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«Mediation to Foster European Wide Settlement of Disputes»

Chapter XIV

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Mediation Principles

SUMMARY: Introduction. – 1. Principle of Freedom or Private Autonomy. –2. Principle of Confidentiality. –3. Principle of Cooperation. – 4. Principle of Neutrality. – 5. Principle of Equality of Parties.

Introduction

Mediation is negotiation carried out with the assistance of a third party¹. The goal of mediation is to reach a solution that is mutually acceptable to all concerned parties and this process is based on special principles which are essential for forging agreed and binding solution. Mediation is a process in which an independent person (a mediator) helps people in disagreement to address their differences, and work towards resolution. The process focuses on future behaviour, rather than past. It therefore offers a way of dealing with tension and is useful in tackling problems in communication or in working relationships.

The mediator, in contrast to the arbitration or judge, has no power to impose an outcome on disputing parties, instead he or she tries to reach a resolution of a particular conflict through various tactics, strategies and methods that further dialogue, discussion, concession, compensation and understanding between the disputants. Every tactic or strategy he or she employs has to be based on certain principles which specifically concern the process of mediation.

Each particular mediation attempt contains a range of unique contextual and process-related variables, for example mediator can encourage exchange of information, help the parties to understand each other's view, let them know that their concerns are understood, invent solutions that meet the fundamental interests of all parties, promote a productive level of emotional expression and many others. This means that it can be difficult to compare across mediation efforts. Nevertheless, within the process of mediation, mediator is recognised as a distinguishing figure. So, whether the mediator is classified as a state, individual, institution/organization, his role as the third party is the distinguishing feature if compared to negotiations. Mediation can vary from very active to very passive involvement².

Since it is assumed that mediator's behaviour is relevant to the mediation process and is based on special principles, the observation of that behaviour is one apparent area of fruitful terrain in which to analyse the mediation process. Within a particular context, disputants perceive specific mediator's emotions. Verbal and nonverbal forms of communication are extremely relevant to all process of negotiations. For example, facial expressions are a key element of body language and emotional expressions since emotions are shown primarily in the face³. In contrast to body language are verbal displays of emotions, for example, through pronounced words, and through written expression.

¹ S.B. GOLDBERG, F.E.A. SANDLER, N.H. ROGERS, S.R. COLE, *Dispute Resolution. Negotiation, Mediation and Other Processes*, New York, 2007⁵, p. 107.

² J. SMILOVITZ, *Emotions in Mediation: Disputant Perception of the Mediation*, http://www.clingendael.nl/publications/2008/20080100_cdsp_diplomacy_smilovitz.pdf.

³ *Ibid.*

It is also important to mention that all of the process of mediation is based on trust. Mediation gains acceptance by earning the parties' trust, a process that begins with the mediator's first interaction with the disputants and continues until mediation is concluded. Trust is attained and maintained when the mediator is perceived by the disputants as an individual who understands and cares about the parties and their disputes, has the skills to guide them to a negotiated settlement, treats them impartially, is honest, protects each party from being hurt during mediation by the other's aggressiveness or their own perceived inadequacies, and has no selfish interests. Only when trust has been established, the parties can fully participate in the process of mediation and disclose their real interests.

There is no "best" way to mediate a dispute, because mediation techniques vary with the parties, the conflict and the mediation process. Private sector labour mediation, for example, tends to reflect the competitive and positional nature of traditional collective bargaining negotiating and mediator will spend considerable time working separately with the parties. Child custody mediation typically is a more cooperative process, at times bordering on counselling, and the mediator spends more time working with the parties together⁴. But, on the other hand, mediation as a separate way of resolving a dispute has common principles that should be taken into account in every mediation session.

The key principles of mediation are the following:

1. Principle of Freedom or Private Autonomy.
2. Principle of Confidentiality.
3. Principle of Cooperation.
4. Principle of Neutrality.
5. Equality of Parties.

These are the most important and basic principles of mediation. Depending on a particular form of mediation, for example, family mediation or cross-border mediation, there can be a requirement to comply with specific principles but the principles discussed in this chapter should be mandatory to every form of mediation.

It is very important to note that the rules of mediation and its principles should be carefully explained in the beginning of the mediation process, with the emphasis on the informal and consensual nature, the mediator's impartiality and responsibility of the parties to find their own solution. The limits of confidentiality may be explained in a more detailed manner and the parties should be informed what are the main principles of the mediation. Questions are encouraged and the mediator uses them to confirm that the parties have understood the path which they are taking and that they agree to be bound by its rules. The mediator tries to make the parties as comfortable and secure as possible.

Mediation has a long history in international diplomacy as well as in family and labour relations, but until recently it has been something of a minority sport in the resolution of commercial disputes. Although there is still perhaps a long way to go, the tide has very clearly turned. Needless to say that most individuals involved in commercial mediation are ostensibly not as affected by the psychological strain attached to the dispute as the people involved in a family mediation. This is particularly because each of the individuals involved plays an interchangeable part in the system so the degree of the personal consternation of the people working in the business environment is, in principle, lower owing to the very nature of the difficulties. However, intra-company mediations often develop similar dynamics to family mediation, because in internal/in-company disputes a number of people, interacting on different levels of the command structure are involved, not unlike the hierarchy to be found between parents and children, which is why it is crucially important to put the imbalance of power in perspective when dealing with such areas of conflicts. In contrast to the situation in ordinary legal disputes, intra-company mediation in particular is apt to consider and include all levels of management, which facilitates the subsequent implementation of the results agreed upon⁵. This means that principles of mediation can be determined by the form of mediation.

Negotiated solutions to conflicts lie at the heart of the culture of society. Furthermore, they are often high quality solutions which satisfy all the parties concerned, which is not the case for imposed solutions⁶.

⁴ S.B. GOLDBERG, F.E.A. SANDLER, N.H. ROGERS, S.R. COLE, *Dispute Resolution. Negotiation, Mediation and Other Processes*, cit., p. 110.

⁵ E.A. FILLER, *Commercial Mediation in Europe. An Empirical Study of the User Experience*, Alphen aan den Rijn, 2012, p. 17.

⁶ J. REDORTA, *The Future of Justice. Courts and Mediation: New Path for Justice*, Barcelona, 2009, selected papers from the symposium on Courts and Mediation, GEMME-Catalan White Book on Mediation.

That is why clear and specified perception of principles of mediation is essential for deep understanding of the process of mediation.

1. Principle of Freedom or Private Autonomy

This principle means that parties will play a major role in mediation. In this sense, both the process and the agreements reached are solely guided by the will of the parties.

Participation in mediation is voluntary at all times and participants and the mediator are always free to withdraw. Where mediators consider that a participant is unable or unwilling to take part in the process freely and fully, they must raise the issue and possibly suspend or terminate the mediation⁷.

When undertaking a mediation, it is important to ensure that parties are empowered to make the necessary changes and that they are free to control the mediation process.

Parties will cooperate more fully if they know that they are free to leave at any point. This engages their own free will and sense of purpose and enables them to drive the process towards agreement rather than to be led to an understanding by a third party. If they drive the process, they are more committed to the outcome⁸.

The other aspect of the principle of private autonomy is that parties are given “uninterrupted” time to describe the dispute⁹. The initiator of the complaint usually begins, although the decision on who speaks first may vary depending on the nature of the dispute. Also parties can decide on their own which one wants to start, but if they do not reach the agreement, mediator should intervene and lead the process of mediation. Sometimes the parties resolve the dispute after hearing each other’s opening statements with minimal direction from the mediator.

The mediator has control over the process, but not over the resolution of the dispute. So he or she can decide who should take part in joint meetings, who should take part in private meetings (just solicitors or just the parties or just the experts). Mediator can require the parties to prepare summaries of their best points or schedules of claims, to emphasise what is the most important thing and what can be negotiated, but he cannot make any orders as such or decide on behalf of the parties. Against this background, it is obvious that the mediator has no power to make a final determination of issues between the parties or order them to make a decision. Mediator can not issue an award or the equivalent of a judgment; nor will he or she express any view on the merits of each party’s case.

When a settlement agreement is signed it is probable that the parties will comply with its terms. Alternatively it might be necessary to sue on the settlement agreement. If the parties do not reach a settlement between them, the mediation will break up without a resolution. The parties will be left either to pursue formal legal process, perhaps to negotiate or to reconvene a mediation on a later date.

To sum up, principle of freedom or private autonomy means that parties control all the process of mediation and the result of the mediation is subject to their will. Needless to say that parties are also free to terminate the mediation at any stage and there is no obligation to end the mediation process with an agreement.

2. Principle of Confidentiality

One of the fundamental axioms of mediation is the importance of confidentiality. Confidentiality means that what is said or written during the proceeding of mediation cannot be used in later, possible court proceedings.

Mediation is private and confidential. Nothing of what is said in the course of mediation can be discussed outside the mediation, nor revealed to any third party. This stipulation of confidentiality is generally embodied in Mediation Agreement which is signed to regulate the mediation process and to express the will of the parties.

Mediation is generally conducted by a series of meetings. Usually the mediation opens with a joint meeting attended by the mediator and all the parties. When that joint meeting is concluded, the parties can

⁷ <http://www.familymediationcouncil.org.uk/us/code-practice/general-principles/>.

⁸ https://rhizomenetwork.files.wordpress.com/2010/12/principles_of_mediation.pdf.

⁹ S.B. GOLDBERG, F.E.A. SANDLER, N.H. ROGERS, S.R. COLE, *Dispute Resolution. Negotiation, Mediation and Other Processes*, cit., p.

break up into separate private rooms or arrange private meetings to conclude the agreement. Anything that is said at the joint session or in private meetings is confidential. Anything which is discussed in the private sessions is also confidential and cannot be revealed by the mediator to the other party or parties unless and until he is authorised by the revealing party to do so. This is one of the most unusual and effective features of the process. By contrast, would you reveal to a judge or arbitrator your weaknesses or details of any commercial or financial pressures you face? Obviously not. Under this cloak of confidentiality the parties often reveal to mediators the most extraordinary things, which the mediators can then use (with their authority) to fashion a bargain between the parties.

In some sense perhaps more importantly, once something is said or revealed, it cannot be unsaid. If a case does not settle anything which is revealed at the mediation even if it cannot be used in the formal arbitration might then influence the conduct of that arbitration. Indeed it might influence the conduct of the parties generally in their commercial dealings from that point onwards. As a matter of strict proof or evidence, parties may be then alerted to things they did not previously know. They may be prompted to hunt down alternative sources of evidence to assist them in proving their case later at a final hearing. This is one illustration of the care that is needed in participating in mediation. Mediation is not merely a matter of common sense. It is a skill¹⁰.

Confidentiality as a principle has three components that are reflected in relations between a party and a mediator, a mediator and a judge (in charge of the matter), and in relation to the public, or social control.

It is central to the role of the mediator as a neutral, unaligned participant, which is a crucial part of effective mediation¹¹. The mediator will come to the core and causes of a conflict only if a party believes and is confident that what she/he says will not be revealed without her/his permission. Mediators must not disclose any information about, or obtained in the course of, a mediation to anyone (including a court welfare officer or a court), without the express consent of each participant, an order of the court or where the law imposes an overriding obligation of disclosure on mediators.

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or public policy.

The benefits of confidentiality flow from each party's expectation, during a mediation, that neither the mediator nor the other party will be able to disclose later what transpires. But because mediation confidentiality is not (and should not be) absolute, the strength of this expectation depends on the ability to predict, at least roughly, the limits on disclosure in a future dispute¹².

Discussions in mediation are understood to be confidential by all parties and all parties agree that issues raised in private will only be communicated outside the mediation with their agreement. The only exception to this rule of strict confidentiality is where there is evidence of serious risk to self or others. Mediators may notify the appropriate institution if they consider that other public policy considerations prevail.

It is the duty of the mediator at all times to ensure that he or she acts with impartiality and that that impartiality is not compromised at any time by any conflict of interest, actual or capable of being perceived as such¹³.

Within the mediation process, a mediator offers protection against harmful use of information by guarding confidences a party reveals to her in a caucus unless she has permission to share them with the other side. A mediator does not, however, have this control outside the mediation process, particularly in follow-up or unrelated litigation.

Mediators are encouraged to discuss confidentiality rules with the participants before confidential information is provided in private sessions during the mediation process. It can also be stated in written, so that the parties would feel more comfortable and free to show their real intentions.

Another aspect of the principle of confidentiality is that mediation is without prejudice. Anything created solely for the purpose of the mediation and anything said on the day is without prejudice. In the

¹⁰ N.R. CLIFT, *Introduction to Alternative Dispute Resolution: A Comparison between Arbitration and Mediation*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1647627.

¹¹ E.E. DEASON, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, in *Davis Law Review*, Vol. 35, Fall 2001, available at SSRN: <http://ssrn.com/abstract=270349> or <http://dx.doi.org/10.2139/ssrn.270349>.

¹² E.E. DEASON, *Predictable Mediation Confidentiality in the U.S. Federal System*, in *Ohio State Journal on Dispute Resolution*, Vol. 17, No. 2, 2002, available at SSRN: <http://ssrn.com/abstract=293559> or <http://dx.doi.org/10.2139/ssrn.293559>.

¹³ <http://www.familymediationcouncil.org.uk/us/code-practice/general-principles/>.

event that no settlement is reached neither party can rely on any documents created for the mediation nor on anything said on the day in the course of the formal mediation “event”.

3. Principle of Cooperation

Participants can improve the mediation process and probability of success when they participate in good faith and cooperate. It is also very important that the parties are flexible in their positions. Needless to say that entering into mediation is a sign that parties see an opportunity to reach an agreement and to negotiate on particular topic. But in any case it is essential to emphasise to the parties that the process of mediation is based on cooperation between both parties and solution can be reach if both parties agree to be flexible.

The parties have to be willing to allow a neutral third party to help them to reach an acceptable agreement. But they should not expect that they will be provided by a solution by the mediator. The mediator, who has been chosen according to a certain procedure, has to be acceptable to both parties.

Mediator should encourage both parties in the dispute to understand the other person’s perspective, to help them to empathize with each other’s position and to be flexible in their decisions. Each party should be encouraged to actively search for a solution of a dispute and in that sense both parties must have a real opportunity and perception that they can equally participate in the proceedings. Ignorant parties are in an unequal position in comparison with a party represented by a lawyer and in this case a mediator should point out their unequal positions in the process, and teach them about the need for representation by a qualified person, or about the exercise of other rights.

Although it does not encompass rigid procedural rules, the mediation procedure aiming to achieve the goal of mediation is projected in the way that each of the parties has equal rights. Mediation would not be a fair process if a party is allowed to force the other party of conflict into the resolution of the dispute. Such solution can be a form of settlement, but is not in fact a conflict resolution.

Willingness to cooperate is a key task of the mediator: to this end, the mediator may support the hesitant parties through active intervention, e.g. through one-to-one conversations (shuttle mediation) or by developing possible alternatives scenarios together with the parties as to how the current dispute may come to an end in one way or another. In any event, the issue concerning the willingness to cooperate needs to be clearly addressed in the course of such meetings; furthermore, the readiness of the parties must be re-obtained, over and over again¹⁴.

This principle has to be employed together with the principle of neutrality which implies that mediator must conduct the mediation in an impartial and neutral manner. Mediator should only encourage parties to exchange the information, help the parties to understand each other’s views and stimulate them to suggest creative settlements, but to stay neutral in all respects.

There is a common sense of shared purpose in much mediation. Often both or all parties really want a deal (the more so if the dispute has been long running) and they are often keen to use the mediation day to achieve just that. Most parties turn up to a mediation because they want to settle, and it is rarely a process of soft compromise and that is why principle of cooperation is very important during all the mediation.

4. Principle of Neutrality

The idea that laws and the adjudicators who interpret and apply them are neutral is central to conventional understanding of fairness and justice in western liberal democracies. Not surprisingly, neutrality was also adopted by facilitative methods of dispute resolution like mediation where a third party helps disputants manage or resolve a dispute, though without imposing a decision on them. Paradoxically, although mediators are skilled at working with the divergent perspectives of disputants, they are required to leave their own perspectives out of the equation. Indeed neutrality is so significant to the mediator’s role that the terms ‘mediator’ and ‘neutral’ are sometimes used interchangeably¹⁵.

Mediator must conduct the mediation in an impartial and neutral manner. The concept of mediator impartiality and neutrality is central to the mediation process. Mediator should observe all principles of

¹⁴ E.A FILLER, *Commercial Mediation in Europe. An Empirical Study of the User Experience*, cit., p. 10.

¹⁵ A. HILARY, *Mediator Neutrality: Making Sense of Theory and Practice*, <http://ssrn.com/abstract=998202>.

mediation and consider only matters of procedure. To be neutral means that mediator should not give advice or suggest solutions (mediators do not express opinions or make judgements about who is right or wrong), he/she should not influence the content or the outcome of the mediation. Every decision made during mediation is participants' decision and choice.

It is also important, that mediators must at all times remain neutral as to the outcome of a mediation. Mediator may only inform parties that the resolutions they are considering might fall outside the parameters which a court might approve or order. They may inform participants of possible courses of action, their legal or other implications, and assist them to explore these, but must make it clear that they are not giving advice¹⁶.

It is also important that mediators should not be influenced by financial or personal connection with the disputants.

Neutrality or impartiality of a mediator should ensure that the parties accept mediator as a person who is sincerely dedicated to resolving the dispute and who favours both sides in the dispute, seeking solutions that would satisfy them both. It means that she or he will treat the parties equally, not favouring one over the other. Mediators are trained to remain neutral and impartial and to help both/all parties equally. The mediator must keep in mind that his/her behaviour, attitude, and sometimes the techniques of mediation can bring a sense of sympathy towards one side. If that happens, the mediation has gone the wrong way. The mediator cannot perform the function if there are circumstances that indicate doubts about his impartiality and objectivity.¹⁷

Certainly, there is no set formula, but there are certain common threads. The mediator must be entirely neutral and independent. The mediator brings a fresh and trusted mind to what is often an old problem. Trust and integrity are the keywords. His role is to aid communication between the parties, to assist them to overcome emotional blockages, to focus their attention and effort on the problems and, moreover, their solutions. He can help each side to understand the other side's case or even their own case (and its weaknesses, which they and sometimes their advisors have been unable or unwilling to look at). Mediators can suggest new avenues to explore, to identify and work to overcome deadlock, to unlock and release any of the entrenched positions and in some cases the ill feeling that can accumulate in the course of a dispute.

Mediators must remain neutral as to the outcome of a mediation at all times. Mediators must not seek to impose their preferred outcome on the participants or to influence them to adopt it, whether by attempting to predict the outcome of court proceedings or otherwise. However, if the participants consent, they may inform them that they consider that the resolutions they are considering might fall outside the parameters which a court might approve or order. They may inform participants of possible courses of action, their legal or other implications, and assist them to explore these, but must make it clear that they are not giving advice¹⁸.

It is not forbidden for a mediator to meet a party in private meeting and it also can help in the process of mediation. These meetings are used to provide opportunities for the parties to cool down and express their ideas in private way, also to build trust between a party and the mediator and to get to the root of the dispute. During these meetings and after them mediator has to stay neutral and not show his partiality or his favour to one or another party. That is why it is recommended that to maintain credibility, the mediator should have individual meetings with both disputants before bringing them back in joint session.

Mediator has to stay neutral during all the mediation process. Even when the parties want to settle, they usually have to work hard to identify acceptable and mutually agreed solution. Potential solutions may occur to the mediator, but mediator has to withdraw them until the parties have had enough time to suggest and analyse their own ideas, as they have more information about the issue and are able to find an acceptable solution. When the disputants are unable or unwilling to come up with their own solutions, then the mediators can approach the mediation process with discreet suggestions and alternative solutions. In this case principle of neutrality works in a broad way and mediator has to avoid imposing his ideas.

¹⁶ <http://www.familymediationcouncil.org.uk/us/code-practice/general-principles/>.

¹⁷ <http://www.posredovanje.me/en/mediation/basic-principles-of-mediation.html>.

¹⁸ V. DUNN, V. LACHKOVICH (eds.), *Family Law in Practice*, London, 2015¹¹, p. 288.

5. Principle of Equality of Parties

Each party has equal opportunities to participate in mediation. The parties in dispute must have an equal opportunity to participate in proceedings, which means that they must have equal opportunity to freely declare their position, and in particular to freely offer conclusion of settlement. Also, the parties must be properly represented when it is needed.

Equality in mediation also means that parties share the same rights in all the proceedings of mediation. The principle of equality is connected with the principle of freedom or party autonomy. It means that parties can be equal only if they are free and have their own autonomy. Only two autonomous parties can equally participate in the mediation process and decide on the matter. Only free and equal parties can settle and comply with the agreement.

The values of a free society are maximized when parties voluntarily elect to participate in a dispute resolution process of their own choosing. No person should be precluded from having access to litigation in the courts or public administrative systems unless they have knowingly and voluntarily waived that right. To the extent participation in an alternative dispute resolution process is mandated, or the product of an alleged agreement not entered into knowingly and voluntarily, the resolution of the dispute should not be binding.

In the sense of voluntary participation, it is very important to mention Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters¹⁹. The directive aims to encourage the use of alternative methods of dispute resolution, particularly the use of mediation. It seeks to ensure a balanced relationship between mediation and judicial proceedings. It is stressed that the mediation provided for in the Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organize it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time-limits for a mediation process. Moreover, the courts should be able to draw the parties' attention to the possibility of mediation whenever this is appropriate.

The voluntary participation is essential in every form of mediation, but in company mediation it plays the main part. The mediator is well advised to ensure that he or she has obtained the permission to mediate before the actual mediation process, not only on paper but also in person, *de facto* from each of the parties involved in a given conflict who are also supposed to participate in the process. If the mandate to mediate is merely imposed from the top, it is the duty of the mediator to make it explicitly clear that this mediation attempt will not succeed without the parties' inner voluntariness or without their willingness to actively cooperate throughout the entire process. Once the basic readiness of the relevant people has been signalled by the individuals involved, the general framework of the mediation procedure needs to be clarified, e.g. the principle of discretion, the principle of neutrality of the mediator, fee issue, the rules of the game, openness for results and openness for the objectives of the process, *etc.*²⁰

¹⁹ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

²⁰ E.A FILLER, *Commercial Mediation in Europe. An Empirical Study of the User Experience*, cit., p. 8.