

Challenges and Lessons Learned in Alternative Dispute Resolution

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Abstract: Currently, conflict management in Hungary is an activity that can be conceptually linked to alternative dispute resolution. One of the options for alternative dispute resolution is mediation. Mediation is an activity in a regulated procedure, which procedure is directed by an intermediary person. 2002 LV. Act on Mediation provides a framework for clients and mediators in which conflict management can take place. Tools and methods of conflict management can be learned by studying the domestic and international literature in theory, but it should be emphasized that the mediation procedure can be practically implemented, but only after the completion of each procedure, that is, by reaching an agreement, lessons can be learned and conclusions can be drawn. Mediation has been an opportunity for natural and legal persons since 2002, and this opportunity presents constant challenges. This study seeks to focus on and investigate the need for a completed case within a reasonable time, based on domestic regulations and highlighting some international examples.

Keywords: conflict; conflict management; mediation procedure; settlement

1 Introduction

This article aims to summarize the position of mediation, through introducing the regulation of the United Nations, of the European Union with the aim of displaying methods that are globally, internationally usable and applicable without borders. Scholars and practitioners widely acknowledge trust's importance. (McKnight, Chervany 1996). Research argues that social capital as proxied by trust (Rousseau et al. 1998) increases aggregate productivity by affecting the organization of firms.

However the field of business mediation can not be clearly separated from other mediation types, business mediation often fuse with them, furthermore research shows that mediation have to be viewed as complementary elements of an integrated system and that the key to successful dispute resolution in international business is conscious and creative design of conflict management process. (Bühning-Uhle et al., 2006). Research show paths of the negotiation space and

negotiation strategies, agreements between nations, firms, and individuals facilitate trade and ensure smooth interaction. Researchers agreed with International Business scholars who say that such questions need to be addressed using an inter-disciplinary approach. We use bargaining theory models of rational behavior and the negotiation literature to explain various Brexit options and predict their consequences. (Ott, Ghauri, 2018)

Due to the increasing number of conflicts in the international arena, and the numerous attempts to settle them, the attention of scholars has recently turned to one of the most effective methods of conflict management, international mediation. The theoretical construction best describing and explaining the process and the outcome of mediation is the contingency model of international mediation. The main postulate of the model is that mediation is a context-driven process: the attributes of the conflict in question, the participating parties, the identity of the mediator etc. all have an influence on what type of mediation strategy is selected, and thus what kind of outcome is achieved. The main innovation of the model is that it does not attempt to separate the mediation process from the wider political, economical and social surroundings of the conflict. (Szent-Iványi, 2014)

2 Procedure based on trust. Mediation, alternative dispute resolution

Mediation

Modern international conflict resolution offers a variety of tools for management and strongly encourages the emergence of conflicts, as effective conflict management does not only affect the business and economic development and efficiency of the business, but also the stability and development of the national economy. (Sáriné 2012)

Mediation is the process in which the resolution of the parties' conflict is supported and guided by a neutral third party, the mediator, until the parties reach an agreement.

Mediation is preceded by conflict. Conflict is a necessary or actual conflict of interests, in which situation the need of the stakeholders is to resolve the conflict. Mediation is a conflict management process based on the aim, help the parties reaching a consensus. A real win-win outcome may be reached by the parties with the support of an independent third party. Methods in mediation are evaluation, restoration and transformation. In case of a conflict, escalation is based on evaluation, communicated by one party, this involves another evaluation, which are based on emotions. Observation without an evaluation is necessary and useful in the process of mediation, where the consensus has to be reached. Transforming the conflict to connection is one of the most important aim in mediation, where the interests are in the highest degree about trust, peace, assets, economy. The

restorative method is the method by which we can never be mistaken and will always be necessary during dispute settlement. Aim is to restore trust, peace, relations, emotions, assets, partnership, cooperation.

Mediation means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (“the mediator”) lacking the authority to impose a solution upon the parties to the dispute. (United Nations 2019)

Conflict

Conflict is inevitable among humans. It is a natural outcome of human interaction that begins when two or more social entities (i.e., individuals, groups, organizations, and nations) come in contact with one another in attaining their objectives. Relationships among such entities may become incompatible or inconsistent when two or more of them desire a similar resource that is in short supply; when they have partially exclusive behavioral preferences regarding their joint action; or when they have different attitudes, values, beliefs, and skills. Another definition of conflict would be “perceived divergence of interest, a belief that the parties’ current aspirations are incompatible. (Rahim, 2011)

We could ascertain that compromise and consensus are one in the same, but there are very important differences between the two definitions.

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 status of related companies in relation to the compromise is as follows: on the one hand they are not sure about their needs, on the other hand, it is urgent for them to agree with the other party with their opinions and interests.

Conflict is a situation in which individuals are emotionally affected. In conflict interest are in collision and trust is lost between the parties (Table 1.).

TABLE 1 CONFLICT BETWEEN PERSONS

Person 1	Person 2
collision of interest(s)	collision of interest(s)
loss of trust	loss of trust

Source: edited by the author

The term conflict (Fink, 1968) has no single meaning. Most of the confusion around the definition was created by scientists from different disciplines who are interested in studying conflicts. The literature review of the conflict shows the conceptual complexity of the commonly accepted definition of conflict.

Having recognized that conflict is an important social concept, we can then look into the special case of organizational conflict. Conflict is certainly one of the major organizational phenomena. Pondy (1967) observed that organization theories “that do not admit conflict provide poor guidance in dealing with problems of organizational efficiency, stability, governance, and change, for conflict within and between organizations is intimately related as either symptom, cause, or effect, to each of these problems”. (Rahim 2011)

3 Conflict management

Conflict-management is an activity and a kind of communication the methods of which can be applied extensively, internationally, regardless of borders. When people are able to understand and communicate their needs clearly, conflict may lead to connection. People have a common sense, that to solve, resolve, to transform a conflict is better than live with or in it. It is a common sense, that nonviolent communication (NVC) leads to effects, it is productive. This paper would like to present some of the resources, of the living instruments, from which humans, business environment, legal entities can choose. The mission is to know how, where and when to make the right step in the space of alternative dispute resolution until we reach the solution, so mediation is an international tool with methodology to help humans and also legal persons to reach an agreement.

Conflict management is a creative facilitation for persons that can be used to develop profitable professional levels in society for individuals, businesses and focus on the dynamism and balance of conflict and harmony. Conflict management is one of the ways of achieving peace. Peace is nothing more than a change in the form of conflict or in the antagonists or in the objects of the conflict, or finally in the chances of selection. (Coser 1998) According to the social meaning of conflict and peace (Lederach, 1995) persons, organizations, working places, families, neighbours, states, consumers in different cultures can bring themselves to a position to do able to make their own decisions. Socio-moral climate is positively related to innovation. The positive relation between the socio-moral climate and innovation was mediated stepwise through debate and decision comprehensiveness. (Seyr, 2014)

Apart from some of the highlighted Hungarian examples, they give an insight into where the alternative dispute resolution is today - alternative dispute resolution can be found in many countries in the world. To strive for peaceful conflict management and peaceful resolution of disputes, today we call court mediation,

mediation, conciliation, arbitration, litigation, and arbitration services as an alternative dispute resolution.

Doing conflict management can be mediation, conciliation, facilitative (lead) negotiation, arbitration. To manage something means to lead something or somebody, holding the case in the hands of the conflict manager (mediator, arbitrator). From the word manage, “manus” has the latin meaning “hand”. Hold the case in the hand and lead it from the conflict until solution.

After mediation trust may be even bigger than before the dispute as parties are more likely to perceive their business partners as reasonable and responsible people, with whom they can go through conflicts and resolve the problems in a proper manner, without court. (Zaleski, 2015)

Different leadership styles are associated with conflict resolution styles. Leaders who are predominantly in the transformative leadership style have adopted integrative and mandatory conflict management styles. Leaders who are mostly transactional style leaders, represent a compromise (unified) conflict management style. While the laissez-faire management style has adopted the avoidance conflict management style. (Saeed et al, 2014)

In Rahim's (2011) typology, organizational conflict management styles are:

- Integrating
- Obliging
- Compromising
- Dominating
- Avoiding

Leadership styles of leaders in the organization system are:

- Transformational
- Transactional
- Laissez-faire

Saeed and his co-workers (2014) consider integrating and obliging as constructive conflict management, while dominating and avoiding styles as destructive conflict management.

Their assertions have been confirmed in their study, according to which the transformational leadership style has a positive relationship with a constructive conflict segmentation and a negative connection to this style of leadership in the destructive conflict management style.

There is also a link between transaction management style and compromise conflict management style.

Partial connectivity can be demonstrated by the identification of laissez-faire leadership with a destructive conflict management style. However, the laissez-faire leadership has a negative relationship with constructive conflict management styles.

Examining business alternative dispute resolution, there is a proven relationship between leadership styles and conflict management styles among managers, executives, and in the management of interpersonal (managerial and subordinate) conflicts. Researchers (Saeed et al, 2014) state that leadership is one of the most frequently studied phenomenon in the field of management.

4 Time

Everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act. (The Fundamental Law of Hungary)

Mediation is at varying stages of development in Member States. There are some Member States with comprehensive legislation or procedural rules on mediation. In others, legislative bodies have shown little interest in regulating mediation. However, there are Member States with a solid mediation culture, which rely mostly on self-regulation.

For the purposes of the Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:

- (a) the parties agree to use mediation after the dispute has arisen;
 - (b) mediation is ordered by a court;
 - (c) an obligation to use mediation arises under national law; or
 - (d) for the purposes of Article 5 an invitation is made to the parties.
- (Directive 2008/52/EC)

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. Courts fulfill the task to decide in the complaints of clients, to run the procedures of trials.

What is the number of mediators and how many cases are there yearly to solve. From the year of the Act on Mediation has become to effect, from the year 2007, can we observe an increasing will of natural and legal persons to initiate

mediation? The 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

Table II. Registered mediators at Ministry of Justice Hungary 2010-2016

After three years of increasing in number of registered mediators, a relapse can be observed in 2014, which has been followed by again with slow increase in 2015 and 2016. The requirements of further training and continuative education of mediators included in the legal regulation may influence the issued registered mediators.

The numbers of incoming cases speak about stagnation despite of the Hungarian indicated title 'It is bad to litigate' (Ábrahám, Eörsi, 2003). Perhaps people and decision makers change their minds and make the choice to choose alternative dispute resolution. Between 2010 and 2016, on the basis of data giving of registered mediators Table 2 shows the conformation of mediated cases, separately the cases with a successful agreement at the end and separately the cases without a successful end.

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

Table III. Incoming cases to registered mediators at Ministry of Justice Hungary 2010-2016

Conclusion of the Mediation Process according to Article 35. of Act on Mediation 2002. LV. provides that a mediation process is deemed concluded

- a) on the day the settlement is signed,
- b) on the day on which one of the parties informs the other party and the mediator of his withdrawal from the mediation process,
- c) on the day on which the parties unanimously declare in front of the mediator their request to close the mediation process, or
- d) after the end of the fourth month following the signing of the statement, unless otherwise agreed by the parties.

The mediator shall record the settlement made in the presence of the parties in the language selected for the mediation process and shall supply a copy of the settlement document to each of the parties. The settlement document shall be signed by the mediator and by the parties at the same time. The four months period to make an agreement and make our own decisions can be adopted as reasonable time.

Conclusions

Suggestion of author is to emphasize the importance as an obligation and possibility of having a decision in cases, conflicts, within a reasonable time. Mediation gives worldwide an international possibility to reach this aim. As provided by the United Nations Convention on International Settlement Agreements Resulting from Mediation Preamble states that the Parties to this Convention recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably. Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation. Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States, convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations. (UN Convention on International Settlement Agreements Resulting from Mediation)

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