

УДК 347.91

MEDIATOR TACTICS AND TECHNIQUES IN DEALING WITH POWER IMBALANCE IN BUSINESS MEDIATION



*Tetiana Vodopian,
Ph. D. in Law,
Associated Professor of the Department of Constitutional Law
and Law Branch Disciplines,
National University of Water and Environmental Engineering*

Водоп'ян Т. В. Тактика та техніки медіатора у подоланні владного дисбалансу у бізнес-медіації. Сьогодні Україна страждає від численної кількості конфліктів у багатьох сферах суспільного життя. Бізнес-сфера також не є винятком. Господарські спори можуть бути врегульовані господарськими судами, але сторони часто не задоволені рішеннями судів, що є причиною для пошуку альтернативного способу врегулювання спорів у сфері господарської діяльності. В останні роки такий медіація як метод вирішення спорів отримала широке визнання. Медіація це процес, в якому сторони вирішують свою суперечку за допомогою третьої сторони, яка приймає рішення щодо спору.

Стаття присвячена питанню дисбалансу сил в медіації, який означає, що динаміка між сторонами впливає на продукування рішень таким чином, що сторони не можуть висловлюватись самі за себе або досягти добровільної згоди.

Сторони в медіації або переговорах знаходяться в дисбалансі сили ще до того, як ці процедури почалися.

В статті звертається увага на те, що хоч медіатор і є нейтральним, це не означає, що у нього відсутня влада, насправді він володіє найбільшою силою в кімнаті.

Силі у медіатора виявляється у контролі усього процесу. Для того, щоб впливати на сприйняття сили сторонами він застосовує різні тактики. В статті наводяться деякі заходи, які можуть вплинути на силовий дисбаланс.

Одним з індикаторів дисбалансу влади є вербальні інструменти. Серед методів, що використовуються медіатором у статті зазначаються комунікативні навички, наприклад, навички ставити питання, перевірка, як найменш поінформована сторона може стати більш поінформованою, окремі сесії, визначення питань для обговорення, виявлення потреб, усвідомлення власних інтересів, BATNA і WATNA. Іншими методами збалансування сил є нейтральними/безпечне місце для медіації, суворе дотримання основних правил, перевірка з обома сторонами досягнутих домовленостей на реальність і позитивність, перевірка того, чи розуміють обидві сторони силу спільно узгоджених рішень, використання співмедіатора.

В статті обґрунтовується теза про те, що робота з дисбалансом сил не означає створення рівності в процесі медіації. Це означає забезпечення можливості сторонам самостійно визначати своє майбутнє. Наділення сторін медіації здатністю приймати обґрунтовані рішення у власних інтересах є наріжним каменем самовизначення і базисом компетенції медіатора.

Ключові слова : медіаційні компетенції, бізнес-медіація, медіація, техніки медіатора, тактика медіатора.

Nowadays Ukraine is suffering on number of conflicts in all life spheres. Business sphere is not an exception. Commercial disputes can be settled by commercial courts but parties often are not satisfied with the courts decisions that is the reason to find alternative way to settle commercial disputes. In recent years such method of dispute resolution as mediation gained wide recognition.

Mediation is a process where the parties attempt to resolve their dispute with the aid of a third party that has no power to decide the dispute issues.

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.

Parties in mediation or negotiation are in a power imbalance even before the processes commence.

Though the mediator is impartial, his or her impartiality should not be construed as a lack of power. The mediator actually has the most power in the room.

A mediator's power derives from his or her control of the entire process. To influence the perception of party's power mediators apply a variety of tactics. Here some interventions which may deal with power imbalance.

One indication of an imbalance of power is verbal instruments. Among techniques used by mediator we should mention communication skills, e.g. question asking skills, check how the least informed party can become better informed, caucus and separate sessions, agenda setting, need exploration, "enlightened self-interest", BATNA and WATNA. Other techniques to "balance" power are the neutral/safe venue for mediation, closely enforce ground rules, check with both parties that any agreements reached are realistic and positive, and ensure both parties understand the strength of genuine jointly agreed decisions, use of co-mediator.

Dealing with power imbalance does not mean creating equality in the mediation process. It means to provide the parties ability to self-determine their own future. Empowering parties to make informed decisions in their own best interest is the cornerstone of self-determination and the lifeblood of a master mediator.

Keywords : mediation competences, business mediation, mediation, mediator tactics, mediator techniques.

Conflict is a part of everyday life. Nowadays Ukraine is suffering on number of conflicts in all life spheres. Business sphere is not an exception. The number of commercial disputes settled by commercial courts of primary jurisdiction in 2015 increased by 1,3 per cent compared with 2014, by commercial courts of appeals increased by 20 per cent and by commercial courts of cassation increased by 1,7 per cent. This figures show increased dissatisfaction with the decisions of the commercial courts of primary jurisdiction. This is the reason to find alternative way to settle commercial disputes. In recent years such method of dispute resolution as mediation gained wide recognition in postsoviet countries area. Mediation is a process where the parties attempt to resolve their dispute with the aid of a third party that has no power to decide the dispute issues [1]. Mediation is designed to expose the parties' true needs and emotions, target the root of the problem and help formulate a creative forward-looking solution [2].

Among many others researches in the sphere of mediation we should admit Joseph P. Folger, Lon L. Fuller, John W. Thomas, Louise Otis and Ukrainian researchers G. Eremenko, V. Zemlyanska, Yu. Prytyka etc.

In this article the author aimed to define tactics and techniques that can be used by mediator to deal with power imbalance in business mediation.

Among the advantages of mediation are an opportunity for parties to develop a creative outcome; parties may use it to resolve disputes that involve not only questions of law and fact, but also "non-arbitrable" or "non-justiciable" issues (intangible feelings, personal interests, and emotional concerns and confidential discussion for parties). Furthermore, "mediation is generally informal, much quicker, far less costly, and, since it is a voluntary process, gives the parties control over the outcome" [3].

It is a function of mediator to facilitate the parties to reach agreement themselves. The mediator can attempt to use the processes of mediation to assist the parties reach a level of equality that allows them to arrive at an agreement. As the parties will have some direct contact with each other, the mediator must be responsible for detecting any factors that threaten the fairness and equality of any agreement [4].

Parties in mediation or negotiation are in a power imbalance even before the processes commence. The bank customer and the bank, the plaintiff in a personal injury claim and the insurer, the employer and employee are all examples of situations where an imbalance already exists.

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.

Even if one person has more power than another, each person has some degree of power. Therefore no every power difference affects mediation and power imbalance is not a problem itself. But in case when an imbalance affects equitability of agreements, mediator needs to deal with it.

There is no general agreement among authors as to the means of dealing with power imbalance. Suggested ways mediators might deal with severe power imbalance range from no assistance, to equalizing power, to helping both parties, to passionately assisting both parties.

In the case of “no assistance” the mediator should do nothing and allow the exploitation to occur. Voyles (2004) argues that power imbalances exist in everyday life and should be allowed in mediation, and that strict power balancing, in practice, seems unlikely [5].

Another way is “equalizing the power”. The mediator makes attempts to equalize the power between the participants by strengthening the weaker party and discouraging the stronger one. Without recommending specific actions, Hedeem (2003) feels the mediator has an ethical responsibility to collaborate with the weaker party to develop ways to ensure his/her full participation [6]. Moore (2003) suggests the mediator can assist the weaker party to recognize, organize, and marshal his/her potential power but should not actually advocate for the weaker party [7].

The mediator may be in a position to apply “heat” to the powerful party when believing that the one party is “exploiting” the other one.

Also mediator may help both parties equally. So that mediator could seek to equally empower both parties. Voyles (2004) focuses on the self-determination of the parties; that is, on each party's ability to participate effectively. He sees the mediator as the protector of the self-determination of both. This is done by separately reminding each party of his/her needs, helping with relevant and important arguments, and coaching. Voyles would use “role-play hypotheticals” to teach a weaker party how to respond effectively [5].

One more way for mediator is to passionately assist both parties. At the far end of the continuum the mediator would passionately act to fully empower both parties so each might attain his/her fullest bargaining potential. In a more extreme vein, Melamed (1999) argues that the mediator should passionately help both parties to be at their personal best, to most capably problem-solve, and attain the greatest possible satisfaction [8].

Although an overwhelming majority of mediators consider that mediator have to adjust a potentially

harmful power imbalance to hinder successful mediation.

The issue of power does not end with an examination of the party's power. Analysis of the power dynamics within the mediation process must include examination of the mediator's power. Though the mediator is impartial, his or her impartiality should not be construed as a lack of power. The mediator actually has the most power in the room.

A mediator's power derives from his or her control of the entire process. This control manifests itself in several ways and every element of power listed below is controlled by the mediator.

E.g. 1. Creating the ground rules.

2. Choosing the topic.

3. Deciding who may speak.

4. Controlling the length of time each person may speak.

5. Allowing and timing a person's response.

6. Determining which party may present a proposal to the other.

7. Presenting an interpretation of what the party said.

8. Ending the discussion.

9. Writing down the agreement.

To influence the perception of party's power mediators apply a variety of tactics. Here some interventions which may deal with power imbalance.

Mediator may talk to both parties about the issue before a meeting, and if necessary get the issue out in the open during a meeting.

One indication of an imbalance of power is verbal instruments. The first technique for addressing an imbalance of power is the mediator's superior communication skills. One effective way to support self-determination is to offer the party a complete hearing (the thing they are not getting).

By alternating attention between the two parties mediator manage with power imbalance. Turning from one part back to another for asking a question or summarize the party's position, paying attention to the flow and focusing of the communication, managing the tempo, timing and can empower self-determination.

One way to manage power imbalance (as well as timing) is mediator's question asking skills.

By asking general background questions in joint discussion both parties get to respond. If the stronger party cuts weaker one off with a tirade or patronizing discourse mediator can claim missing data from his/her information or fact gathering by asking clarifying questions. Filling out “forms,” or getting all the data, or fulfilling mediator obligations requires weaker party to speak and be heard (at least by mediator). Using these “excuses” to have weaker party talk can take attention off any focus on it,

keeping it innocent, maintaining balance, staying neutral. Question asking in caucus can lead to reality testing. Mediator has to ensure that both parties are able to be heard and that their interventions are balanced.

Imbalance of power can also manifest itself via information. If access to information is an issue, it is to mediator to check how the least informed party can become better informed. Mediator assists each party to obtain all the information needed. One party may have more information or experience than the other. A way to balance self-determining power could be appealing to the use of outside resources, e.g. to consult expert. Giving "homework" to the party can be a good way to get information on the table. Mediator may advise to encourage use of an attorney.

Another way to get information on the table is for the mediator to be as ignorant or inexperienced as the parties need. Asking for further clarification on a particular issue when mediator know one party is not getting the explanation or is overlooking a point can bring self-determining information to light.

A second agenda setting opportunity exists in caucus and separate sessions. Meeting privately with each party and developing an agenda for topics they each want to discuss when everyone gets back together assures Jim's agenda items equal exposure when we reconvene together. Roleplying a hypothetical conversation during caucus can greatly increase the possibilities for self-determination.

Another technique for managing communication and information is agenda setting. First opportunity to create an agenda is during joint discussion using chart paper. It is easy to list items that come up during opening statements and joint discussion. While summarizing parts' opening statements list their topics. This creates focus and structure to parties' communication. By identifying topics, mediator can turn to each party for information or perspective on that topic.

The most powerful technique addressing an imbalance of power is need exploration. Working with the weaker party, identifying his/her self-interest(s) can empower negotiation. Helping the weaker party name his/her need(s), helping him/her structure a way to discuss his/her need(s), exploring possible options for meeting his/her need(s) can empower the weaker party. Identifying need can be the best antidote for power imbalance due to information, emotion, verbal ability, etc [5].

One more strategy of dealing with power imbalance is the "enlightened self-interest", the mediator (usually in caucus) becomes an "agent of reality" and explains to the dominant party that he/she has a responsibility for the satisfaction of the weaker party. "If the other party should opt out, the mediation

ends, keeping you from recognizing any benefit from your superior power." The powerful party's responsibility is to make the weaker party's payoff greater than what the party would receive should the negotiation end. The mediator indicates that the other party will be reminded of the voluntary nature of mediation and of his/her choice to opt out rather than accept an unsatisfactory payoff. A softer statement to this effect might be included in the mediator's opening statement suggesting that each party has a responsibility to the other to make the outcome worth the other's negotiation effort.

This strategy is an attempt to initiate a willing shift of some power by the stronger party to the weaker based on his/her self-interest [8; p.79].

One more way to rebalance power is to help the parties to examine and consider their BATNA and WATNA. Mediators who can help parties to perform a high quality and comprehensible alternatives analysis will often improve negotiation strategy significantly. This helps parties to avoid accepting an inadequate settlement offer.

Other techniques to "balance" power are the neutral/safe venue for mediation, closely enforce ground rules, check with both parties that any agreements reached are realistic and positive, and ensure both parties understand the strength of genuine jointly agreed decisions use of co-mediator.

If a power imbalance is such that mediator determines that self-determination by one of the parties is unobtainable, it's better to terminating the mediation. Not getting an agreement is better than getting a bad agreement. On the one hand: terminating the mediation, if self-determination is not possible, mediator end the chance for stronger party to determine weaker party's future by offering the opportunity for a judge or hearing officer to decide it.

On the other hand: by terminating the mediation, if self-determination is not possible, mediator ends the chance for stronger party to determine weaker party's future and becoming a collaborating perpetrator or a by-stander.

If a power imbalance is such that mediation is not appropriate by the mediator and the mediator and the parties agree then the mediator should consider signposting alternatives e.g. legal action, arbitration.

Power imbalances are a reality of the life and the mediation process as well. The mediator must attempt, as soon as possible, to ascertain where the power imbalance lies in the relationship. The talented mediator requires serious attention and skill application to determine the steps that can be taken to adjust power imbalance. In many cases, power imbalances appear obvious. However, the mediator should constantly be mindful that there might be non-obvious factors that can influence the parties, and

give rise to an unfair agreement. The imbalance could be intellectual, verbal, or an imbalance of experience etc. Dealing with power imbalance does not mean creating equality in the mediation process. It means to provide the parties ability to self-determine their own future.

Dealing with power imbalance in business mediation by using special mediator's techniques

allows parties to make agreement that meet their needs in the best way.

Empowering parties to make informed decisions in their own best interest is the cornerstone of self-determination and the lifeblood of a master mediator.

References :

1. Gazal-Ayal, Oren and Perry, Ronen, Imbalances of Power in ADR: The Impact of Representation and Dispute Resolution Method on Case Outcomes / Oren Gazal-Ayal, Ronen Perry // *Law and Social Inquiry*. – 2014. - 39. – P. 791–823. Available at SSRN : <http://ssrn.com/abstract=2343083>.
2. Fuller Lon L. Mediation – Its Forms and Functions / Lon L. Fuller // *Southern California Law Review*. - 1971. - 44. - P. 305-339.
3. Van Ginkel, Eric. Transatlantic Dispute Resolution [Electronic resource] / Eric van Ginkel // 2004. – October. Available at: <http://www.mediate.com/articles/vanGinkelEl.cfm>
4. Eliades, Dimitrios. Power in mediation - some reflections / Dimitrios Eliades // *ADR Bulletin*. – 1999. - Vol. 2: No. 1. - Article 2. Available at: <http://epublications.bond.edu.au/adr/vol2/iss1/2>
5. Voyles R. Managing an imbalance of power [Electronic resource] / Rick Voyles. 2004. Available at : <http://www.mediate.com/articles/voylesr3.cfm>
6. Hedeem, T. Ensuring self-determination through mediation readiness : Ethical considerations. [Electronic resource] / T. Hedeem // 2003. – July. Available at : <http://www.mediate.com/articles/hedeent1.cfm>
7. Moore, C. *The mediation process: Practical strategies for resolving conflict*. San Francisco: Jossey-Bass; 2 edition, 2003. - 464 pages.
8. Jeffrey Z. Rubin & Bert R. Brown. *The Social Psychology of Bargaining and Negotiation*. Academic Press, 1975. - 359 pages.