

VOLUNTARINESS OF MEDIATION - THE MEDIATOR'S PERSPECTIVE

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ABSTRACT

Mediation is a process where parties meet with a mutually selected impartial and neutral person who facilitates the resolution of their dispute, with the aim of arriving at a self-determined outcome. The voluntary characteristic of the mediation process requires all sides to agree to mediate and have an equal stake in resolving the dispute. The parties in the dispute have the freedom to resolve the dispute in their time and terms. The right of the parties to reach a voluntary agreement is fundamental to the mediation process. Consequently, a mediator should act and conduct the process in ways that maximize its voluntariness. The mediation process is voluntary for the parties as well as the mediator. What is voluntariness from the mediator's perspective? What situations warrant the exercise of the mediator's voluntary rights? What are the implications of the mediator's voluntary rights on the quality of the mediation process? This article addresses voluntariness from the mediator's perspective, rationales for voluntariness and ethical concerns in the exercise of the mediator's rights.

CASE STUDY

The black mahogany office door cracks open. A tall elegant old lady makes her way into the mediator's office, exchanges polite greetings with the mediator and at the latter's guidance, walks to one of the opposing empty seats reserved for parties. Despite her graceful appearance, hushed sighs and twitchy hand movements betray her uneasiness. A few minutes later, a stout, boisterous collections officer makes his entrance, acknowledges the mediator with a nod, darts an angry glance at the old lady, muttering a threat to "teach these old folks a lesson" beneath his breath as he occupies the nearby empty seat. The scene is set for another housing mediation. Should the mediator turn a deaf ear to the discriminatory and abusive remark and proceed with mediation? Should the "neutral" cast-off the restraints of neutrality and impartiality and lash out at the deserving party?

VOLUNTARINESS - THE MEDIATOR'S PERSPECTIVE

The mediator's duties generally entail careful exploration with parties, within the bounds of discretion and confidentiality; watchfulness over the quality of the process - whether a party is being forced into and/or through the process; observing parties' conduct through every stage of the process - to determine continuity or termination of the mediation process and ultimately, the mediator strives to ensure that parties' concerns are fully addressed in a fair and safe environment. From the mediator's perspective, voluntariness means that the mediator is not tied to any party's opinion or constrained by the potential outcome of the mediation. A voluntary approach to mediation not only assures professionalism but also quality of process. Voluntariness also requires the purposeful use of ethical options to interrupt, end or postpone mediation without restraint. Impartiality and neutrality demand freedom from bias and a commitment to serve all parties in contradistinction to a single party. Confidentiality and avoidance of conflict of interest oblige disentanglement of mediator's interests from the dispute, parties and the outcome of mediation while the mediator's quality assurance function commands a thorough attention to fairness at every stage of the mediation process.¹ Inability to satisfy these prerequisites of impartiality, neutrality, confidentiality, avoidance of conflict of interest and fulfil the duties arising from the mediators' quality assurance obligation would likely result in the mediator's voluntary withdrawal from mediation. Whilst the law does not

provide an exhaustive list of circumstances that can prompt a mediator's voluntary withdrawal; it seems that human right infringing acts, abuse and crime may make the list.

RATIONALES FOR VOLUNTARINESS

There are various reasons why mediation should be a voluntary process for the mediator. Voluntariness permits the mediator's choice of cases and specialisation, it ensures that the mediator is not emotionally attached to the dispute, parties or outcome of the mediation, voluntariness preserves the integrity of the mediation process, it facilitates mandatory reporting at any stage of mediation and creates leeway for the mediator's disabilities. These rationales for the mediator's voluntariness are discussed below.

To Permit the Mediator's Choice of Cases/Specialisation:

Voluntariness is necessary to ensure the mediator does not feel coerced to mediate cases the mediator is not competent or interested in mediating. If a family mediator sets out to mediate between a couple but realises that the deciding issues in the mediated case are rooted in real estate not family or domestic dispute, the mediator may co-mediate with an expert who is well-versed in real estate mediation or voluntarily opt-out of the mediation on the ground of incompetence. A contrary opinion may lead to an unsuccessful or unsatisfactory settlement. Furthermore, several spheres of specialisation like construction, medicine, etc., require a mediator to have specialised knowledge which enables the mediator to process information and respond much quicker than a mediator who does not share such specialisation.ⁱⁱ Parties often find comfort in knowing that the mediator shares their expertise and the mediator's specialisation may be the primary criterion for appointment.ⁱⁱⁱ The mediator in the case study above can report the abuse and withdraw from mediation, especially, if further abuse is inevitable.

To Ensure the Mediator is not Emotionally Attached to the Dispute, Parties or Outcome:

Sometimes, the mediator is perplexed by many factors that could rip-apart his/her distinguished mediatorial values. A carefully concealed yearning to see a particular party "favoured," attachment to a desired mediation outcome, the temptation to bend the rules to increase

financial gain and/or the number of successful settlements. Mediators are obligated to withdraw from mediation if the process could be tainted by any shade of compromise or the mediator's interest threatens to be exalted beyond the parties' right to self-determination.^{iv} The mediator's facilitative role is very important in the dispute resolution process, nonetheless, the mediator's duty to facilitate only arises if parties have agreed to mediate. Mediators should be wary of abusive parties like the collections officer in the case study above. Abuse in that instance may be a strategy to discomfit the elderly lady and obtain his desired settlement terms. On the other hand, it could just be an angry reaction to incidents that occurred prior to the mediation. The mediator is duty-bound to ensure that parties mediate in a fair and safe environment. A mediator should be at peace with withdrawing if parties are not prepared to engage professionally in the mediation process.^v

To Preserve the Integrity of the Mediation Process:

At the inception of every mediation session, the mediator rolls out mediation guidelines and facilitates parties' consent to the agreement to mediate. Promises of confidentiality, neutrality and impartiality are recited by the neutral. Guarantees of fairness in the quality and outcome of mediation urge the parties into the mediation session. The mediator's presence in every mediation session symbolises professionalism. Protracted presence in the face of abuse, discrimination and illegality endorses such impropriety. The mediator's voluntary withdrawal prevents such subtle endorsements and strengthens the victim to seek justice in other fora. In respect to mediation, integrity entails unity, wholeness, completeness and soundness of the mediation process.^{vi} The process should be fair, capable of meeting parties' needs and providing a safe place to resolve conflict. The mediator may voluntarily withdraw if every effort to preserve the mediation's integrity proves abortive. An instance that a mediator may withdraw to preserve the integrity of the mediation process is where the mediator's perspective is incompatible with a co-mediator's. Rather than create a scene before the parties, it is more professional for the mediator to withdraw. However, if the co-mediator's perspective would undermine the integrity of the mediation, withdrawal alone may not be sufficient. The withdrawing mediator may be required^{vii} to leave a formal complaint with the respective mediation institution or regulatory body.

Voluntariness Facilitates Mandatory Reporting at Any Stage of the Mediation:

Mandatory reporting would be hampered if the mediator cannot discontinue mediation and report an impropriety revealed in the course of mediation. Additionally, the principle of voluntariness ensures that the mediator is not trapped between mediation principles and laws. The obligation of confidentiality, neutrality and the mediator's duty to mandatorily report require a tender balance because reporting dashes parties' expectation of confidentiality and self-determination.^{viii}

For example, if a particular landlord commonly favours white tenants over black tenants, the mediator may decide to make a human right report on the observed pattern. To prepare parties mind on the possibility of a report arising from disclosures or information obtained during mediation, it is good practice to notify parties of the mediator's duty to report and the applicable reporting scope (e.g. child abuse, elder abuse and threat of bodily harm) during the introductory phase of mediation. Nonetheless, mandatory reporting triumphs over the mediator's duty of confidentiality and neutrality; it prevents the possibility of mediators failing to act.^{ix} Mediators should be diligent to understand the reporting standard and report accurately when required as subsequent investigation can be very stressful and unpleasant.^x

Voluntariness Creates Leeway for the Mediator's Disabilities:

Knowing that the mediation process is voluntary is comforting for the mediator. Standard VI(A)(10) of the 2005 US Model Standards of Conduct for Mediators requires that mediators make provision for accommodation where a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation. Incidentally, a mediator in the party's situation, who is unable to relate with a subject matter or parties to a mediation is often faced with the option of terminating the mediation or withdrawing from the mediation process. Even where there is a co-mediator, the co-mediator's expertise may not shield the inexperienced mediator. Other instances of disability include ill-health and emotional instability. Thus, the voluntariness of the mediator's participation in mediation may be the only professional exit route when the mediator is faced with a disability.

ETHICS IN THE EXERCISE OF VOLUNTARINESS BY THE MEDIATOR

There are statutory and practical guidelines on the exercise of voluntariness by the mediator. Below is a non-exhaustive list of ethics for the mediator's guidance.

Inform Parties and Co-Mediator (If applicable):

When a mediator decides to withdraw from mediation, it is necessary to inform parties and co-mediator(s) where applicable. Article 9(d) of the 2021 United Nations Commission on International Trade Law (UNCITRAL) Mediation Rules requires that the mediator should make a declaration of a voluntary termination after consultation with the parties, to the effect that further efforts at mediation are no longer justified. Another reason proposed by the UNCITRAL Mediation Rules for the mediators' termination is the non-payment of mediator's fee.^{xi} The first reason for withdrawal seems to be a wide provision encompassing myriads of rationales that can professionally justify a mediator's termination of mediation. It is noteworthy that the mediator is not mandated to divulge the specific reason from which the declaration of termination arises just like the UNCITRAL Mediation Rules does not require that parties disclose the reason for terminating mediation.^{xii}

Whether or Not to Disclose Reason for Withdrawal:

Whether or not to disclose reason for mediator's voluntary withdrawal to parties depends on the facts of the case and legal requirements. As discussed above, it seems that disclosure of the reason for withdrawal is not mandated by the 2021 UNCITRAL Mediation Rules. Where such disclosure would impact the mediator's avowed confidentiality, neutrality or impartiality; the mediator should be cautious with disclosure. For example, during caucusing, if a party makes a confidential disclosure which the mediator is not permitted to disclose to the other party; the mediator should refrain from divulging such information while withdrawing from mediation.^{xiii} Nonetheless, where a Code of Conduct or regulation mandates disclosure, the mediator should not hesitate to make such a disclosure. For instance, Standard III (C) of the 2005 US Model Standards of Conduct for Mediators provides that a mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be

seen as raising a question about the mediator's impartiality. In this instance, the mediator should make the specific disclosure required.

Prompt Reporting:

Depending on the facts of each case, reporting may be an appropriate next step for the mediator. Triggers that prompt reporting include crime, child abuse, elder abuse, bodily harm, infringement of fundamental human rights and any other statutorily required circumstance. These triggers may be spotted in both commercial and non-commercial disputes. It is expected that financial crimes like fraud may be more prevalent than abuse in commercial disputes. Where an impropriety warrants reporting to a regulatory authority, such reports should be made immediately to protect abused persons, prevent further unlawful acts and restore law and order. The case study above provides an illustration of elder abuse. According to the American Psychological Association, patterns of elder abuse include physical abuse; verbal, emotional or psychological abuse; sexual abuse; financial abuse, exploitation and caregiver neglect.^{xiv} The case study above illustrates verbal, emotional or psychological abuse. Emotional abuse and verbal threats during mediation may take a toll on the receiving party. The outcome of such abuse includes a cowered disposition - where the abused person accepts whatever the abusing party proposes for the "sake of peace;" withdrawal from the mediation process or a counter abuse, making the mediation session rowdy and unprofessional. Whatever scenario plays out, it is the mediator's duty to maintain the quality of the mediation process while the mediation lasts and report relevant abuses as the occasion demands.

Refund of Unearned Fees:

Where fees had been deposited in advance, a mediator should make a transparent account of logistic cost (where applicable), professional service provided, the attendant professional fee and unearned fees. The mediator should come to terms with parties on the amount to be refunded. Unearned fee in this instance could be unspent mediation fees which would not accrue due to the mediator's withdrawal. Mediators should be cautious with the use of hooded terms like "non-refundable fees." It seems safer to itemise components of fees paid by parties. Where fees cannot be refunded for good reasons, the mediator should be mindful to lay such reasons bare before the parties. For example, where

the initial fee included the booking fee for the mediation room, a rational explanation is that such rent had already been expended in booking the venue utilised for the mediation session, therefore, a refund is not practicable. The mediator's duties call for fairness, accountability and trust. The mediator should be watchful to ensure these virtues are not compromised in dealings with parties.

Caution on Incessant Withdrawals from Mediation:

While voluntariness is the mediator's right to exercise, every deadlock or "irregularity" does not warrant a withdrawal from mediation. Standard VI(A)(10) of the 2005 US Model Standards of Conduct for Mediators, for instance, leaves room for accommodation to cure irregularities that could have arisen from a party's disability. Withdrawal from a mediation session can be justified on many grounds - ill-health, lack of co-operation by parties, conflict of interest, incompetence etc. Nonetheless, the mediator should be mindful that incessant, unwarranted withdrawals from mediation could earn a mediator the reputation of an incompetent neutral.

CONCLUSION

Voluntariness of the mediation process for parties has been emphasised; but the mediation process is not less voluntary for the mediator than parties. Mediation Code of Conduct and court rules provide guidance on withdrawal by the mediator. Mediation is an outbreak of the state's judicial function, regulated by the law and supervised by courts – and a solemn duty for the serious-minded. Unnecessary withdrawals, punitive "silent treatment" that could make the mediator seem invisible in a session, make mockery of mediation as a legal medium for dispute resolution. Mediators should be cautious to ensure the right to voluntarily withdraw from mediation is not abused at every whim and caprice.

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Legislations

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United Nations Commission on International Trade Law (UNCITRAL) Mediation Rules (2021)

ENDNOTES

ⁱ US Model Standards of Conduct for Mediators, Standard II - VI, (2005); Minnesota Civil Court Rules, Rule 114.13(1-5), (1994 - Amended in 2023).

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ⁱⁱⁱ *id.*

^{iv} US Model Standards of Conduct for Mediators, Standard I (2005).

^v Greg Bond, *Some Thoughts on the Voluntary Nature of Mediation, or Why Mediators Should Not Overestimate What They (Can) Do*, Kluwer Mediation Blog (July 5, 2023, 02.46 AM)

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^{vii} By insitutional and regulatory guidelines.

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^{ix} *id.* 35,47.

^x *id.* 38.

^{xi} Article 9(e) of the 2021 UNCITRAL Mediation Rules

^{xii} Article 9(b) and (c) of the 2021 UNCITRAL Mediation Rules

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