

Methods of alternative dispute resolution - from conflict to connection

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*„With whom happens deliberate case, that person will not experience injustice.”
(Ulpianus)*

Abstract: In the relationships between persons, the conflict appears by nature. Mediation is one kind of procedures to solve a conflict. Mediation is based on the voluntary participation of the parties. Mediation is a voluntary process in which an impartial person (the mediator) helps with communication and promotes reconciliation between the parties which will allow them to reach a mutually acceptable agreement. Mediation is a procedure facilitated by a neutral third-party who assists the parties in moving to resolution. The neutral third party has no control over the outcome of the case and conflict, but controls and directs the process itself, he or she is responsible for the procedure. While court proceedings are authoritative, formalised and claim-oriented, mediation offers a flexible, self-determined approach in which all aspects of the conflict -independent of their legal relevance- may be considered. Against this background, mediation -in contrast to court proceedings- is described as alternative dispute resolution (ADR). The question is: to solve the conflict and find a solution or to transform a conflict and reshape the connection between the parties? What is the matter when the mediation process has to be conducted between parties, who live in different countries or when one person of the parents just want to go abroad with the common child or children. How can cross-border mediation help? This publication tries to show a possible answer and researches the methods of mediation, which can be evaluative, restorative or transformative. This study examines, which fields of ADR use more often, either one or the other method.

Keywords: evaluative mediation, restorative and transformative mediation; cross-border mediation; intermediary; neutrality; confidentiality

1. Regulation in Hungary

In the relationships between persons the conflict appears by nature.⁹ Parliament has adopted the Act LV. of 2002 on Mediation in Hungary in order to facilitate the out-of-court settlement of civil disputes. The objective of this Act is to offer an alternative for natural and other persons to settle their disputes arising in connection with personal and property rights where the parties are not bound by statutory provision.

Mediation is a special non-litigious procedure conducted according to this Act to provide an alternative to court proceedings in order to resolve conflicts and disputes where the parties involved voluntarily 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 24¹⁰ of the Act, inviting the parties to the first mediation hearing and informing them of their right to obtain representation.¹¹

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.

9 Dr. Kohlhoffer-Mizser Csilla: Mediáció a jogi személyek életében II.-munkatügyi mediáció Vállalkozásfejlesztés a XXI. században VII. tanulmánykötet, 2017 Óbudai Egyetem Keleti Károly Gazdasági Kar, Budapest 2017, <http://kgk.uni-obuda.hu/publikaciok> p. 293.

10 (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.

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

The mediator in the first mediation session shall inform the parties

- a) of the basic principles of mediation and the major stages of mediation negotiations,
- b) of the process effectively leading to an agreement,
- c) of the costs of the process,
- d) of the confidentiality requirement encumbering the mediator and expert who is involved,
- e) of the option that parties may agree on the confidentiality to which they are subject,
- f) 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,
- g) of the contents of Subsection (4) of Section 32¹² and Subsection (3) of Section 35 -(3)¹³

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.

The new civil code imported the legal institution of mandatory courts-judicial mediation in the hungarian justice practice with the Act V. 2013 on Civil Code, primarily inland and cross-border cases connected to parental custody..

While in 2014 there were conducted 656 pieces of courts-judicial mediation and they finished with agreements in 363 cases.¹⁴

The system of court mediation furthers the resolution of legal disputes in the shortest possible time and to the satisfaction of the clients. This option has been available in the courts of Hungary since the second half of 2012. The way for court mediation was paved by those judges who were retired in 2012 but

12 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.

13 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.

14 Annual Report of the President of the National Office for the Judiciary -2014, Hungarian Version, p. 67. http://birosag.hu/sites/default/files/allomanyok/obh/elnoki-beszamolok/elnoki_beszamolo_2014.pdf,

continued to practice as law clerks. Owing to the continuous training, an increasing number of law clerks could be appointed as mediators. The aim of providing the clients with direct access to court mediation at each of the courts having a staff exceeding seven persons was met by the first half of 2015.

This system may be an efficient instrument of the resolution of legal disputes in a timely manner and of the nationwide spreading of a new approach to dispute resolution. At the end of the first half of 2015 at 20 regional courts, 48 judges and 89 law clerks have been appointed as mediators, 657 cases were referred to mediation, out of which an agreement was reached in 285 cases, 293 orders were issued compelling parties to jointly enlist the assistance of a mediator in their lawsuit concerning parental responsibility. Mediation was conducted in a total of 197 cases, out of which an agreement was reached in a total of 88 cases.¹⁵

At the end of June 2016 74 judges and 84 court clerks were appointed for court mediation activities. In the framework of the tender for the setting up and furnishing of the mediation rooms initiated by the president of the National Office of Justice in November 2015, 18 regional courts and one regional court of appeal set up or arranged court mediation rooms in courts of larger size in the first half of 2016 and equipped the court mediators with mobile phones and laptops.¹⁶

In 2016 court mediators altogether proceeded nationwide more than 1600 mediation cases (1664), more than 55% of those cases (919) court mediator process were conducted. 54,4 % of the conducted processes (500) conducted with the written agreement of the parties. 419 court mediation process closed without a written agreement, in the 40% of the continuous court trials (approx.160) the parties agreed in the lawsuit, in the the process, not much after the close of the court mediator process.¹⁷

15 Annual Report of the President of the National Office for the Judiciary -2015, English Version, p. 16-17.

16 Semi-Annual Report of the President of the National Office for the Judiciary -2016, English Version, p. 17.

17 www.birosag.hu Annual Report of the President of the National Office for the Judiciary -2016 Hungarian Version, p. 75.

2. Rules 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.¹⁸

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.¹⁹

Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.

In order to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure.

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. *Article 3 I*.Definitions

¹⁹ 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)

The provisions of the Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes. The use of modern communication technologies in the mediation process is allowed. The Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should apply in civil and commercial matters. However, it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law.²⁰

The rules should be applied to cases where a court refers parties to mediation or in which national law prescribes mediation. Furthermore, in so far as a judge may act as a mediator under national law, the Directive should also apply to mediation conducted by a judge who is not responsible for any judicial proceedings relating to the matter or matters in dispute.²¹

Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable.

The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law.²²

20 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. (6)-(10)

21 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. (12)

22 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. (19)-(20)

3. The returning question: „why mediation?“

There are a lot of reasons why to choose an alternative dispute resolution method, in several fields of the society. From family law, conflicts in the family through consumer's law, of course in the field of criminal law. Mediation is very confidential and secret, because the mediator has to keep the privacy of the clients. We often meet the question (in publications, in the literature, during conferences, written on several websites): „*why mediation?*“ There are a lot of possible answers, why it is positive, why it is favorable and profitable to choose mediation. Some aspects below.

3.1. Because of relations, relationships

Court verdicts distinguish parties of a dispute. After issuing a judgment by court we have got a winner on one side and a loser on the other side. This builds a psychological barrier between the parties. Moreover the real conflict often remains unsolved as only compensation of loss is adjudged without consideration of needs and interest of the other party. This can result in several consequences especially in cases regarding family issues (divorce, division of assets, children custody). Court reality is black-and-white and court judgment always makes one party frustrated and discouraged to maintain further relations. Mediation offers a win-win solution. To work out a consensus make the involved parties feel satisfied with their own work. As parties make arrangements on their own, they are more committed in implementing them and obey established rules in future relations.

3.2. Because of business

Mediation is a procedure which may benefit the business. Parties which worked out a consensus are more willing to maintain further relations. Moreover mutual trust is maintained. It 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.

3.3. Because of emotions

Mediation resolves conflicts not only by taking into consideration problems arising from division of resources such as assets, estate, time - but tries to go much deeper and deal with emotional misunderstandings. Mediation is successful when

the agreement between parties appeases not only their material but, more importantly, their emotional needs. This guarantees the stability of the agreement.

3.4. Because of good reputation, „image”

One of the main rules of mediation is confidentiality. It guarantees that nothing what is being said will be used outside the room where mediation is being held. This rule makes mediation very attractive in particular for companies. It allows the parties to keep in secret crucial information about their firms, management, assets, and contracts. It also allows to resolve conflict on the line company-client without publicity, what often deteriorates the image of the company and can have further going consequences in its financial outcome.

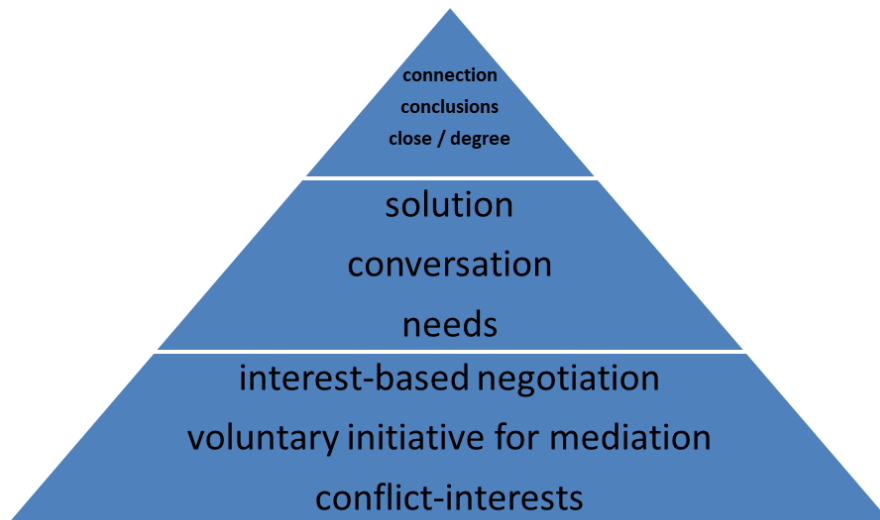
3.5. Because of comfort of making our own decision

Mediation allows parties to influence their actual state. In mediation parties decide on their own how the problem will be solved and what rules will govern their relations in future. This is much more comfortable situation in comparison with a court procedure in which decision is made by a stranger (judge) who does not always have the full view of the problem. This makes mediation much less stressful.

3.6. Because of money

In most of the Europeans countries mediation procedure is faster than court trial and less expensive. Most often parties of a dispute share the expenses of mediation in half what makes it fairer. Of course during mediation other agreements may be agreed.²³

²³ [http://www.european-mediation.eu/mission/why mediation](http://www.european-mediation.eu/mission/why%20mediation) 201.10.03 12:54



1. Figure

From Conflict to Connection – on the grounds of graph

Dr. Kohlhoffer-Mízser Csilla: 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> p. 201²⁴

4. Stages of mediation:

1. Opening: the mediator sets the stage

The mediator starts by explaining the purpose of mediation, the process and the mediator's role within it. The mediator sets rules and asks of each party to agree to this specific process.

2. The statement of the problem by the parties

The mediator listens to each party when they tell their story.

He acknowledges feelings and assures parties when needed and he identifies the concerns of each party.

²⁴ Dr. Kohlhoffer-Mízser Csilla: 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> p. 201

3. Identification of the issues and determination of the agenda for negotiation

During this stage, the mediator sets the agenda for the negotiation by summarising areas of agreement (similar concerns) and disagreement. The mediator determines in consultation with the parties the issues to be discussed.

4. Generating options/solutions

The mediator helps the parties, by brainstorming with them, to consider a variety of options/solutions for their situation.

5. Considering the options and selecting the most workable/acceptable option/solution

During this stage, the mediator helps the parties move toward an agreement by considering the options generated and selecting those most workable and acceptable to each party.

6. End of mediation

Reaching an agreement

The mediator assists the parties in the writing of a clear and detailed agreement.

Legal representatives can review the mediated agreement to ensure that this agreement has legal effect in all the legal systems concerned.

No agreement

If parties do not reach an agreement, the mediator summarizes issues identified and any progress made. The mediator thanks the parties and ends the mediation session. Parties are free to file or pursue a lawsuit in court.²⁵

The conflict transformation theory regards the focus not on case, but it considers the case as an opportunity: as such kind of entrance, wherethrough the transformation of the conflict genering environment can be set in motion. The tarnsformation approach regards the conflict as the catalyzer of the progression.²⁶

In all procedure I would stress the four-part Nonviolent Communication Process. Clearly expressing how I am without blaming or criticizing; empathically recieving how you are without blame or criticism.²⁷

25 https://e-justice.europa.eu/content_key_principles_and_stages_of_mediation-383-en.do?clang=en
2017.09.27 16:39

26 John Paul Lederach: The Little Book Of Conflict Transformation, Good Books 2003 p. 15.

27 Marshall B. Rosenberg PhD: Nonviolent Communication: A Language of Life 3rdEdition p. 231.
Puddle Dancer Press 2015 ISBN: 9781892005281/189200528X

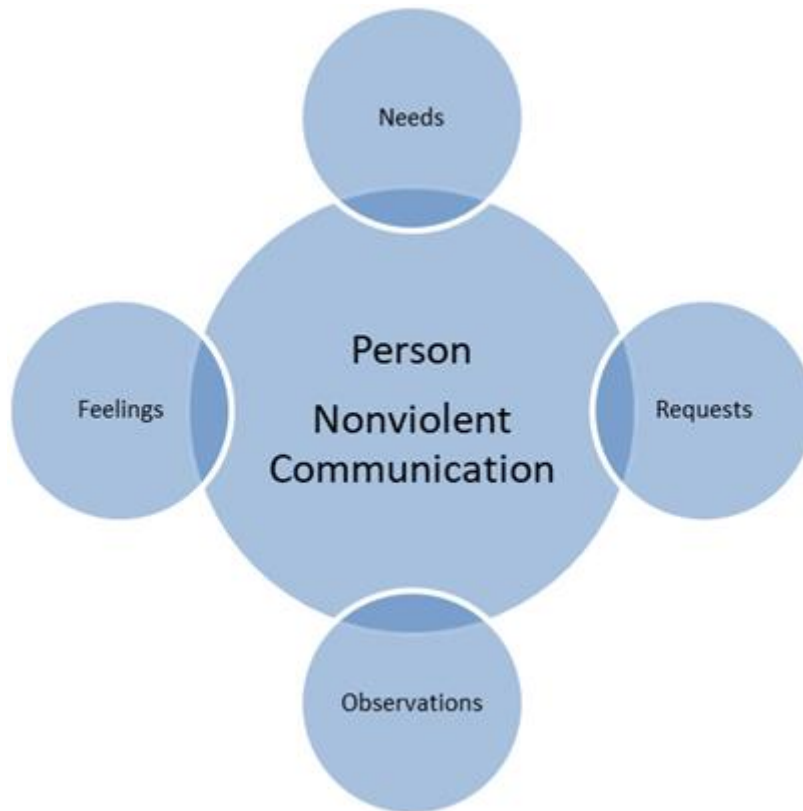


Figure 2.

On the grounds John Paul Lederach:
The Little Book Of Conflict Transformation, Good Books 2003 p. 15.

5. Mediation beyond borders

As family mediation has its own characteristics, therefore the management of the characteristics has to manifest itself in the working process of mediators.²⁸ Making an agreement in special cases, in special life status is sometimes a harder task than to think only about mediation as it were a scheme, a bianco process, in which everything repeats itself and can be replaced. It is especially true for cases, where

²⁸ Sáriné Simkó Edit szerk.: Mediáció-Közvetítői eljárások. HVGOrac Lap- és Könyvkiadó Kft., Budapest 2012 p. 174.

the parties take part in the case from different countries. Cultures, customs, customary law and of course the written law are different.

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 5²⁹ an invitation is made to the parties.³⁰

If the question is when to use a cross-border mediation, we shall know about some type of cases. (1) When a child is taken abroad; (2) When a parent wants to move abroad; (3) When the parent has a fear an abduction of the other parent; (4) When a parent want the child live abroad with him/her.

Cross-Border Family Mediators is a network that brings together family mediators specifically trained to deal with cross-border family conflicts. In the EU approximately 130,000 international couples file for divorce annually. In 2015, 37% of cases dealt with by European hotlines for missing children were parental child abductions.³¹

Conclusions

If a conflict is managed, it is an activity, which was conducted by the parties in the case and by the mediator. Conflict-management is an activity and a kind of communication. When people are able to understand and communicate their needs clearly, and with empathy for the universality of those needs, conflict leads to connection. The illusion or life period of separation from self and others disappears, and as a result people become able to work together to respond to the challenges they and the society face. People have a common sense, that to solve, resolve, transform a conflict is better than live with or in it. It is also a common sense, that nonviolent communication leads to effects, it is productive. This short

29 Recourse to mediation 1. A court before which an action is brought may, when appropriate and having regard to all circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and easily available.

30 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 2 Cross-border disputes

31 www.crossbordermediation.eu

study would like to show some of the resources, some of the living instruments, from which we can choose. We can decide. The task, the mission is to know well, how, where and when to make the right step in the space of alternative dispute resolution solutions.

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