

Business mediation - consensus instead of compromise

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„In all debates, let truth be thy aim, not victory, or an unjust interest.”
(William Penn)

Abstract: Mediation is a voluntary process in which an impartial person helps with communication and promotes reconciliation between the parties which will allow them to reach a mutually acceptable agreement. Conflicts arise in every space of our lives, in the life of natural persons and of legal entities. Companies, enterprises, organizations, corporations has to manage their conflicts. With this background, the knowledge about process and methods of alternative dispute resolution (ADR) can help students to be able to solve conflicts with their own competences. During the teaching process we solve a conflict together with the students, from the beginning until the end of the case, so we finish with a binding agreement -the method shows step by step how to reach a reorganization, a resolution in legal or simply in human relationships. With special attention to business mediation we have to try to use consensus based procedure instead of compromise based solution.

Keywords: transformative mediation; conflict-connection, reorganization, agreement

1 Disputes in business

Disputes have to be solved between natural persons and also between legal entities. Also companies, enterprises, organizations, corporations has to manage their conflicts. While mediation is often thought of in the context of personal or family disputes, business owners realize that mediation services are available to resolve business-related disputes as well. In alternative dispute resolution of business conflicts there are used the three methods, technics of mediation: the evaluative mediation, the restorative mediation and the transformative mediation.

Mediation is an efficient, cost-effective process of problem-solving where the disputing parties work together to find a solution. It is sometimes easier to explain what mediation isn't.

Mediation isn't like litigation.¹⁷ Litigation involves a system of rules and limitations that has evolved over centuries to ensure procedural fairness amongst disputing parties. It often involves lawyers to speak for the parties and help navigate those rules, and ultimately, a judge or jury to decide the outcome. Litigation has value and is often necessary, but it's not the only way.

Mediation isn't a system of rules, but rather a means of communication. It does not involve document filings, discovery or court appearances, and it doesn't require a long wait or high costs. Instead, mediation is a less formal, accessible, flexible process that usually involves the parties meeting together with a mediator in a neutral setting to work out the issue.

The mediation process begins when both parties agree to mediate, and then agree on a mediator. Typically, before the mediation begins each side prepares a summary of the issue for the mediator to review, or each party meets with the mediator individually to provide background.

Once the pre-mediation details are completed, a meeting date and a *neutral location* is chosen, which can be a set of boardrooms, an office, or even an online space. While relations may be strained at the outset of the mediation process, a good mediator can eventually get parties talking to each other, can help identify common goals, and ultimately find a resolution that works for all. (<https://smallbusinessbc.ca/article/mediation-effective-tool-business-dispute-resolution>)

Another important draw to mediation is that it is a confidential way of resolving business related conflict. The parties are asked to sign confidentiality agreements and the inner workings of the business do not end up a matter of public record as they do in litigation. The protection of the parties' right to privacy is a key factor to both the business and the aggrieved party and makes mediation an attractive choice. (Marta J. Papa, 2008)

Mediation is a special non-litigious procedure conducted- according to the hungarian Act on mediation to provide- an alternative to court proceedings in order to resolve conflicts and disputes where the parties involved voluntarily

¹⁷ Litigation –is used not in every country, but for example in US- is the term used to describe proceedings initiated between two opposing parties to enforce or defend a legal right. Litigation is typically settled by agreement between the parties, but may also be heard and decided by a jury or judge in court. Contrary to popular belief, litigation is not simply another name for a lawsuit. Litigation includes any number of activities before, during, and after a lawsuit to enforce a legal right. In addition to the actual lawsuit, pre-suit negotiations, arbitrations, facilitations and appeals may also be part of the litigation process. <https://law.freeadvice.com/litigation/litigation/litigation.htm>

submit the case to a neutral third party (hereinafter referred to as 'mediator') in order to reach a settlement in the process and lay the ensuing agreement down in writing.

If the mediator accepts the invitation, he/she shall send the parties a statement of acceptance, as stipulated in Subsection (1) of Section 24¹⁸ of the Act, inviting the parties to the first mediation hearing and informing them of their right to obtain representation.¹⁹

Where either of the parties fails to appear in the first mediation session, the mediator shall not start the mediation process. The representative may be a person of legal age and legal capacity or a legal counsel acting under a power of attorney. The parties or, if the party is a legal person, the authorized representative must appear together in person at the first mediation hearing and for the conclusion of the agreement. The mediator shall hold the mediation hearing in the place indicated in the register as the official location of mediation activities or at some other location subject to the parties' approval.

The mediator in the first mediation session shall inform the parties

- of the basic principles of mediation and the major stages of mediation negotiations,
- of the process effectively leading to an agreement,
- of the costs of the process,
- of the confidentiality requirement encumbering the mediator and expert who is involved,
- of the option that parties may agree on the confidentiality to which they are subject,
- of the mediator's obligation to present only those legal materials and facts that directly pertain to the case, where it is so warranted by the nature of the case,
- of the contents of Subsection (4) of Section 32²⁰ and Subsection (3) of Section 35 -(3)²¹

In Hungary, there are four known ways for alternative dispute resolution in civil law: (1) mediation by the courts-judicial mediation; (2) arbitration; (3) conciliation; (4) mediation. (Csilla Kohlhoffer-Mizser, 2017)

¹⁸ (1) The invited natural person or the employee acting in the name of a legal person, following consultation with the director of the legal person, shall communicate his acceptance or rejection in writing within eight days following receipt of the invitation. Acceptance of the invitation shall constitute the right of the invited natural person or the employee acting in the name of a legal person to function as the mediator in the mediation process.

¹⁹ Act LV of 2002 on Mediation, Section 28 (1)

²⁰ The mediator may convey any information received from one of the parties to the other party for reply, unless the party supplying the information expressly forbids the mediator to convey it to the other party.

²¹ Where the mediator of a mediation process is a legal advisor, a notary public or an attorney, the mediator shall not be permitted to prepare a legally binding document on the basis of the written settlement, nor shall he/she be entitled to endorse such document in his capacity as a legal advisor or attorney.

Common strategies a mediator might use during a business mediation to help the parties reach settlement include:

- Brainstorming new options;
- Questioning parties regarding the facts, law, interests strengths, and weaknesses of their case and the other party's case;
- Exploring non-monetary settlement options;
- Conditional demands and offers;
- Backwards bargaining;
- Decision tree analysis;
- Last best demand and offer;
- Best alternative to negotiated settlement;
- Mediator's proposal;
- Attorney-only sessions;
- Triangulating the gap;
- Apologies;
- Timing of payments. (Deborah Buyer, 2012)

The ultimate goal of the mediation is for the parties to come to an agreement on a resolution.

The stable continuation of business relationships between companies may be impaired by recourse to courts; additionally, litigation is extremely expensive, especially if the dispute involves complex contractual documents, a large number of witnesses or substantial amounts of time in the courtroom dealing with technical aspects of a business contract. The basic common-law rules of contract²² have been largely and increasingly superseded by specialised and technical statutory provisions requiring corresponding specialism in dispute-prevention and settlement devices and techniques.(Phil Harris, 2007)

2 Consensus instead of compromise?

In the procedure of persuasion the first step is to hear and apprehend the partner. (Neményiné Gyimesi Ilona, 2017.)

To use effective tools to persuasion, parties should lean at the end of the process to make a compromise or create a consensus. We could ascertain that compromise and consensus are one in the same, but there are very important differences between the two definitions.

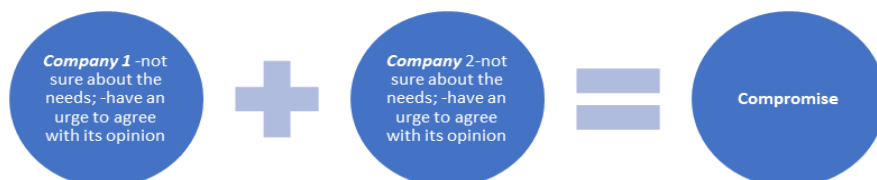
²² examples: past consideration, sufficient consideration, insufficient consideration, implied terms and exclusion clauses, misrepresentation

To compromise is to make a deal between different parties where each party gives up a part of their demand. In arguments, compromise is a concept of finding agreement through communication, through a mutual acceptance of terms—often involving variations from an original goal or desire.

The idea of compromise is usually based upon competing demands and some willingness to give up some part of the demands. Each party says they are willing to give up on getting a portion of their demands to get the other to make an agreement. If there is agreement they feel like they lost or won but neither party trusts the other to follow through. The compromise soon collapses and is often forgotten. This leaves both parties with an increasing sense of powerlessness, bitterness and distrust

The structure of compromise can lead to be manipulative and co-dependent:

1. give away something for the moment;
2. to get something the one needs from the other (Company1-Company2);
3. later parties will seek to modify the agreement or parties will behave as if there is no agreement. Parties can be both being manipulative and controlling, the two pillars of co-dependence. Parties may feel increasingly anxious, increasingly impulsive, and increasingly powerless.

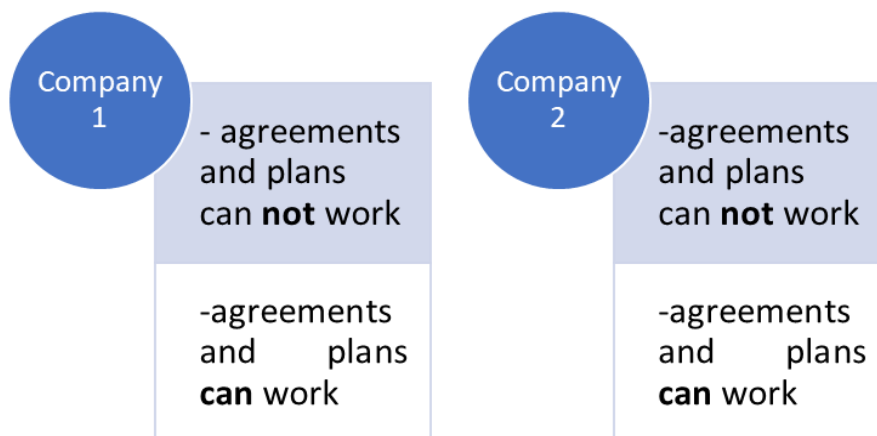


1st graph: author's construction

Consensus decision-making is a group decision making process that seeks the consent, not necessarily the agreement of participants and the resolution of objections. Consensus is defined as, first, general agreement, and second, group solidarity of belief or sentiment. It has its origin in the latin word *cōnsēnsus* (agreement), which is from *cōnsentiō* meaning literally feel together. It is used to describe both the decision and the process of reaching a decision.

The idea of consensus is based upon the reality of overlapping interests. Companies that have chosen to work together for some time and aims almost certainly have a long list of interest in common, especially if they have aims over taking profit. Thing may have become very difficult but there are strengths in the

relationship derived by the strengths of each individual. These strengths usually represent a good portion of the shared values. In consensus parties shall realize they can stop trying to get the other to agree about stuff they do not agree about. They can instead focus on finding agreement to solve problems in any area of common interest.



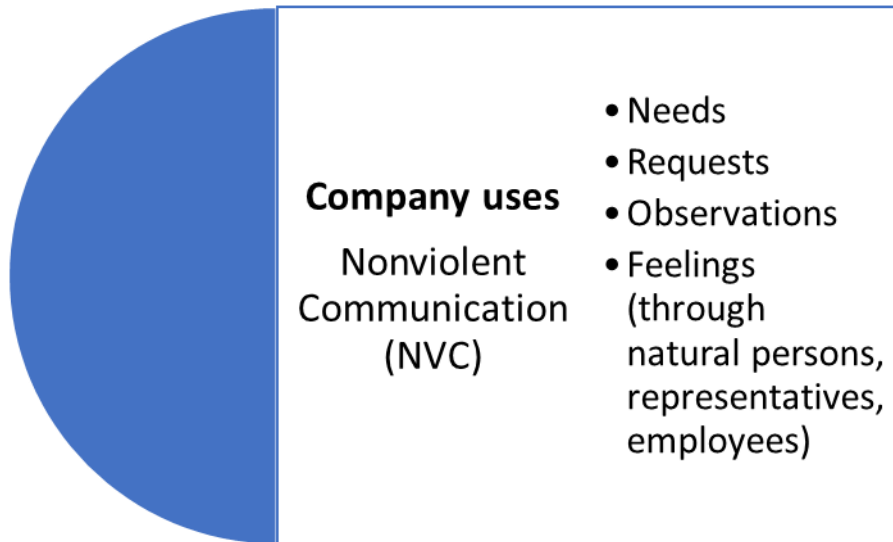
2nd graph: author's construction

In business mediation conflict transformation theory regards the focus not on case, but it considers the case as an opportunity: as such kind of entrance, where through the transformation of the conflict generating environment can be set in motion.

The transformation approach regards the conflict as the catalyzer of the progression. (John Paul Lederach, 2003)

In business dispute-resolving there can be used the four-part Nonviolent Communication Process (NVC). Clearly expressing how I am without blaming or criticizing; empathically receiving how you are without blame or criticism. (Marshall B. Rosenberg, 2015)

Often simply we do not have idea how to escape from the vicious circle of attacks and counter-attacks. Nonviolent communication shows a way, a method, with which we can show our feelings during our conversations and debates and we can express what we really need. It encourages us, to put off our preconceptions and hostility and dare again receive detachedly the friendly overture of the other's. (Serena Rust 2014)



3rd graph: on the grounds John Paul Lederach: The Little Book Of Conflict Transformation, Good Books 2003 p. 15.

In the regulation of the European Union ‘Mediation’ means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

‘Mediator’ means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation. (The 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. *Article 3 I. Definitions*)

The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods.

This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services. (The 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. (5))

3 Do we want trials in business disputes?

In the hungarian legal regulation there are several ways for businesses how to resolve disputes, how to resolve a conflict, how to continue with business partners. Of course, courts fulfill the task to decide in the complaints of clients, to run the procedures of trials.

Number of registered mediators at Ministry of Justice between 2010-2016 were the following:

	2010	2011	2012	2013	2014	2015	2016
registered mediators at Ministry of Justice	1272	1408	1578	1615	993	1041	1168

1st table: registered mediators at Ministry of Justice Hungary 2010-2016-author's construction based on the given data from Ministry of Justice

The numbers of incoming cases between 2010. and 2016, on the basis of data giving of registered mediators are the following:

	2010	2011	2012	2013	2014	2015	2016
successful	216	708	370	589	851	864	983
unsuccessful	63	203	160	204	260	487	400

2nd table: Incoming cases to registered mediators at Ministry of Justice Hungary 2010. and 2016

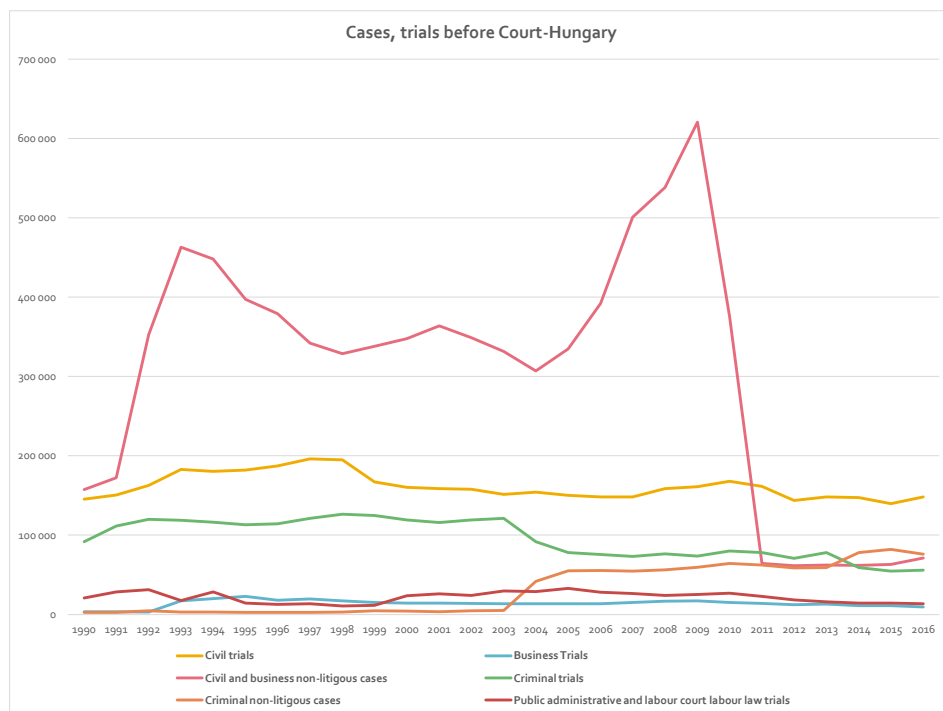
YEAR	Civil trials	Business trials	Civil and business non-litigious cases	Criminal trials	Criminal non-litigious cases	Trial cases at Public Administration and Labour Courts
1990	145 290	3 531	157 316	91 742	2 725	20 959
1991	150 694	3 413	172 424	111 671	2 562	28 253
1992	162 663	3 053	352 760	120 036	4 475	31 319
1993	182 703	17 227	462 891	118 829	3 065	17 394
1994	180 345	19 819	448 138	116 241	3 152	28 243
1995	182 065	22 725	397 232	113 294	2 664	14 458
1996	187 145	18 139	378 983	114 482	2 582	12 842
1997	195 957	19 539	341 927	121 296	2 454	13 318
1998	195 041	17 007	328 882	126 539	2 839	10 589
1999	166 981	15 189	337 930	124 868	4 478	11 490
2000	160 242	14 153	347 783	119 003	4 147	23 732
2001	158 486	14 172	363 681	116 056	3 356	26 099
2002	158 007	13 928	348 822	118 952	4 808	23 798
2003	151 204	13 329	331 601	120 962	5 179	29 801

3

rd table: cases, trials 1990-2003, source: KSH, Central Office of Statistics Hungary

YEAR	Civil trials	Business trials	Civil and business non-litigious cases	Criminal trials	Criminal non-litigious cases	Trial cases at Public Administration and Labour Courts
2004	154 067	13 612	306 928	91 910	41 540	28 856
2005	150 268	13 502	334 956	77 932	55 125	32 818
2006	148 180	13 415	391 954	75 708	55 447	27 903
2007	148 176	15 226	500 964	73 090	54 669	26 538
2008	158 558	16 764	538 364	76 589	56 446	24 086
2009	161 082	17 329	620 597	73 458	59 307	25 075
2010	168 045	15 217	375 981	80 155	64 265	26 745
2011	161 335	13 881	64 328	77 980	62 186	22 844
2012	143 904	12 324	61 521	70 886	58 838	18 299
2013	148 181	12 924	62 138	77 978	59 012	16 023
2014	147 428	10 900	62 019	58 944	78 074	14 186
2015	139 705	11 123	63 293	54 625	82 130	14 273
2016	148 279	9 478	71 247	55 681	76 159	13 477

4th table: cases, trials 2004-2016, source: KSH, Central Office of Statistics Hungary



4th graph: changing of cases, trials 1990-2016 source: KSH decreasing number of civil and business non-litigious cases only, civil trials (1), criminal non-litigious cases (2), business trials (3), criminal trials (4), public administrative and labour law trials (5) stagnate

Conclusions

Business mediation is a kind of mediation which needs researches on the basis of definition of consensus. It will be the real win-win outcome and solution after the procedure where the companies were taking part in. In business mediation we will meet evaluation, we will meet restoration and we will need really the transformation method. It is common in every mediation type, case, that evaluation involves an other evaluation and they are based on emotions. Observation without an evaluation is really necessary and useful in business mediation, where the consensus has to be reached. Transforming the conflict to connection is one of the most important aim in business mediation, where the interests are in the highest degree about economy.

References

- [1] Act LV of 2002 on Mediation
- [2] Annual Report of the President of the National Office for the Judiciary -2015, English Version

- [3] Annual Report of the President of the National Office for the Judiciary -2016 Hungarian Version
- [4] Balázs László, H. Varga Gyula: A hatékony kommunikáció. Tanulmányok. A kommunikáció oktatás 5. Papirusz Book ISBN: 9786155351020, 2013
- [5] Csilla Kohlhoffer-Mizser: Methods of alternative dispute resolution –from conflict to connection FIKUSZ 2017 Symposium For Young Researchers Proceedings p.177.ISBN 978-963-449-064-7
- [6] Csilla Kohlhoffer-Mizser: Mediáció a jogi személyek életében I.**Vállalkozásfejlesztés a XXI. században VI. tanulmánykötet**, Óbudai Egyetem Keleti Károly Gazdasági Kar, Budapest 2016, <http://kgk.uni-obuda.hu/publikaciok>
- [7] Csilla Kohlhoffer-Mizser: Mediáció a jogi személyek életében II.-munkaügyi mediáció **Vállalkozásfejlesztés a XXI. században VII. tanulmánykötet, 2017** Óbudai Egyetem Keleti Károly Gazdasági Kar, Budapest 2017, <http://kgk.uni-obuda.hu/publikaciok>
- [8] Deborah Buyer: Making the Case: Business Dispute Resolution Through Mediation 2012
- [9] John Paul Lederach: The Little Book Of Conflict Transformation, Good Books 2003
- [10] Marshall B. Rosenberg PhD: Nonviolent Communication: A Language of Life 3rdEdition, Puddle Dancer Press 2015 ISBN: 9781892005281/189200528X
- [11] Marshall B. Rosenberg PhD: A szavak ablakok vagy falak Erőszakmentes kommunikáció Agykontroll Kft. ISBN: 9789637959707 2001
- [12] Marshall B. Rosenberg PhD: A szavak ablakok vagy falak Erőszakmentes kommunikáció Agykontroll Kft. ISBN: 9789637959707 2001
- [13] Marta J. Papa: A better way to resolve workplace conflict 2008
- [14] Neményiné Gyimesi Ilona: Hogyan kommunikáljunk tárgyalás közben? Elkerülhető csapdák az üzleti kommunikációban Akadémiai Kiadó, ISBN: 9789630598828, 2017
- [15] Phil Harris: An Introduction to Law. Seventh Edition. Law in Context. Cambridge University Press 2007 ISBN-13 978-0-521-69796-5
- [16] Sáriné Simkó Edit szerk.: Mediáció-Közvetítői eljárások. HVGOrac Lap- és Könyvkiadó Kft., Budapest 2012
- [17] Serena Rust: Erőszakmentes kommunikáció –amikor a zsiráf a sakállal táncol Bioenergetic Kft. 2014. ISBN: 9789632912172

- [18] The 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.

Websites

- [1] https://e-justice.europa.eu/content_key_principles_and_stages_of_mediation-383-en.do?clang=en
- [2] www.mediateyourlife.com
- [3] www.ksh.hu
- [4] www.nonviolentcommunication.com
- [5] www.mediate.com
- [6] <http://www.selftimeout.org/assets/consensus.pdf>
- [7] <https://smallbusinessbc.ca/article/mediation-effective-tool-business-dispute-resolution>
- [8] <http://pju.hu/attachments/article/24/e-book.pdf>