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POWER IMBALANCE IN MEDIATION

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Vodopian T.V. POWER IMBALANCE IN MEDIATION

The article is devoted to the issue of power imbalance in mediation. The concept of the power imbalance, types and areas in which it may arise is considered. The signs on which the mediator determines the imbalances of the parties' power in mediation are highlighted. The reasons for the imbalance of forces and examples of such an imbalance in mediation are given.

Key words: *mediation competences, power imbalance, mediation, mediator, power in mediation.*

Стаття присвячена питанню дисбалансу сил у медіації. Розглянуто поняття дисбалансу сил, види та сфери, у яких він може виникати. Висвітлено ознаки, за якими медіатор визначає прояви дисбалансу сил сторін у медіації. Наведено причини виникнення дисбалансу сил і приклади такого дисбалансу в медіації.

Ключові слова: *медіаційні компетенції, дисбаланс сил, медіація, сила в медіації.*

Статья посвящена вопросу дисбаланса сил в медиации. Рассмотрены понятие дисбаланса сил, виды и сферы, в которых он может возникать. Освещены признаки, по которым медиатор определяет проявление дисбаланса сил сторон в медиации. Приведены причины возникновения дисбаланса сил и примеры такого дисбаланса в медиации.

Ключевые слова: *медиационные компетенции, дисбаланс сил, медиация, сила в медиации.*

Mediation is a process where the parties try to resolve their dispute with the help of a third party called mediator. The issue of a potential power imbalance emerges each time a mediator are working to help two parties manage disagreement. A wealthy husband negotiating with wife that has no independent source of income, employer may discriminate an employee who is unaware of basic laws; a pupil may be facing suspension by director. Imbalance of power is not a problem itself. But when an imbalance affects parties' self-determination or mediator's neutrality something needs to be done.

Researches in the sphere of mediation who argued about power imbalance are Delgado, Tony Belak, Gary L. Welton, Norman R. Page, Jeffrey Z. Rubin, Bert R.

Brown, Walter A. Wright and Ukrainian researchers G. Eremenko, V. Zemlyanska, Yu. Prytyka etc.

In this article the author aimed to define what is power imbalance in mediation and it's examples.

According to some authors less powerful parties such as the poor and the disadvantaged should instead pursue litigation, therefore reserving ADR "for cases in which parties of comparable power and status confront each other" [1].

However, still others suggest a strong commitment to the actual process of mediation might help overcome such power imbalances, and therefore, use of the process should not be eliminated altogether [2].

When the dynamics between the parties affect the discussion of solutions to the



point that one or both parties are unable to speak for themselves or to reach a voluntary agreement this means a power imbalance.

Sometimes mediation is critiqued using the argument that power imbalances cannot lead to fair and equitable outcomes. The “oppression story” is the belief that mediation allows for stronger parties to impose their will on weaker parties because mediation emphasizes the power imbalances and the system does not provide effective checks and balances [3, p. 24].

There are almost no cases where power would be equally balanced between the parties to a dispute. Even if it were desirable, there is no way a mediator would be able to measure the distribution of power between parties, and then intervene to redistribute power more equally. Mediators, however, are not primarily concerned with obtaining justice for both parties in the sense of an outcome judged to be ‘fair’ or ‘equitable’ by the mediator or some outside agent: the end outcome of a dispute should in the normal course of events be agreed between the disputants without reference to values or measurements proposed or imposed by others. In some cases, though, the imbalance of power will be so great that mediation may be hindered without intervention by the mediator to combat it, or in more extreme cases may simply be inappropriate altogether. There is no standardized formula available to mediators to decide whether intervention is necessary or whether the imbalance is great enough to make a case unsuitable. It is a matter for judgment in the light of the mediator’s own experience and understanding [4].

Power imbalances produce skewed agreements “because, with few exceptions, a mediated settlement reflects the pre-existing inequalities between disputants” [5, p. 105, 107] As a result, failure to deal with power imbalances disadvantages the less powerful party. On the other hand, the more equal the relative power; the more likely parties will cooperate in arriving at more equitable agreements. The axiom that unequal power results in inequitable agreements has as its progenitors negotiation and historical forms of mediation. From

the theory of negotiation, relative equality of power and resources between parties will result in approximately equal division of resources, whereas parties with greater power will demand and ultimately receive a larger share of resources [6, p. 79].

The issue of power at the mediation table concerns Self-Determination and mediator’s Neutrality. In fact, there is not anything to get excited about encountering an imbalance of power at the mediation table, unless it affects a party’s ability to self-determine. A cornerstone of the mediation process is the protection of self-determination. If a party cannot self-determine their own future, then little difference exists between mediation and a judge or hearing officer deciding their fate for them. Empowering someone to determine for themselves the outcome of their conflict is part of the design of the mediation process and the skill set of talented mediators. Any challenge to a party’s power to self-determine should be a concern of the talented mediator, requiring some serious attention and skill application. If a mediator does not recognize and address this challenge then the mediator could unwittingly become an accomplice or collaborator in undermining a party’s power [6, p. 79].

According to James A. Cristopherson the examples of power imbalance may arise as following:

- Belief system – a belief that one is one the side of right;
- Personality – the image one projects, how powerful one acts;
- Self-esteem – the internalized image of oneself, how powerful one feels;
- Gender/Race – Western society grants women and people of color less power;
- Selfishness – consistently putting oneself before others is a form of power;
- Force – willingness to use coercion or threats and the fear engendered in others is a form of power;
- Income/assets – power increases with income and the accumulation of assets;
- Knowledge – possessing information is a form of power;
- Status or age – increased status confers increased power, and power usually increases with age;



- Education – higher levels of education are associated with higher levels of power;
- Physical/emotional abuse [7].

There are two types of power imbalances that may occur: significant imbalances and critical imbalances.

Significant imbalances often occur in the situations where: the number of people on each side is unbalanced; one party has personal skills/resources substantially greater than the other; one party has detailed technical knowledge/information not held by the other; one party has sanctions available; there are clear alternatives to mediation for one party; one party is perceived to have higher status.

Situations where critical imbalances often occur are: where one party has substantial sanctions available; one party is intimidated/threatened by the other; one party has no interest in resolving a dispute [8].

The mediator must recognize the power dynamics between the parties in order to address the power imbalance between the parties. Often the behavior of one or both of the parties will indicate a power imbalance. The following may indicate problems: one party is very reluctant to consider mediation but won't give reasons, anxious and withdrawn, concedes issues very easily, aggressively refuses to negotiate/modify demands, issues threats. It is important to remember, though, that all of the above behaviors can be displayed in situations where power is not a substantial issue, and can indicate something as simple as nervousness. Again it is a matter where the mediator must use experience and judgment.

For instance, the power imbalance in employment disputes may arise in the following sides. First, the employee is often financially weaker, hence interested in the swiftest possible resolution—because of the pressing need for resources to cover living expenses, and the financial burden associated with prolonged proceedings. Dragging out the proceedings may be a negotiating ploy in the hands of the defendant employer. Second, the employer itself is a repeat player. It may have complex employment relations with numerous employees over a long period of time, and therefore enjoy greater knowledge and experience in em-

ployment disputes, which can be exploited at almost every stage. Third, the parties' states of mind differ. Psychological incentives, such as the pursuit of justice and fairness, play a significant role in employees' decisions throughout the process, and this must be so particularly when the expected financial benefit is low, as in summary hearing cases. For the average employee, the matter is almost always one of principle and substance, whereas for the employer it is often financial [9].

In business mediation as well as in other kinds of mediation a financially superior party may have an advantage in mediation. In ADR, as in any other dispute resolution process, the participant with the greater resources who can hire a lawyer, afford to wait and to raise more issues will have an advantage over other participants [10, p. 20].

Where parties are from different cultural backgrounds there is a risk of communication difficulties. Different nationalities, ideologies, countries of origin, political views or perceptions of the legal system may contribute to these difficulties and may lead to the ethnic participant accepting a proposal because it seems hopeless to resist.

Cultural differences impede business mediation as well. Individualism and collectivism are often considered to be at the root of cultural differences. "Individualism is a social pattern that places the highest value on the interests of the individual [whereas] [c]ollectivism is a social pattern that places the highest value on the interests of the group" [11]. Individualists are predominant in most western societies including the western European countries, United States, Canada, Australia, New Zealand and South Africa. Collectivists are predominant in most African and Asian societies. The difference between individualists and collectivists translates international business dispute resolution as both parties are typically from societies which have such cultural differences.

Power imbalances appear in mediation in case of more wealth, resources, and experience one of the parties has. It is assumed that the stronger parties will spread their will and desire for the weaker parties,



forcing them to accept less favorable conditions. However, this assertion alleviates the basic understanding of mediation, that is, mediation is a voluntary process, it is assumed that both sides want to reach agreement and avoid the costs of litigation, and no agreements can take place, until both sides give their consent to them.

The problem of power imbalance cannot be solved once and for all. In each case, the mediator solves this issue based on specific circumstances. Mediation, better than any other way of resolving disputes, has the proper tools to overcome the imbalance of power. Mediation provides the best opportunities for the maximum number of people; this is the procedure that forces the dispute to resolve the best.

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