

Some Thoughts on the Voluntary Nature of Mediation, or Why Mediators Should Not Overestimate What They (Can) Do

Kluwer Mediation Blog
August 24, 2017

Greg Bond (Bond & Bond Mediation / University of Wilsdau.)

Please refer to this post as: Greg Bond, 'Some Thoughts on the Voluntary Nature of Mediation, or Why Mediators Should Not Overestimate What They (Can) Do', Kluwer Mediation Blog, August 24 2017, <http://mediationblog.kluwerarbitration.com/2017/08/24/thoughts-voluntary-nature-mediation-mediators-not-overestimate-can/>

One of the principles of mediation as it is trained and practised around the world is that participation is voluntary. The parties decide for themselves if they wish to mediate their dispute. The mediator is only needed if that is what they decide.

Of course, this is not quite that clear cut, and there are grey areas. Such as when a court makes mediation highly recommended, and it would be unwise for the parties not to attend. Or when a law makes it mandatory. Or there is a contractual obligation to mediate, which may not always be welcome when it comes to the crunch. Or, in the workplace, when a superior expects staff to participate. Or when the lawyers are not convinced but go along with their clients, advising them it may not work. In these cases, it is wise to ask if the parties or their representatives are ready for mediation and whether they may feel coerced into the process, and if that will backfire.

What is voluntary is not attendance, but real engagement and a wish to at least see if it can work. I will tell two stories.

A mediator is asked to mediate in an escalated conflict in a workplace. There is no legal dispute, but there is a sign that the dispute may turn to the law down the line. A manager is concerned about members of staff she is responsible for, worried for their well-being in a conflictual situation that is causing them distress. The organisation is concerned that they need to do something about the situation, not least to show that they are aware of their duty of care. The human resources department suggests mediation. There is an intake interview with the manager, in which the mediator listens to her concerns. They agree that one course of action could be to mediate with the manager and the staff in question attending. She will suggest that to her staff.

The mediation never comes off. One of the potential participants refuses it flat out and very vehemently, giving no reasons. There is no point in the manager trying to force the issue. In a phone call, she thanks the mediator for the help that talking provided. The mediator wishes her well.

This is not unusual. Many enquiries do not result in mediation. The parties decide that a mediator is not needed, and mediators learn not to be disappointed, however much they may believe in mediation, or in their suitability to do the job, or wish the parties would take the chance.

Mediation can be seen as a threat, or a weakness, or as superfluous, or as an unknown, and whatever other ways people choose to deal with their conflict are more attractive than talking it through with their partners in conflict and a third party. This best alternative to trying out mediation is a process alternative - with processes involving avoidance or escalation taking precedence. We can all probably relate to this in our own lives, when we experience friends, neighbours, or colleagues who simply refuse to talk. Or when we ourselves refuse to talk. This is not always a rational state of mind. Being rational is not the human default. So when I say (to myself or others) that in trying mediation there is nothing to lose, I cannot expect this to be how it is (always) seen by people in conflict situations.

Here is the second story that highlights why the mediator's role within a dispute should not be overestimated. It is the exact opposite of the first story, because here the parties want to engage in the process from the outset. The unusual thing is that the merits and material interests of the dispute are already decided and are not up for negotiation. This mediation involves a number of people owning adjacent property, with different ideas as to what to do with this property and how it might be developed. Each of them sees what some of the others are doing as detrimental to their interests. The development plans are already decided, and can be rightfully decided by each owner individually. The request for mediation is a wish to talk, not to thrash out any settlement to a disputed material issue.

In the mediation, views are exchanged politely, feelings are named, and the participants listen to each other and acknowledge different perspectives. If they are able to do that, why do they need a mediator? Because, they say, they need (and were willing to pay for) a setting that provides them with a place to talk, a process that gives them a prompt, and a person who lends their talk some structure, ensures they all get a chance to speak, and keeps the pace down. This mediator has no hard bargaining to deal with, no aggression, no stonewalling, no impasse. There is a role for the mediator, but it is much less significant than the readiness of the parties to engage in the process - voluntarily. Here too the mediator should not overestimate his own influence. What matters is the parties' willingness to engage.