is no law-making, this process is strict. The steps of the

[18] *What is Family Mediation?* 5 October 2011 www.ichatmediation.com/family-mediation-florida/

mediation meetings will vary since the mediation will be adapted to the needs of the parties involved in the process. [19]

Contrary to general belief, reaching an agreement is not the end of mediation. Some agreements require the ratification of an external party such as a council or the court. Furthermore, in order to implement a mediation agreement, the agreement must follow the applicable statutes and regulations of the relevant jurisdiction. Also, parties can petition the court to give legal effect to the settlement reached in mediation. If the court does not grant this, the settlement in question has the same effect as any other agreement.

An important step for mediators is the debriefing stage which is conducted either between co-mediators or between mediator and supervisor. It is in fact a feedback session, where the mediators reflect on the mediation which they conducted, in order to reflect on the analysis and evaluate the process. Finally, in order to ensure that the parties were happy with the mediation process and everything that this implies, it has become common practice for mediators to conduct a short survey in order to evaluate and offer the possibility of amending any problems in the future.[20]

Styles of Mediation

This sub-section will outline and evaluate the different styles of mediation in existence, since it is argued that this has an influence on the extent to which mediation is used in practice. Because mediation is quite complex, there is a need to assess the main ones to determine which one is best used in the context of international commercial disputes.

The lack of stability in mediation styles and the hesitance of the governments to create a more structured process of mediation might be one reason why mediation is not used too often in commercial transactions. The styles of mediation are influenced by political, social and economic factors.[21] Due to the fact that mediation does not have a universal procedure, various styles have been developed. In international commercial transactions, mediation is normally facilitative or evaluative, but this are not the only styles of used in general mediation.

[19] Ibid no 1 p 276-298

[20] *Boulle, Mediation: Principles Processes Practice, (2005),* p88

[21] Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative and Transformative Mediation,* http://www.mediate.com/articles/zumeta.cfm

This section will consider the appropriateness and applicability of each of these types of mediation to the specific issue of dispute in international commercial transactions.

Facilitative Mediation is considered to be the first type of mediation and it was been developed in the 1960s and 1970s. Here, the mediator is responsible for creating a process in order to create the right environment to solve the problem of the parties. In order to do this, the mediator asks questions, validates points made by each party and makes sure both of them understands the view presented by the others. Furthermore, he tries to understand and reveal the true reason why the conflict appeared between the parties and assists the parties in finding a resolution, but he is not allowed to offer his own opinions, to make recommendations or to make predictions regarding what the court might do in their case. This type is focused on reaching an agreement based on information and understanding. This type of mediation creates another advantage for solving international commercial dispute since instead of putting emphasis on the outcome i.e. that a settlement is reached no matter how the parties get there, the focus is on protecting the relationship between the parties.

Normally, the process consists of joint meetings where all the parties are present in order for each party to hear the arguments brought. Also, the focus is on the parties to make the decisions and not on the parties' lawyers i.e. parties can have legal representation present at the meetings but they are not allowed to intervene in any substantial way.

This type of mediation was developed in a time when mediation was dealt with through dispute resolution centres. When facilitative mediation was emerging, the centres where it was used, were run by volunteer mediators who did not need to have much knowledge regarding the area of the dispute and, more often than not, there was no legal representative present. Because of how it got developed, mediators came from all backgrounds, but recently it is mostly used in civil, employment and commercial cases. This type of mediation is still practiced today but it is practiced equally by professional mediators which makes it suitable for the complexity of international commercial cases. [22]This could be an argument used to promote the use of mediation in international commercial disputes.

It can be said that in this type of mediation, the mediator makes sure that the process is respected and that the parties are responsible for the outcome. Thus, it can be argued that facilitative mediation is suitable for many commercial disputes since it is looking to protect the

[22] Ibid no 20

relationship between the parties involved. This means that both big businesses and small businesses would benefit from this type of mediation since it is not going to create a hostile environment during the dispute, but, on the contrary, it can ensure that the parties will be able to collaborate in the future when the mediation has finished. A disadvantage of facilitative mediation is that due to the way it was formed, it could be considered to be unsuitable for international commercial transactions since these cases might be so complex that the mediator might need a good amount of knowledge in this area. But seeing as many professionals also practice it, as long as the mediator has the relevant specialist knowledge, it can be said that it may be an effective type of mediation for international commercial contracts.

Unlike facilitative mediation, in **evaluative mediation** a mediator helps the parties in reaching a conclusion by highlighting the strengths and weaknesses of the parties' cases, bearing in mind what the judgment of the court would be in that situation, when making his or her final recommendations. Because of this feature, evaluative mediation is compared with settlement meetings[23] held by judges. The focus in this type of mediation is on the legal rights of the parties and the mediator bases his evaluation on legal concepts of fairness rather than on the needs and interests of the parties. The meetings are normally held separately where the mediator helps the parties and their lawyers to assess the legal position and work out the costs and the benefits of going to court as against solving the case through mediation. In contrast to facilitative mediation, lawyers in this type of mediation have a more important role since they can assists meetings without their client.

Evaluative mediation was developed based on court-mandated or court-referred mediation. This is why legal representatives are active participants in this type of mediation. Due to the influence they have in reaching an agreement in this type of mediation, most mediators are also lawyers in order to satisfy the need for the legal knowledge required to reach a settlement.[24] In international commercial transactions, involving complex disputes between big companies, this type of mediation is favoured. This is mostly because, in this situation, companies are more interested in the legal aspects rather than the relationship with the other party as well as the fact that the people involved in the process have an extensive knowledge of commercial aspects and the applicable law on international commercial transactions.

[23] A settlement meeting is a meeting where the parties of a lawsuit come together in the attempt of reaching an agreement before going to trial and are normally conducted by judges in order to make sure that the law is respected.

[24] Ibid no20

Although not yet widely used in international commercial disputes, it will probably further develop and become the middle ground between the two types of mediation previously presented.

Transformative mediation is the newest kind of mediation, developed by Bush and Folger, but is not yet applied in international commercial transactions. Transformative mediation is based on the concept of giving as much power as possible to both parties. Furthermore, this type of mediation encourages each party to recognise the needs, interests, values and points of view of the other party. Thus, the idea behind transformative mediation is that during the process of mediation the relationship between parties may transform. The mediator of this type of mediation will meet both parties at the same time since this is the only way they can give each other recognition.

It can be seen that there are a lot of similarities between transformative and facilitative mediation such as the clear interest for both in giving the power to the parties. Furthermore, similarly to facilitative mediation, transformative mediation is looking to continue the process of transforming society by offering parties in mediation to choose the direction that the mediation is going to take. Since in this type of mediation the parties create both the process and the outcome of mediation, the mediator's job during the process is to follow their lead. [25]

Pros and Cons of the styles of mediation

These types of mediation have their supporters and critics which demonstrates that while in some circumstances mediation is advantageous, potentially, there may be difficulties with it too. It is often believed that facilitative and transformative mediation fulfil the true purpose of the mediation since it gives parties the chance to take responsibility in their dispute and find a resolution. This also explains why some cases of international commercial contracts favour this approach[26] since more often than not parties want to deal with the problems themselves in order to make sure that there will still be an opportunity of doing business together in the future.

However, it is believed that it is a waste of time[27] since it takes too long, and in some situations, the parties do not reach an agreement. Also, even in situations where an agreement

[25] Ibid no21
[26] Ibid no20
[27] Ibid

is reached it might go against the standards of fairness imposed by the law and, due to their role, mediators cannot give support to the weaker party. In the international arena, this could be one of the reasons why businesses are reluctant to use it since it might not bring them the result which otherwise they might get by using litigation.

At the same time, supporters of transformative and facilitative mediation believe that evaluative mediation puts too much pressure on the parties to find a solution; it should be the parties which are pushing for an agreement and not the mediator. This is why using evaluative mediation might create a disproportionate dispute resolution if a big business and a small business are involved in a dispute since the big business will be in a better position to pressure the other party into a settlement which might not necessarily benefit the small business.

Furthermore, it is believed that evaluative mediation is preferred by clients because parties want an answer even though they do not reach an agreement. Another benefit of this type of mediation is that the parties will have the certainty that the answer is fair which is believed to be the reason why it is the most popular type of mediation.[28] Supporters of transformative and facilitative mediation feel that the popularity of this type of mediation is based on the fact that legal representation is more often used in the process of evaluative mediation. They believe that, if given the appropriate information, clients would not opt for evaluative mediation.[29] In international commercial mediation, this may vary according to the complexity of the case at hand i.e. there are cases where legal knowledge is not the fundamental factor in solving a dispute but there might be situations where the legal issues in a dispute might be so predominant that only legal representation is properly equipped to deal with it.[30] This could be a reason why there are still some concerns regarding the applicability of mediation in international commercial transactions.

There is more concern regarding evaluative and transformative mediation than facilitative. Although some criticism has been directed at the fact that these two types of mediation are time-consuming, facilitative mediation seems to receive the most recognition. Much more criticism has been focused on evaluative mediation since it is believed that this type of mediation is too coercive, not impartial and is too heavy-handed. This comes as a result of the higher involvement of the mediator and also, their ability to bring their opinion in the mediation as well as the fact that the settlement is highly influenced by the law and what would

[28] Ibid
[29] Ibid
[30] McLoughlin v O'Brian [1983] 1 AC 410

the court decide in that particular situation. This could be a reason why mediation is not used in the international commercial arena since disputes vary from case to case and usually parties are looking for flexibility. Having the misconception that mediation does not offer them this flexibility, companies prefer to bypass this step and head directly into litigation.

At the same time, transformative mediation has been severely criticised because is too idealistic and is not focused enough. People who are against this type of mediation do not believe that individuals are capable of solving the disputes themselves since they do not have a full understanding of the law. This is why this type of mediation is not used for business disputes or court matters. Of course, supporters of these types of mediation would challenge these criticisms.[31] For example, Sam Imperati shows that evaluative mediation should not be considered heavy-handed but rather giving the mediation process a full picture since it considers the opinions of each party, offers opinions, challenges those opinions but most importantly puts everything in balance with legal standards and offers opinions and advice regarding the outcome.[32] Furthermore, Folger and Bush negate the criticism stating that transformative mediation presents flexibility which helps it apply to any type of dispute. [33]

For and against mediation[34]

There has been much debate for a number of years both for general use but also for the use mediation in international commercial contracts concerning benefits of using mediation but also the disadvantages of mediation and reasons why it should not be used. As it will be seen below, many of the advantages and disadvantages which are often raised overlap with each other. In recent speech held at the Civil Mediation Conference 2015 titled "Mediation Meeting Participants' Expectations?", Lord Neuberger[35] gave a panoramic view of the most often arguments used in the academic debate on the appropriateness of mediation in the context of international commercial contractual disputes. Lord Neuberger is currently the President of the

[31] Ibid

[32] Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 706 Willamette Law Review 33:3, Summer 1997

[33] Robert A.B. Bush, Joseph P. Folger, *The Promise Of Mediation*, Jossey-Bass, 1994.

[34] Lord Faulks QC's keynote speech at the Civil Mediation Conference on 22 May 2014 www.gov.uk/government/speeches/mediation-and-government

[35]Bowcott, Owen, *Lord Neuberger appointed supreme court president,* 12 July 2012, The Guardian www.theguardian.com/law/2012/jul/12/lord-neuberger-appointed-supreme-court-president (last accessed 29/09/15)

Supreme Court in the United Kingdom, which is the most senior judge position in the UK. Because of his position and experience in the field, it can be seen that his words are authoritative and hence represent an important support for this topic.

In his speech[36], Lord Neuberger generally presents that critics believe that mediation is a whim for the legal system, does not have any real substance and soon enough the dispute resolution arena will be mediation-free.[37] This is mainly caused by the fact that that there is a perception that mediation does not protect parties' interests. On the other hand, some interpret mediation as being a universal panacea mainly because it saves money. Neither of these arguments is necessarily wrong, but these arguments have been taken out of context and the effect has been to narrow the scope of mediation.[38] The problem with this is that misinterpretation of the arguments brought against mediation leads to mistrust from the public who will be reluctant in using this type of alternative dispute resolution.[39]

Firstly, Lord Neuberger pointed out that mediation is the quicker, cheaper, less stressful and time-consuming choice. Also, generally speaking, mediation is the better choice when considering the interpersonal relationships between the parties involved in the dispute since the parties involved in the process interact to each other in a safe environment in order to solve their problems. At the same time, mediation is more flexible than litigation since it can adapt the outcome to the needs of the parties while in litigation, the law will not change in order to fit those needs. Furthermore, mediation is more intimate since it is conducted in a private environment offering a safer less artificial location compared to a court. Lastly, Lord Neuberger pointed out that in mediation both parties could consider themselves winners rather than having a winner and a loser.[40] This is reinforcing the point made earlier that mediation is more flexible since it will adapt in order to suit individual needs. This was also highlighted in the Golann study which showed that "almost two thirds of all settlements in there survey were integrative" where commercial mediation was used. [41]

Even though there are a significant number of advantages brought by mediation, the critics believe that all these advantages are valid only if mediation is successful i.e. if the parties

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[36] Lord Neuberger, *A view from on High,* Civil Mediation Conference 12 May 2015
[37] Ibid
[38] Ibid
[39] Erica Bristol, *Trade secret Mediation: Negotiating beyond the Distrust,* October 2014. www.mediate.com/articles/BristolE1.cfm
[40] Ibid no36
[41] Laurie S Coltri, *Alternative Dispute Resolution: A Conflict Diagnosis Approach,* 2nd edition

reach an agreement. As stated before, more often than not the advantages are interlinked with the disadvantages and, depending on the view one has, an advantage can be interpreted as a disadvantage. For example, it is believed that if a mediation does not reach an agreement it brings a number of disadvantages to the overall process such as the need of going to trial, increases the costs, the time and causes damages to the relationship between the parties involved. Furthermore, it has been said that mediation does not provide an equally balanced environment i.e. a richer, more powerful party will use mediation in order to put pressure on the other party. In the international commercial contracts this will not always apply since usually the disputes are between businesses are found at the same level. But this is not universally valid since there quite a vast number of contracts done between big and small business and, at the same time, there are circumstances where international commercial contract are concerning a business and an individual.[42] This unbalance can be one explanation why there in a reluctance of using mediation in international trade.

Also, there are situations where parties feel that mediation has brought an unfair settlement to them and that they might have been given a better outcome in court. Probably the most important point of all is brought by lawyers. They believe that if most cases settle via mediation this means that hardly any cases will reach the court which could lead to an undeveloped legal system.[43] This will not favour legal systems especially a common law one where judges develop the law though cases. It is important for all judicial systems, but even more so for a common law system, because in order to ensure the rule of law right it is important for the law to develop relevant statutes. This is done though court decisions. If the majority of the disputes will choose mediation over litigation than the judiciary will have to suffer and possibly the legal system will become weaker.

Mediation became more attractive for both businesses and individuals also due to the ever increasing legal cost, when court fees are increasing and the legal system is much more complex than it used to be. It is believed, that in this way, people are deprived of access to justice. In this manner, it has been argued that mediation goes against the fundamental right of every citizen i.e. the rule of law.

The general misconception comes from the fact that some opponents believe that mediation is offered as the better and improved alternative to litigation. Lord Neuberger makes

[42] An example is the relationship that results from using online shopping (for example eBay)
[43] Ibid no36

the point in his speech that mediation is not litigation, it is just a step which might lead to court, but if successful, might reduce the time parties require to fixing their disputes. In order to emphasise the distinction between mediation and litigation, but also show how closely linked they are, he states that they could be considered to be "twins but in fact they are not identical twins".[44]

The most important argument against mediation is that sometimes people simply do not want to mediate. This is mostly based on the lack of credibility caused by the lack of appropriate ways of informing people. [45] This could also be considered one of the reasons why people do not seem to resort to mediation when confronted with commercial problems. Due to the lack of information, it might be considered a weakness to propose or even accept to attend mediation instead of resorting immediately to litigation. Of course, there might be situations when people simply want their day in court or believe that they have a winning case so there is no point for them to mediate. At the same time, there might be situations when one party does not think the other party will come to mediation in good faith. In a survey conducted in 2007, it was shown that in commercial litigation around 47% of the participants chose this root because they did not like the other party which lead to a costly and lengthy process. [46]

Chapter 3 International Support

While there may be mixed views on the benefits of mediation and indeed the use of it in practice in the UK, there is a growing emphasis on mediation in the international arena. The

[44] Ibid no36 p5 para 9
[45] Paul Randolph, *Compulsory mediation?,* 02 April 2010, www.newlawjournal.co.uk/nlj/content/litigation-v-mediation
[46] Ibid

support of various international organisations but also important states involved in international transactions are going to be laid down in the following chapter.

UNCITRAL

One of the most important organisations which is promoting mediation in international commercial disputes is the United Nations Commission on International Trade Law (UNCITRAL) also known as the Working Group. This organisation came in place in December 1966 and was established by the United Nations General Assembly in order "to promote the progressive harmonization and unification of international trade law".[47] UNCITRAL has at the moment 36 members chosen by the General Assembly. The institutions is divided in such a way that all the different geographic areas of the world are represented as well as the main economic and judicial systems.

In 2014, the Working Group agreed that they should take into account the possibility of enforcing a settlement agreement resulting from an international commercial mediation proceeding.[48] UNCITRAL has shown their support in using mediation/conciliation and acknowledged that using this type of dispute resolution will result in fewer situations where dispute will result in termination of commercial relationship, will help in better administration of international transactions and considerable savings in relation to legal costs.[49] In order to consolidate their efforts to promote the use of mediation and in an attempt to create a harmonized way of dealing with disputes in the international arena, UNCITRAL has implemented various instruments, some of which are the Conciliation Rules (1980) and Model Law on International Commercial Conciliation (2002)[50]. UNCITRAL stated that the reason behind these instruments was because an "easy and fast enforcement of settlement agreements should be promoted".[51]

[47] www.ec.europa.eu/civiljustice/homepage/homepage_int_en.htm

[48] Official Records of the General Assembly, Sixty-ninth session, Supplement No. 17 (A/69/17), para. 129

[49] Resolution 57/18 of 19 November 2002

[50] Although it is called conciliation it is in effect mediation

[51] Guide to enactment of the Model Law on International Commercial Conciliation, para. 88

In 2014, UNCITRAL has decided to go a step further and bring into place the Convention on Enforceability of Settlement Agreements Resulting from International Commercial Mediation. This is just another example of the measures that this organisation has taken in order to bring mediation into international trade. In this convention, the benefits of using mediation are being present showing that it reduces the number of disputes which terminate commercial relationships, makes it easier to administrate international transactions by commercial parties and saves time and money in administration of justice by States. [52]

EU law

The European Parliament: Directorate General for Internal Policies, Policy department C; Citizens' Rights and Constitutional Affairs- Legal Affairs: Quantifying the cost of not using mediation- a data analysis are just a few of the examples which show the concern of the European community has regarding the possible misuse of mediation. It was stated that:

> "The core themes in the EU's concept of conflict prevention-the importance of economic factors in conflict, the 'link between conflict prevention and democracy, human rights, the rule of law and good governance'- are repeatedly stated in Council documents for example the Council Common Position 2005".[53]

Most recently, Article 24 of Directive 2008/52/EC[54] of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters 21 May 2008 creates the duty for Member States to encourage parties to use mediation. This was one of the first concrete steps that the EU has taken in promoting mediation. The EU has adopted the Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR)[55] for EU consumers which came into force in June of 2012 and established that Member States (MS) have 24 months to incorporate it into their jurisdictions. This meant that by mid-2015 all MS should have complied with the requirements of this directive. As we are getting close to the end date, it would be a good time to have a look at how everything was intended to work and what the UK government is doing.[56]

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[52] Gracious Timothy, *The UNICTRAL Convention on Enforceability of Settlement Agreements Resulting from International Commercial Meidation,* July 2015 www.mediate.com/articles/TimothyG1.cfm
[53] Hughes, James, *EU Conflict Management,* 1st edition (2010) p5
[54] www.eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32008L0052
[55] www.ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm
[56] Ibid no 54

The Directive creates some guidelines which should be followed by all MS. The standards provided are mostly procedural and deal with time limitation regarding how long the mediation should be (no more than 90 days since the complained has been filed). Also, MS must insure that the mediators are at the standard imposed by the Directive i.e. have the necessary expertise, are independent and impartial and the mediator providers should ensure that there is no conflict of interest.

This new legislation is part of a long term plan that the EU has stated in the Single Market Act I. The ODR component of this directive was also important as part of the development which the EU is trying to implement under the Digital Agenda for Europe. ADR Directive is a platform for Member States to better structure and promote alternative dispute resolutions but it does not create a mandatory obligation to use ADR. Governments have to ensure that ADR is available to both parties if needed and that they have all the information they need in order to access this service.

Generally, the EU intended to provide the consumers with a faster, easier and cheaper alternative to litigation. Though this initiative, it can be seen that there is big support from the EU to promote the use of mediation in all the state members. This is why ADR entities are non-judicial ones with neutral party who helps the parties of the dispute to reach a solution. The ODR is especially important in international commercial disputes concerning complaints between parties which are located at a considerable distance one from the other (for example online transactions), but it is also useful for small business which want to deal with their disputes in fast and painless manner. From this it can be seen that there significant guidance and support offered by the EU in the context of international commerce.

EU clarified that this directive is intended to be applied in every market sector of all Member States, with the exception of health and education, reinforcing the support given to the use of mediation in international commercial transactions. Furthermore, it can be seen that the EU is trying to find a solution for one of the disadvantages of using mediation i.e. that it can sometimes be unbalanced by showing that the directive should only apply to claims brought by consumers against traders and not to the ones brought by traders against consumers or any disputes between traders.

Also, the directive will impose a certain level of quality which needs to be guaranteed i.e. all the ADR entities will have to provide effective, fair, independent and transparent services to their customers. At the same time, the directive impose an obligation on the traders

to inform their consumers that they have the possibility to access this service. According to the Memo they released, at the EU level, 2 recommendations have been given by the Commission which have a definition of the common principles which should be applied in order to achieve an effective and efficient ADR. The EU clarified that specific sectors are obliged to set-up ADR mechanisms (such as telecommunication, energy, consumer credit or payment services) and other are merely recommended to do so (e.g. e-commerce, postal services).

Following another of the disadvantages of mediation, the EU puts much emphasis on the need to information that businesses should provide their customers. In situations where the dispute is not resolved, all the businesses are required to provide their customers with information about the option of going to an ADR provider. This applies for both offline and online businesses.

Also, following the steps of UNCITRAL, the EU intended for all MS to create an authority which would monitor all the ADR providers which fulfil all the requirements included in the Directive. This is a step towards harmonizing the process of mediation and, through this, offering more credibility to it, potentially making it more accessible for international commercial disputes.

Support from other organisations

The International Chamber of Commerce (ICC)[57] also gives support and promotes the use of mediation in international commercial transactions. In order to ensure that general public which might require such services are correctly informed, they have provided a full description of mediation from describing the process to advising parties how they should draft their contracts in order to include a mediation clause.[58] It also provides a comprehensive list of rules[59] as well as a list of benefits for using mediation.[60] More recently the National Committee of International Chamber of Commerce in the Czech Republic has brought a new initiative. They wish to establish a mediation centre which would provide parties with possible disputes

[57] www.iccwbo.org/ (last accessed 29/09/2015)
[58] *What is Mediation?* www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/introduction/ (last accessed 29/09/2015)
[59] *Combination of arbitration and mediation under the ICC Rules of Arbitration and ICC Rules of Mediation* www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Introduction/Combination-of-arbitration-and-mediation-under-the-ICC-Rules-of-Arbitration-and-ICC-Rules-of-Mediation/ (last accessed 29/09/2015)
[60] *Ten good reasons to choose ICC Mediation www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Introduction/Ten-good-reasons-to-choose-ICC-Mediation/ (*last accessed 29/09/2015*)*

in international commercial transactions with information and educate them regarding mediation. Initially, this centre will be available for countries in Central Europe, but, if proven successful, it could extent to further parts of the world.[61]

UN mostly uses mediation in conflict between states[62] as it can be seen from the following statement:

> "Since one of the most promising approaches to the peaceful settlement of disputes is skilful third-party mediation, we, the United Nations, have a responsibility to 'we the peoples' to professionalize our effort to resolve conflicts constructively rather than destructively and to 'save succeeding generations from the scourge of war".[63]

The simple fact that they promote the use of mediation at an international level is a step further for the purpose of solving international commercial disputes, but recently they have published a set of guidelines which acknowledged the UN support for the use of mediation in international commercial disputes.[64]

Support for the use of mediation in international commercial transactions has also come from the World Bank. They have released in June 2011 the Alternative Dispute Resolution Centre Manual- A guide for Practitioners on Establishing and Managing ADR Centres[65] which offers guidance regarding how to create successful mediation providers in order to ensure that possible beneficiaries of this service will be well informed.

Lastly, the World Trade Organization[66] has a very important role in the development of mediation in the international arena. They believe that the central objective of a multilateral trading system should be dispute settlement. It is believed that without this the whole

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[61] Martin Svatos, *Art Deco Thoughts of ICC Mediation,* 22 June 2015 kluwermediationblog.com/2015/06/22/art-deco-thoughts-of-icc-mediation/ (last accessed 29/09/2015)

[62] Lars Kirchhoff, *Constructive interventions: paradigms, process and practice of international mediation,* 2008, p220-224

[63] Ban Ki-moon, *Report of the Secretary-General on Enhancing Mediation and Its Supporting Activities,* April 8 2009

[64] *United Nations Guidance of Effective Mediation*, 25 June 2012 www.un.org/wcm/webdav/site/undpa/shared/undpa/pdf/UN%20Guidance%20for%20Effective%20Mediation.pdf

[65] Alternative Dispute Resolution Centre Manual- A guide for Practitioners on Establishing and Managing ADR Centres www.wbginvestmentclimate.org/advisory-services/upload/15322_MGPEI_Web.pdf (last accessed 29/09/2015)

[66] www.wto.org/index.htm (last accessed 29/09/2015)

international relationship will not work. Due to the benefits they offer, the WTO has chosen to promote mediation.[67]

Government implication

The UK has one of the most influential government regarding the endorsement of the use of mediation. This can be seen from the numerous areas where mediation applies- from environmental issues[68] to public health to housing relating issues[69]. At the same time, the importance of mediation was reinforced by the court. *Cowl v Plymouth City Council*[70] Lord Woolf stated that it is important that the parties are involved in the potential use of mediation since this could save public money. He stated that failure of correctly informing the parties about ADR is going to create unnecessary costs for the state. He follows by saying:

> "In particular the parties should be asked why a complaints procedure or some other form of alternative dispute resolution has not been used or adopted to resolve or reduce the issues which are in dispute."[71]

Developments are being done in international commercial mediation as well. Because litigating cases have created problems and frustrations, the UK government has started heavily promoting the use of mediation for international trade disputes but also for consumer protection. This can be also be seen though the implementation of the Consumer Rights Act 2015 which incorporate a duty for business to offer mediation if any disputes arise. [72]

In the United States the first instances when the applicability of litigation started to be questioned was around the 1980s when insurance companies started encouraging people to look at alternative dispute resolution. The reason behind this movement was to show the US citizens that there was no need of going directly to litigation. Also, promoting mediation as an alternative to litigation was a way of protecting international companies from frivolous

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[67] *Understanding the WTO: Settling disputes- a unique contribution. www*.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

[68] www.the-enviroment-council.org.uk (last accessed 29/09/2015)
[69] www.housing-ombudsman.org.uk/ (last accessed 29/09/2015)
[70] [2002] 1 WLR 803 (CA)
[71] [2002] 1 WLR 803 (CA)
[72] www.legislation.gov.uk/ukpga/2015/15/contents/enacted

litigation such as the Stella Liebeck case[73] against McDonalds where the claimant was awarded $2.9 million for spilling coffee on her lap, which was clearly in exaggerated outcome.

Steps towards the implementation of mediation are being taken also in developing countries with increasing interests in the international trade market such as Brazil. In an effort to rectify the current situation of the legal system (there are approximately 10 years of lawsuits), the National Council of Justice has started a process of promoting the use of mediation. The Brazilian Senate is trying to implement a law authorizing mediation[74] and also putting in place a Commission in place to make sure everything is done properly. [75]

Although there are many governments where steps are being taken in order to promote the use of mediation in international commercial transactions there are still countries which are reluctant to do this or have done it badly. In the first category India can be found. Due to cultural and political reasons, India is not open yet in using mediation as a means of solving disputes. Only recently a property dispute which started 32 years ago was settled thought mediation.[76] A case of hit and miss in incorporating mediation in the legal system can be seen in Romania. The Constitutional Court[77] held that mediation, enforced by a badly drafted law[78] was held to be unconstitutional.[79]

Chapter 4 Why mediation does not receive more endorsement?

Overview

[73] *Stella Liebeck v. McDonald's Restaurants, P.T.S., Inc. and McDonald's International, Inc.* 1994 Extra LEXIS 23 (Bernalillo County, N.M. Dist. Ct. 1994), 1995WL 360309 (Bernalillo County,N.M. Dist. Ct. 1994),
[74] Which should pass by the end of the year
[75] Andrea Maia, *Latest developments associated with a new draft mediation law in Brazil,* 5 September 2013 www.kluwermediationblog.com/2013/09/05/latest-developments-associated-with-a-new-draft-mediation-law-in-brazil/ (last accessed 29/09/2015)
[76] Soumittra S Bose, *Mediation resolves 32-years-old civil case,* 30 March 2014, www.timesofindia.indiatimes.com/city/nagpur/Mediation-resolves-32-year-old-civil-case/articleshow/32925946.cms Last accessed 29/09/2015
[77] Decision no.266 of May 7th 2014
[78] Law no. 115/2012
[79] Constantin-Adi Gavrila, *Don't Rush,* 02 March 2015, www.kluwermediationblog.com/2015/03/02/dont-rush/ last accessed 29/09/2015

As it can be seen from the previous chapters, the use of mediation in international commercial transactions receives recognition from important international organisation as well as governments with high interests in international trade. Lord Neuberger stated:

> "In the context of increasingly expensive litigation, augmented court fees and substantial legal aid cuts, the relative cheapness of mediation (coupled with its speed) is, or at least should be, particularly attractive to ordinary people".[80]

The question then is, why is not used more in solving international commercial disputes? In the previous chapter it was made clear that mediation is not a universal concept: it is highly dependent on social and cultural environment as well as being judiciary related- but one of the common things is the reluctance of the governments to endorse mediation.[81]

Some critics believe that it is a western problem that the courts are flooded with commercial cases. An example where this can be seen in the Chinese courts. After Chinese businessmen started doing business with western companies, the court have started to see increasingly more cases involving international commercial disputes.[82] In order to deal with this, the Chinese quickly embraced arbitration and mediation and incorporated them into their law firms. Furthermore, with the government support, they incorporated into their legal system private mediation entities.[83]

Another issue which might create reluctance between claimants in using mediation in international commercial disputes, is the fact that the process is not the same in all the countries. In order to combat this international organisations (as seen before) as well local governments have started to put together guides which are trying to harmonise the way mediation is conducted. For example, guidance has been given from the UK government through different papers which give certain guideline that should be followed in mediation. One of them is the Court Mediation Service Toolkit put together by the HMCS (Her Majesty's Courts Service)[84]. Also the Office of Government Commerce has put out in March 2002 a Dispute Resolution

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[80] Ibid no36
[81] Ibid no8
[82] Ibid no 1 p 191-193
[83] Chris Poole, *The Future of Mediation,* March 2015, www.mediate.com/articles/PooleFutures.cfm
[84]Her Majesty's Court Service, *Court Mediation Service Toolkit,* 2006, www.clerksroom.com/downloads/72-Toolkit---PDF-Version---April-2006.PDF

Guidance which contains the full pledge of the government to using mediation and any other form of ADR as well as an explanation of how they work. [85]

Mediation incorporated into the legal process

The UK is one of the countries which is trying to incorporate mediation into their legal system. In doing so, the UK is increasing credibility and showing that mediation is a valid step to take before going to court. A first example is the approach UK has taken to family law. In November 2011, the UK has released the Family Justice Review- Final Report[86] which makes mediation an obligatory step incorporated into the process. The review introduces into the process the Mediation Information and Assessment Meetings or MIAM. This is an initial assessment where mediators check if the case of the parties involved is suited to undertake mediation or should go directly to court. In doing this, the mediator meets with both parties, usually separately, and gives them more information regarding what mediation is and how it works. This way the parties receive all the information they need regarding what mediation is so they can choose to go to mediation or directly go to court. It can be said that a similar action can be taken regarding international commercial disputes in order to give parties the knowledge they might lack about mediation and offering them the possibility of avoiding costly and lengthy litigation.

In a similar manner, the UK has introduced mediation in the small claims court. Here, mediation is offered during the proceedings if both parties are willing to attend it. Although it is not well advertised and it is very hard to find the mediation option without going to court, it is still a step forward in the process of using mediation at its full potential.[87] Money Claim Online[88] has adopted the same approach of promoting mediation by offering parties involved in disputes the use of their services.

Also, the financial sector has incorporated mediation into their process. Following the European example, the UK has brought into place Ombudsman[89]. They are dealing with situations when something goes wrong with the transactions between an individual and a bank,

[85]www.webarchive.nationalarchives.gov.uk/20100503135839/http:/www.ogc.gov.uk/documents/dispute_resolution.pdf
[86] www.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf
[87]www.gov.uk/make-court-claim-for-money/overview
[88] www.moneyclaim.gov.uk/web/mcol/welcome
[89] www.financial-ombudsman.org.uk/

insurer, financial firm or when there is a problem with most financial transactions. They have been established by Parliament in order to resolve any disputes between consumers and financial businesses which the parties cannot solve themselves. It could be said that a similar approach would benefit international commercial transactions because it might be the way of the tackling all the issues previously presented. By putting in place such a system, it is ensured that everybody involved in the process receive the right information about what mediation is and how it works and, thus, can make an informed decision regarding whether or not they still wish to proceed to litigation or prefer to use the alternative dispute resolution path. Furthermore, the UK developments and discussions regarding incorporating mediation into the legal process are happening in the workplace[90] and in county courts[91] offering the hope that the government is taking the mediation aspect of resolution seriously.

All of these methods of incorporating mediation into the proceeding have been bringing more attention to ADR and the easier ways that consumers and people involved in consumer transactions in general can find resolution for their problems in an effective and efficient way. At the same time, seeing that the government is getting more involved promoting the use of mediation it could be optimistically stated that in the near future there might be some developments in the way the use of mediation in international commercial transactions is seen.

A balance nees to be found between mediation and litigation. On the one hand, the state cannot force somebody to go to mediation because that would go against their rights under the rule of law (as it was presented in Chapter 2). But, on the other hand, it cannot be expected that everybody is against the use of mediation over litigation. Because of this, it is clear that there is a need to offer the option of mediation over litigation, instead of imposing one or the other. The lack of information and understanding of the process is probably the main reason why mediation is not used as much as litigation, especially in international commercial disputes.

Another reason why mediation might have to suffer could be the way mediators are accredited. Due to the high importance of the business undertaken in the international arena, the problems which might arise there are very complex and sensitive. Because of this, individuals as well as businesses involved in these disputes might not trust a mediator to deal with this type of problem. This mistrust by people in the abilities of mediators makes it more likely that they would prefer to choose litigation instead of trying mediation even though it

[90] www.gov.uk/solve-workplace-dispute/mediation-conciliation-and-arbitration
[91] www.gov.uk/county-court-judgments-ccj-for-debt/overview

might not be the better option for them. Because of this doubt, the EU has put together a code of conduct which is an attempt to create some sort of structure and give more credibility at an international level which would lift the barriers that mediation currently encounters.[92]

Another attempt at promoting mediation has seen the Ministry of Justice pledging to use more ADR methods in solving any disputes encountered. Evidence shows they did not do it as much as they led to believe they would, but it can be seen as a method of crediting the use of mediation. It could create an incentive for turning to mediation instead of immediately going directly to court. If not managed correctly (which it does not seem to be done) i.e. the Ministry only makes the statement that it is a good and approved way to solve disputes but does not actually use it themselves, it could have the opposite effect- consumers might be of the opinion that it isn't in fact efficient to use mediation if not even the government does. [93]

Furthermore, there is the argument that mediation is not used as much as litigation because is a relatively new concept introduced in the legal system. Traditionally, people are under the assumption that going to court is the only way they can find justice. But in reality in most of the circumstance they do not come nowhere near close getting the justice they deserve. As seen in the previous chapters, in court parties do not have so much space to actually discuss the problem and reach the source of it; issues are used selectively provide whatever is needed from the legal point of view. Mediation offers a more relaxed environment where everything is about finding the best outcome which would make both parties happy rather than just one. In true negotiating manner, none of the parties should leave completely satisfied but this is a better outcome than having an imbalanced result.[94]

Lastly, there is the human rights argument of whether or not mediation is going against the self-determination right of individuals. Human rights advocates believe that though mediation there is a risk for individuals to lose this right and be pressured into decisions which they are not happy with. This could be one of the reasons why mediation is not used as much i.e. people simply do not want to take the problem into their own hands. There is a chance that the majority of the people involved in disputes prefer to home somebody else analysing their

[92] www.ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf

[93] Annual Pledge Report 2007/08 www.adrresources.com/docs/adr/2-2-1548/informe-anual-adr-reino-unido-2009-uk-annual-adr-pledge-report.pdf
The Dispute Resolution Commitment (Ministry of Justice and Attorney General's Office)
www.gov.uk/government/news/government-supports-more-efficient-dispute-resolution

[94] Charlie Irvine, *Lawyers of the future on mediation: threat or a promise? 14 June 2015,*
www.kluwermediationblog.com/2015/06/14/lawyers-of-the-future-on-mediation-threat-or-a-promise/

problem and deciding what is a fair result. There might also be a reluctance, caused by the lack of information discussed before, that it could not be safe to try and solve the problem yourself because the other party might take advantage of your good will. But, it can be seen that in the international arena there are organisations which are trying to offer a more complete view of this issue. The organisation Mediators Beyond Borders is one of this organisations and their motto is on the other side of the spectrum:

> "The only lasting peace is the one built by the disputants themselves".[95]

This has been interpreted as meaning that the true resolution can be found only by taking the problem into your one hands and find a middle ground with the other party.

Chapter 5 Conclusion

In conclusion, it can be said that even though at this point in time, mediation does not receive enough recognition in international commercial disputes, important steps are being taken both at an international and local level. At the same time, considering the advantages and disadvantages of mediation, it is somewhat clear that mediation is a better option to litigation since is more flexible, cheaper, faster, and, most importantly, allows parties to get involved in the process hence, having input in the settlement.

[95] www.mediatorsbeyondborders.org/

At the same time, it could be said that in order to satisfy all the needs of a legal system, there needs to be a balance between the use of litigation and mediation in order to ensure that both individuals and business have the choice and that their rights provided by the rule of law have not been breached.

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