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Impasse, Breaking Impasse and Avoiding Impasse

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ABSTRACT

Mediation provides a unique opportunity for the parties as it relates to the opportunity of a negotiated resolution of their case. An impasse is considered to be a deadlock in mediation and during a mediation, impasse occurs when neither party is willing to compromise any further on an issue. An impasse is considered to be an end of negotiations when both the parties are willing to not end the proceedings with a result. In mediation, the impasse means and includes a hurdle, barrier, bottleneck, hindrance, deadlock or standoff.

An impasse is a situation which may occur due to various reasons. It may occur due to an overt conflict between the parties and it is said by many experts that it can be also be used as a tactic to put pressure on the opposite party. In today's scenario it is evident that impasses are frequently experienced by negotiators and the same are being featured in the courts and sometimes in the newspaper articles. In negotiation and mediation, it is systematically organized past findings on impasses and integrate them in the impasse type, cause, and resolution model (ITCR model).

The current paper will examine the purpose of term impasse by discussing from the very basic understanding of this term and further explaining it in a deep manner so as to look and understand deep into the term. The present paper will review the methodology which is used by the negotiators and which finally leads into a proceeding being termed as impasse and it will also discuss the manner and methods associated with breaking or avoiding of any impasse. It is important and very first step by a mediator that he/she shall try to avoid any further conflicts and try to end it as soon as possible rather than bringing the conflict to a stage where it is declared to be an impasse. The author will try to put forth some of its recommendations which can be used in order to avoid or break the impasse.

Keywords: *Impasses, Negotiations, Agreements, Mediators, Conflicts, Conflict Resolution.*

I. INTRODUCTION

To discuss any topic, it is very much important to first understand the basic meaning of the

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same. Let us first discuss the basic understanding of the term “Impasse”.

The term Impasse in mediation means: - When neither of the party is willing to make another concession to reach any agreement, they are said to impasse. As the negotiations are proceeded, the parties sometimes reach an impasse and that impasse is reached not due to over conflict but rather due to resistance to workable solutions or simply due to exhaustion of creativity.

(A) Meaning

An impasse is said to be bane of all mediators. There is a gap between the parties which seems to be unbridgeable. It reaches a situation where none of the side is willing to make a move because both the sides are ready to walk away rather than solving the problem. At this time it is said when a proceeding reaches an impasse. Even though the negotiators and mediators never want any proceedings to reach an impasse, but there are situations when both the parties are persistent on doing that rather than solving the problem. The main motive of negotiators is to prevent any proceeding from reaching an impasse.

In the words of Lee Jay Berman², the term Impasse must have been originated by the first mediator who ran out of the tools while mediating and did not know what to do next. When the negotiator was no more able to imagine any further as to how to deal with the case or situation, he/she must have thrown their hands in the air and declared the negotiation over and decided it to be an impasse by declaring and deeming the mediation process, which according to him is a fallacy and not a real time problem solver.

To talk about the pros and cons of reaching an impasse it can be said that it can either be beneficial to one or both the parties, and it can also be damaging. An impasse can damage relationships, reputations and future value- creation opportunities. This has been also proved and indicated in a survey by O’ Connor and Adams³ where respondents considered “avoiding an impasse” as the second most important indicator of a successful negotiation after “attempting to compromise.”

(B) Literature review

If we talk about the literature review of this study, it is evident from the studies that the extensive literature which is based or published on negotiations tends to study the quality of the agreement which either is reached or is ignored which there is a possibility of impasse.

The studies are mainly based upon the defining of impasse which are here defined as a

² supra

³ O’Connor, K. M., Adams, A. A. 1999. What novices think about negotiation: A content analysis of scripts. *Negotiation Journal*, 15: 135-147.

negotiation in which one or two parties discontinue the interaction either because one or both parties prefer no agreement, or because they could not reach an agreement despite them benefitting from doing so. It is been defined as “when negotiators do not reach an agreement and the situation in which the parties are unable to create deals that satisfy the parties and their expectations.”⁴

According to the study conducted by Lee Jay Berman⁵ and Galinsky & Mussweiler⁶, they state that for negotiators to declare an impasse can make sense because the goal of a negotiation, at the end, is to win. Therefore, sometimes the threat of impasse can sometimes be an effective tactic in achieving the goal. These are said to be tough negotiations tactics wherein, for example, the extreme first offers may help to claim more value but can also threaten the relationship between negotiators or the parties. The tough negotiations of impasse are used to claim the value whereas the soft tactics used by negotiators and agreed by parties are used to encourage co-operation.

Forced impasses are used by the negotiators to punish the counterparts who threatens the relationship by seeking to dominate the structure of the alternatives, which in this these cases, are the negotiations and their proceedings.

It is been recommended to the mediators that while the proceedings are going on, it should not be the goal to overcome the impasse per se, but to help the parties analyse the negotiations constructively. It is not always the job of the negotiators or mediators to put a pressure on the parties into a settlement because there can always be a legitimate reason for an impasse.⁷

A mediator is responsible for managing every step of the process with an eye towards anticipating and avoiding the potential for an impasse later in the mediation.

II. BREAKING IMPASSE

Breaking an impasse between two parties is often considered as a true test of a negotiator or a mediator during any settlement conferences. Before moving forward with the concept of breaking of impasse, let us first discuss the types of impasses that occur⁸-

⁴ Tripp, T. M., Sondak, H. 1992. An evaluation of dependent variables in experimental negotiation studies: Impasse rates and pareto efficiency. *Organizational Behavior and Human Decision Processes*, 51: 273-295.

⁵ Lee Jay Berman, “Mediation Strategies”, *Daily Journal, California’s Legal Newspaper*. Published on February, 2006.

⁶ Galinsky, A. D., Mussweiler, T. 2001. First offers as anchors: The role of perspective-taking and negotiator focus. *Journal of Personality and Social Psychology*, 81: 657-669.

⁷ Jim Meland, Department of Veterans Affairs(VA) Alternate Dispute Resolution (ADR), *Mediate India*. Published on June 2001.

<https://www.mediate.com/articles/va2.cfm>

⁸ Riya sehgal, *Impasse: A Deadlock in Mediation*, White code Mediation & Arbitration center.

1. Emotional Impasse- An emotional Impasse occurs when the party is emotionally struck onto some point and does not want to overcome that point and move forward. Emotional impasse occurs due to various reasons and some of those reasons are mistrust, ego, false pride, etc.
2. Substantive Impasse- Substantive Impasse is a type of impasse which can be easily recognised as it occurs when there is some monetary interest of the party which is not being met. Substantive impasse occurs due to various reasons like lack of knowledge or facts, any type of limited resources, incompetence of parties or any interference of third parties who instigate the either of the parties to not settle the dispute and move forward.
3. Procedural Impasse- Procedural Impasse occurs when either of the party or both of them feel that the process for mediation which is being conducted is unfair or inappropriate in its manner.

(A) Breaking Impasse: Meaning

A mediator works as hard as for their cases like an attorney works for their respective parties. A mediators, in a regard, serves as both the vehicle and the opportunity for breaking impasse. The mediator's role start as soon as the case is brought forward and better and more able the mediator is going to work so as to assist the parties in getting to a "yes".⁹ To break an impasse is a responsibility which is associated with a mediator from beginning to an end. It can broke up by the mediator through various techniques whichever is deemed to be suitable by the mediator like for example, exchanging of information or exchange of communication and exchanging of any offers, etc. A mediator and a negotiator should have some strategies and techniques with them in order to avoid the impasse and break it into pieces so as to move forward with the conflict and build the trust.

(B) Strategies of breaking an impasse

Some of the techniques or strategies of breaking an impasse are:-

1. Gather the information- A mediator or negotiator should gather all the relevant information of the parties involved in the negotiation and put forward that information in front of them so that no confusion and lies lie between them and the conflict can be easily resolved.

<https://viamediationcentre.org/readnews/Mjg5/Impasse-A-deadlock-in-mediation>

⁹ Rodney A. Max, BREAKING THE IMPASSE "The Unique Mediation Opportunity" Upchurch Watson White & Max.

https://www.uww-adr.com/zupload/zgraph-content/uploads/pdfs/BREAKING_THE_IMPASSE_Article.pdf

2. Encouragement to parties- The mediator should encourage the parties to make any type of concession and let the other party react to that or reciprocate. When a mediator names the concessions the parties have made and recited the reciprocal moves by the other, the parties feel more confident and satisfied about the progress they are making in the mediation process and have more hope of closing down the conflict with a good deal in hand.
3. Reframe the statements- A mediator should try to break the impasse or any situation, if arising, by reframing the possible outcomes. When a party refuses to make any further concessions, the parties should try to reframe the resolutions or their statements from loss to victory.
4. Communication way- A mediator should always try bridge the gap of communication between the parties and should try to open all the ways and forms of communication between them so that any conflict or case comes to a concluding statement and does not end up becoming an impasse. The way of communication should too be soft rather than hard which further intrigues the parties.
5. Conditional Offers- Where negotiations are stalled either because the Plaintiffs are too high or the Defendants are too low, conditional offers can be a means of breaking impasse.¹⁰ Where the plaintiff is not moving from compensation amount, the mediator should negotiate in a manner where the parties understand it in a better manner and break the conflict from becoming an impasse. Many times it is seen that the higher offers from plaintiffs and lower counter-offers from Defendants are provoked because each side is looking at the relationship of their offer to that of the other side. Conditional offers are also known as bracketing or framing of the negotiation.
6. Mediators Proposal- when the parties have come to a point during negotiation that they cannot reach to any conclusion of proposal or offer, then the mediator should take their own decision and come up with a proposal which is beneficial for both the parties.

III. AVOIDING IMPASSE

A mediator, who is truthful to their job, always wants to avoid an Impasse rather than getting into it and there are some of the keys or ways to avoid the impasse. These are said to be negotiating techniques that a professional negotiator can use to build not only the trust with and between the parties but also to break through and avoid an impasse. Some of those techniques are:-

¹⁰ *ibid.*

1. Multiple steps- A negotiator or a mediator should always think of multiple steps before getting into the conflict case. When the mediator thinks that the other party is not happy with the offer or it sounds unappealing, then it is the job of mediator to think of multiple steps ahead before the other party can refuse to the negotiation and these multiple steps should only be stopped once the parties meet their conditions or are happy with it. Therefore, rather than taking a tough stand or refusing the offer, the negotiators should think of something more and take the step immediately.
2. Gaining strategy¹¹- The negotiator or mediator should adopt the strategy of gain frame, wherein the negotiations costs are not burdened upon the parties.
3. Framing an agreement- An agreement should be framed by the mediator where the mediator does not convey offers and counteroffers but stick to the decision taken by him/her according to their own understanding for the best interest of the parties. Zone of agreement should be made.
4. Multi party assessments- Multi party assessments are used in multi-party cases where the parties work separately in confidence to draw their own view of liability of the other party. There the negotiator have to look for both the parties and work simultaneously with them.
5. Re-examine the perception of parties- Mediators should use the facts and logic some questions and tasks so as to cause the parties to re-examine their perceptions and inconsistencies with the other party and work it out with them so as to reach a decision.

IV. CONCLUSION

Parties are often called for mediation before they are sent to the courts because mediation is a process which helps in not only solving the conflicts but also it saves a lot of court's time and the courts can look into cases and solve them faster. Mediation is a process wherein parties are called anticipating that a third person is necessary to help the parties do what they cannot otherwise. Impasse, is now seen to be one of the most important concepts under the process of mediation wherein the mediator always tries to resolve a conflict and end it will all possible negotiations available. None of a mediator wants to end up getting into conflict which is further hit by the concept of impasse as explained in the paper. Breaking impasse is a most vital role a mediator can be called for to achieve and the parties should be patient enough to understand and accept the decision of the mediator because that is taken looking into and after hearing

¹¹ Hon. Patrick J. Mahoney (Ret.), How to avoid impasse in settlement negotiations, JAMS ADR Insights. Published on January, 2014.

both the parties, with the best of their interest in it. Premature efforts to break impasse will result in failure. In short, if a mediator can anticipate common causes for impasse, such as discussed above, the mediator can help the parties to avoid the potential for impasse all together, and find their way directly to a successful resolution.

The mediator's ability to break impasse of process or negotiations at the right time in the right way is the key to a successful mediation.
