

**University of Western Hungary  
Faculty of Economics**

**POSSIBILITIES OF ALTERNATIVE  
DISPUTE RESOLUTION IN THE  
PRACTICE OF ORGANIZATIONS**

The theses of a doctoral (PhD) dissertation

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## **I. Objectives and hypotheses**

In Hungary, both professionals and laymen have shown more and more interest in the possibilities alternative dispute resolution recently – internationally, however, since much earlier. This interest is quite two-sided. Some professionals welcome it enthusiastically, almost over-mystifying it, while others regard these procedures with scepticism and rejection.

The objective of the dissertation is to present the legal institution of mediation as a possible alternative of dispute resolution, through which a great part of actions at law could be eliminated or simplified. The author examines the possible alternative solutions of conflicts occurring in organizations. He outlines the types of organizations, the organizational culture and the characteristics of organizational conflicts. He demonstrates how problems emerging in organizations may result in conflicts also in the life of smaller organizations or systems, primarily of families. The dissertation examines, in the first place, those aspects

of mediation that are related to the dissolution of marriage. In doing so, the author presents the Hungarian and international legal rules of the termination of marriage, emphasizing the problems in connection with the vindication of children's rights.

Through surveying the theoretical and practical side of the mediation procedure, the author tries to point out that mediation can be conducted in a more informal way than actions at law. The dissertation is meant to demonstrate what factors influence the mediation procedure related to marital conflicts and what specific features distinguish it from the other procedure forms of alternative dispute resolution or mediation.

## **II. The content, method and justification of the research**

In expounding the subject, the author seeks after an interdisciplinary presentation of the problem. Besides presenting and grouping the mediation procedures, the paper also deals with their history. The author strove for a work of synthesizing character,

making a survey of the related Hungarian and foreign literature.

1. In the first part of the dissertation, the author outlines the structure, culture and functioning of organizations, and further, how the unsolved situations occurring as a result of the inappropriate relations that emerge in the functioning of organizations influence the functioning of other organizations through the individual. In surveying mediation procedures, the alternative procedures related to the dissolution of marriage are presented in the first place. In order to get acquainted with the essence of alternative procedures it is essential to do so with the legal way of the dissolution of marriage. In the course of that, the author points out substantial problems that may appear in the case of a divorce during the procedure or after it. While presenting the process of the dissolution of marriage, he does not examine the problems connected to material possessions but he deals primarily with the aspects that may concern the parties to the case mentally, such as child residence or contact with them. In order to demonstrate the advantages of

the procedure, he compares mediation with actions at law, emphasizing the differences between them.

With the object of a detailed presentation of mediation, other alternative procedures of dispute resolution are also described, and their history is dealt with. After grouping the alternative methods of dispute resolution, the author presents the rules of Hungary and the European Union which enable these procedures to be applied.

The dissertation also deals with the theory and practice of mediation. In the course of that, the author makes an attempt at defining the concept of mediation. While presenting the analysis of the process, he also touches upon the factors influencing the procedure, and further, he analyses the specific features of family mediation, paying special attention to the person of the child.

Both the advantages and the disadvantages of the mediation procedure are treated in detail.

In the dissertation, the author calls attention to those main areas where a change in the rules of law

may be necessary and, in correspondence with that, it is – in all probability but not wholly – also expectable.

2. To approach mediation and alternative methods of conflict resolution in a systemic and theoretical way, the author of the paper uses related Hungarian and international literature: in the form of books, articles and studies. The survey of the historical part of mediation procedure is based primarily on the related foreign literature. The presentation and analysis of the prevailing legal regulations are of course founded on the exploration and analysis of Hungarian and international legal sources. The analysis of the legal sources is complemented by the processing of the data from the related literature. On this topic, a growing amount of literature is available on the Internet. The author also used that while getting acquainted with the related literature, and the information on the websites of various international organizations provided significant help in the research. In the dissertation, the judgement of mediation is examined not only in legal respect. The author of the paper attaches just as great

importance to the psychological background and, therefore, he used literature also from that field.

3. The hypotheses of the author are the following:

- H1: In the case of conflicts in organizations, the application of mediation may have greater advantages than dispute resolution in actions at law.
- H2: In view of the special character of (family) mediation, the mediator must be in possession of special knowledge.
- H3: In view of H2, special training of mediators and the establishing of the competency limits are necessary.
- H4: Mediation as a way of dispute resolution involves lower costs than actions at law.

### **III. The new results of research**

1. The dissertation presents the possibility of applying mediation in the case of conflicts related to marriage. The author makes an attempt at defining the concept of mediation. In doing so, he does not



necessarily consider the agreement closing the mediation procedure as the indicator for the success of the procedure. The author of the dissertation thinks that the legal and other definitions of mediation are too exclusive. Most definitions approach the mediation procedure primarily from a legal point of view and they are quite agreement-oriented. However, *mediation is a complex legal and psychological process, free of formal constraints, in which the parties strive for the out-of-court resolution of the conflict between them with the help of a neutral, impartial third person chosen by them jointly (the mediator). During mediation, the parties are subject to mental processes starting and taking place in them that make their problem management, self-estimation and tolerance shift partially or completely in a positive direction and, at the end of the procedure, even an agreement suiting all the parties may – but not as an inevitable condition – be reached.*

The majority of professionals make the success of the mediation procedure depend primarily on the accomplishment of the decision made at the end of the

procedure – similarly as in the case of an action at law. The author, however, does not regard the effective process, ending necessarily with an agreement, as the essence of the mediation procedure in the first place but, rather, the fact that – so to say, as an unavoidable concomitant – the parties sustain less mental damage in the procedure than in actions at law. The substantial point of the mediation procedure is not only that the parties should reach a peaceful agreement but also that their self-esteem should not decrease and that the understanding of the other person should be reached at the end of the process. If the parties do not part as enemies, this may function as a positive factor in the future relationship between them. This is of importance in those situations in the first place when the parties still stay in contact – because of the child born in the marriage – after the divorce.

2. The author of the paper thinks that family mediation represents a special group of mediation procedures, which includes mediation connected to the dissolution of marriage in a legal procedure. Family mediation can be divided in two main groups. One

group is represented by the possibilities where the procedure is determined by the framework of legal regulation and, thus, mediation can have a complimentary role. This group includes the dissolution of marriage, child residence and the changing of child residence. The other group is represented by the cases that are beyond the scope of legal regulations. This includes, for instance, family conflicts which may arise from the relationship of children, parents and grandparents living together but also the conflicts in connection with the dissolution of marriage or child residence which, however, do not belong to the legal procedure. By that, the author means problems which are not regulated by the court in the course of the dissolution of marriage but play an important role in the parties' lives. This group is made up by the particular rules that belong to the parties' private lives but cannot be enforced by means of law (e.g., details of contact with the child; who picks up the child at the (nursery) school).

## **The types of family mediation**

### **1. Matters belonging to the scope of legal regulation**

- a) Dissolution of marriage – divorce mediation
- b) Child residence, changing of child residence (mediation procedure for child welfare, mediation for relationship management)

### **2. Matters beyond the scope of legal regulation**

- a) Family conflicts (child, parent, grandparent)
- b) Matters related to the dissolution of marriage or child residence (particular rules) that do not belong to the legal procedure

3. Mediation can be applied for family conflicts with a preventive or a remedial purpose. The preventive function may appear primarily in the case of the preliminary marriage settlement to property rights. By the preventive role, the author of the dissertation means also the prevention of a specific

controversial situation in which the parties could sustain serious mental damages. Thus, it is important in what state, or, in which phase the conflict comes to the mediation procedure.

Remedial mediation, however, can be applied much more widely. As for matters belonging to the scope of legal regulation, it can include mediation related to the dissolution of marriage, as well as mediation procedure for child welfare and mediation for relationship management. The matters beyond the scope of legal regulations may all be suitable for the application of remedial mediation. Besides family conflicts (child, parent, grandparent), this procedure can be applied successfully also for discussing matters connected to child residence (the particular rules not belonging to the legal procedure).

4. A significant part of Hungarian and foreign literature on mediation regards making the procedure compulsory as losing the substance of mediation. By virtue of its attitude, which emphasizes consensus, mediation functions on a voluntary basis as a main rule in most cases.

The author takes the view that making the procedure of mediation compulsory – the omission of the voluntary character – is conceivable for the purpose of the assertion of exceptionally important interests and rights. Such an especially important right is the child's paramount interest. In the case of matters belonging among family conflicts, it is thus worth considering to prescribe compulsory mediation either before the action at law, or during it, or, in certain cases, even after the judicial proceedings.

5. Performing a mediator's tasks cannot be regarded as a self-contained profession at present but it still constitutes a range of duties which requires special knowledge and practice. As mediation is on the borderline between law and psychology, a person who wishes to perform this difficult task well must have the necessary knowledge from both disciplines. It is a prerequisite of every profession that its scope of competency should be clearly confinable. In the present situation, the role of a mediator does not separate from the social worker's, the social

educator's, the lawyer's or even the psychologist's professional competency in a clearly confinable way.

6. Family mediation represents a special kind of mediation. This specialty arises primarily from the fact that, in this procedure, emotions play a more important role than in other varieties of mediation. The emotional factor plays an important role not only in divorces but also in other family conflicts. Not only the spouses but all the family members and relatives are affected by the emotions. Special attention must be given to the child in these cases.

When involving the child in the procedure of mediation – whether it is an action at law or a mediation procedure, - the participants must take great care not to make the infant feel that they have to choose between their parents. Though the child can be involved in the mediation procedure but only with due caution: not every time and especially not at all costs.

#### **IV. Conclusions and recommendations**

1. Mediation is a self-contained profession, the expert performance of which requires professional, theoretical and practical education of the appropriate level. Thus, it would be important to define, or, specify the professional field exactly. Defining the limits between the competencies of professions may be a prerequisite of effective functioning and acknowledgement. After the acknowledgement of the profession and the propagation of training, or, parallel to it, it is worth considering the regulation of in-service training. The long-term practising of this profession inevitably requires also the widening of the judicial as well as the psychological and methodological knowledge. A proposal for an amendment of law will make provision for that, hopefully, within a reasonable time.

However, the proposal for an amendment of law still does not contain that the mediator may practise the activity of mediation in a field appropriate to their qualifications. The author considers it



necessary that the ministry should specify the professional fields exactly and they should make the possibility of practising them dependent on the special qualifications belonging to the given field.

2. According to our current legal regulations, mediation is a quasi procedural form, suitable for avoiding the legal procedure and functioning besides it. An agreement accepted and signed jointly by the parties as a result of a successful mediation procedure is not enforceable in judicial proceedings. It would facilitate the work of courts significantly if an agreement that was created with the mediator's help and is in accordance with law would have to be only approved by the judge, even including regulations beyond judicial problems!

Knowing the current state of affairs, the author of the dissertation considers it realizable in the distant future that a lawful agreement created in a mediation procedure could become effective and enforceable without a judge's approval. In family mediation, namely, such problems may surface and need to be resolved that the parties themselves can solve best.

The existing legal background is of course not sufficient for that! The current rules of law suggest, anyway, that a mediational agreement does not have much significance, since in spite of the fact that the parties made an agreement, they may, disregarding the agreement, bring the matter before a court without any special procedure or legal consequence if they change their minds later. A legally binding agreement made earlier and based on accord could be modified by the parties only by mutual consent. The enforcement of an effective mediational agreement that is not observed could belong to the authority of courts. Thus, the motivating force to urge the parties to make an agreement is missing.

3. According to the new draft of the Civil Code, the spouses may employ mediation procedure, regulated in a separate law, for the purpose of settling their relationship or the controversial issues related to the dissolution of marriage in a consensual way, *before starting the divorce suit or during the divorce suit – voluntarily or following the recommendation of the court.*

The author takes the view that if the parties follow the recommendation of the court to employ mediation procedure, this is their own decision just as if they followed or rejected someone else's recommendation. It is, namely, not compulsory to follow the recommendation of the court and it is not compulsory for the judge to make this recommendation.

It could change the situation for the better if the law contained the following: *Before starting the divorce suit or during the divorce suit, the court may obligate the spouses to employ mediation procedure, regulated in a separate law, - for the purpose of settling their relationship or the controversial issues related to the dissolution of marriage in a consensual way – if the court believes that there is a chance of agreement being reached between them.*

In the case of married couples with children, the mediation procedure needs to be regulated but not incidentally, yet, much rather, with compulsory employment. The draft of the new Civil Code does not, in effect, add anything important to the regulation

effective at present. It provides a possibility for the court to make a recommendation in order to call the parents' attention to the employment of the mediation procedure. Although declaring this possibility in a rule of law changes the situation for the better but this right of making a recommendation is already granted to the judge at present. The author thinks that this procedure should be made compulsory also in these cases, since the new Civil Code declares that the parent having the child custody and the parent living separately from the child *must cooperate* – respecting each other's family life as well as peace and quiet – to provide for the child's balanced development.

As a matter of course, also the reasons that exclude the mediation procedure need to be listed.

4. On the basis of the available data, the fees for mediation are basically between 5,000 and 50,000 Ft. It is important to emphasize that according to the provision of law, the mediator's fees are subject to the free agreement between the mediator and the parties, and its extent depends primarily on the character and complexity of the matter and, further, on

the number of the individual appointments during the procedure. Even the lowest fee for the procedure may be a burden for many persons and families.

The possibility of employing cost-free mediation procedure could be a task fulfilled by qualified employees belonging to the state sector or it could even be connected to private mediators. A solution could be – similarly to legal aid – the introduction of the so-called 'mixed' system. Needy clients should be given assistance in choosing mediators and in easy terms of paying the fees. Others, however, should be allowed to choose the suitable person of their own choice from among the mediators working also on a market-oriented basis. If the procedure is made compulsory, not only the possible introduction of gratuitousness but also restraining the fees within certain limits may be a solution.

5. The author's hypotheses have partly proved true. Thus, it has been found that:

- H1: In the case of conflicts in organizations, employing mediation may have greater

advantages than dispute resolution in actions at law.

- H2: In view of the special character of (family) mediation, mediators must be in possession of special knowledge.
- H3: Since the previous hypothesis has proved true, special training for mediators and the specification of the competency limits of the mediators' profession are necessary.
- H4: This hypothesis has proved true only partially. Mediation involves lower costs, namely, only if the mediation procedure was successful, i. e. the parties have concluded an agreement. If the mediation between the parties is unsuccessful, the costs of mediation and those of the subsequent action at law are added up and, thus, the mediation procedure appears as a cost-increasing factor.

## V. The author's publications related to the topic of the paper

- *A mediáció alkalmazási lehetőségei a gyámhivatali munka során (The possibilities of applying mediation in the work at the public guardianship authority)* (4<sup>th</sup> December 2005)  
In.: <http://szochalo.hu/hireink/article/104280/3218/>
- *A magyar gyermekvédelem alakulása az 1945-1950 közötti időszakban (The situation of Hungarian child welfare in the period between 1945 and 1950)* (26<sup>th</sup> July 2006) in.:  
<http://szochalo.hu/hireink/article/107252/3218/>
- *Alternatív konfliktusmegoldási lehetőségek a gyermekvédelem területén (Possibilities of alternative dispute resolution in the field of child welfare)* in.:  
Tudomány Napja 2003. conference lectures Nyugat-magyarországi Egyetem Benedek Elek Pedagógiai Főiskolai Kar Sopron, 2004. 109-123 p.
- *Globalizáció hatása a gyermekvédelemben (The influence of globalisation in child welfare)* in.:  
Doktoranduszok és fiatal kutatók konferenciája „Globalizáció, avagy a nemzetközi folyamatok hatása a magyar jogrendszerre” Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar Doktori Iskolája 2006. 45-54 p.

- *A gyermekvédelem Magyarországon, különös tekintettel Sopron vármegyére. 1945-1950 (Child welfare in Hungary, with special regard to the comitat Sopron. 1945-1950)* in.: Acta Universitatis Szegediensis, Acta Juridica et Politica Tomus VI, Fasciculus 1. Szeged, 2006. 199-246 p.
- *A gyermeki jogok érvényesülése a mai magyar joggyakorlatban (The vindication of children's rights in the Hungarian judicial practice of today)* in.: Collega issue 2-3. 2006. 175-180. p.
- *Válási mediáció (Divorce mediation)* in.: Collega issue 1-2. 2007. 184-189.p.
- *Problémás gyerek, problémás gyakorlat (Problem child, problematic practice)* (under publication) – Magister Magiszter – Romániai Magyar Pedagógusok Szövetsége
- *A családi közvetítés (mediáció) specifikumai és problémái (The specific features and problems of family mediation)* – in.: Iurisprudentia et iuro publico. Jog- és Politikatudományi folyóirat. vol.III. issue 2009/2. 74-107.p.