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BENEFITS WITH MEDIATION? CONFLICT MANAGEMENT IN HUNGARIAN PUBLIC ADMINISTRATION

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Abstract: *In Hungary, the possibility to switch between civil litigation and mediation proceedings is open since 2008. The court may, at any stage of the proceedings, attempt the parties to settle all or part of the dispute amicably.*

A major breakthrough, especially in the development, transparency and efficiency of public administration in Hungary in terms of administrative practice and regulation of administrative activities, is that in the case of administrative litigation from 1 January 2018 it is also possible to use the mediation procedure.

The significance of this is, among other things, that the official decision and the procedure aimed at making it can take into account the views of the client or other interested parties in a more emphatic and direct way, so it can have a significant impact on the client's acceptance and voluntary implementation.

The aim of the present study is to examine how the possibilities of mediation in a functioning organizational system have prevailed in the recent period. The examined area shows an answer to the question whether the aim of the legislator is achieved by providing the possibility of mediation in everyday administrative practice.

Key words: *conflict management, mediation, public administration*

1. INTRODUCTION

Conflict appears in private sphere and in public sphere, too. Conflict is everywhere. It can be found in human interactions as well as business interactions. Companies involved in formal conflict, search for lawyers and leaders that resolve conflict in an efficient way. This means not only to address the issue of conflict and come to a solution but also to do so with the best use of resources possible and that assures a final solution rapidly. In the last quarter century,

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alternative dispute resolutions (ADR) has become an increasingly efficient and popular strategy to conflict management. Among the most well-known ADR methods are mediation, conciliation, negotiation and arbitration. (Lieberman and Henry, 1986) (Hong et al, 2021) (Holtzworth-Munroe et al., 2021) (Bogacz et al, 2020).

Litigation present a series of inherent disadvantages for companies - the parties lose control, the lawyers and the judicial system have power over the timing and procedure of the conflict resolution, and in result, disputes can take years to come to any resolution. The parties lose the ability to communicate with each other in order to resolve the problem. This causes most business relationships to be ruined and erodes trust and cooperation. Also, the costs of litigation increase significantly due to delays and (mostly) the lawyer's fees. The companies that become embroiled in litigation can lose its competitive advantage.

On the other hand, alternative dispute resolutions have become progressively common due to the advantages to litigation such as benefits in costs, simplicity and maintenance of the power of the entire state of affairs. In case of usage of these methods, a resolution is only reached if both sides accept to engage in this voluntarily. This own-willed approach to a conflict management implies a rationalized approach to the conflict at hand. This same rationalized approach also looks to quick conclusions that allow to construct a scheme to frame the relationship to prevent future disputes.

While there are some notable nuances between the different ADRs, they share the common feature: the dispute is mostly decided by the parties involved and less power is given to the third party involved (i.e. mediator, referees). Whereas in the case of litigation, the jury is granted absolute powers for the resolution of the conflict and to enforce this resolution. In mediation, the parties determine the result of the dispute and are in power of the conflict management the whole time while in arbitration, the result is determined in accordance with a rule, the law applicable. In both cases of ADR, when deciding on a result, the parties can take account for a wider range of rules, and in particular, their respective commercial interests. (Bercovitch and Jackson, 2001) Therefore, mediation and arbitration are procedures based on interests and rights. The fact of taking commercial interests into account also means that the parties can decide the result by reference to their future relationship rather than solely by reference to his past conduct.

The term conflict (Coser, 1956) (Dahrendorf, 1959), (Pondy, 1957) has no single clear meaning. Much of the confusion around the definition has been created by scholars in different disciplines who are interested in studying conflict. Reviews of the conflict literature

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show a conceptual sympathy for, but little consensual endorsement of, any generally accepted definition of conflict. There is tremendous variance in conflict definitions, which is mainly defined according to two approaches. First, a more specific approach which includes a range of definitions for more particular interests or areas. Second, a broader approach which include a variety of more wide-ranging definitions that attempt to be more all-inclusive in the subject matter. We use the definition of Rahim (Rahim, 2011) which is more of a broader approach. According to this author, "conflict can be considered as a breakdown in the standard mechanisms of decision making, so that an individual or group experiences difficulty in selecting an alternative". Conflict is even published by authors on the side of 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)

2. POSSIBILTY FOR AGREEMENT

In case of a court trial, the conflict management revolves around different litigation costs. In the case of litigation, which continues as the most popular formal conflict management procedure there are several costs to bear in mind. First, one can clearly compare the type of costs a plaintiff might have during a civil or a public administrative procedure. Not only the court fees, but time, the question of reasonable time mean also the cost of litigation.

Why it may be effective to reach an agreement in the public administrative procedure? If the subject matter of the dispute so permits and is not precluded by law, the court shall try to reach an agreement between the parties if there is a reasonable opportunity to do so within a reasonable time.2) The court shall a) inform the parties of the benefits of the agreement. and (b) inform the parties of the nature of the mediation procedure, the possibilities and conditions for its use, (c) it may present the proposed agreement to the parties in writing during the preparation of the hearing or in the minutes of the hearing, or (d) summon the parties to an attempt.

2.1 Agreement and mediation

Settlement and mediation can be classified as alternative dispute resolution. The legal institutions of settlement and mediation are based on the aim of reaching an agreement between the opposing parties that reflects the interests of the parties as much as possible. The

amicable settlement of a conflict between the parties is not only in the interests of the parties, but is also in the fundamental interest of the public authorities, as it speeds up the proceedings before them and, in all likelihood, closes them permanently. In contrast to traditional judicial decisions, which necessarily have a winning party and a losing party, the essence of alternative dispute resolution is that, at the cost of compromises, all parties involved can be considered to be largely winning. (Sáriné, 2021)

A necessary condition for this is that, given the nature of the dispute, it is possible to reach an agreement and that the parties also have a willingness to settle their conflict in this way. The classic areas of alternative dispute resolution (family mediation, health redress, consumer conciliation) are typically linked to private enforcement, as the parties' decision-making autonomy in private law is significantly wider than in public law, and in particular administrative law. (Sáriné, 2012) In administrative law, ADR is closely linked to the issue of discretion, as there is essentially an agreement between the parties in areas where the law allows for some degree of discretion. Logically, in situations where the administrative body can only make one lawful decision, the possibility of a different agreement cannot arise during the litigation. If, on the other hand, the administrative body has acted in the exercise of its discretion, the following legal institutions may be applied within that framework.

In the application of settlement and mediation in administrative lawsuits, a fundamental question arises as to whether these tools can only be used in lawsuits where opposing parties outside the administrative body or authority are opposed to each other (e.g. contact cases, expropriation cases) or possibility. there are for their application in official activity, in classic bipolar cases, i.e. also in the opposition of an authority and a client (e.g. imposition of a tax fine).

In our view (Barabás et al, 2020), there is no obstacle to the conclusion of a settlement or mediation in cases where an authority is confronted with a client, since the basis for the application of these legal institutions does not depend on the number of subjects of the underlying legal relationship but on whether room for maneuver defined by law within which the agreement can be established.

Thus, for example, the legal institution of the settlement can be used in construction matters when establishing special permit conditions or even in social assistance matters. Similarly, it can be beneficial to seek settlement in complex regulatory regulatory lawsuits such as communications cases or competition cases. The wider application of the agreement in this type of case may also induce a change in the perception of the judiciary, as the focus of

judicial activism is on reaching an agreement on reviewing the decision, leaving more room for market participants and the authority to agree on their own interests. (e.g. GVH Notice 3/2015 on the settlement attempt). The court can thus indeed act as a guardian of legality in these complex cases and does not take over the role of the regulatory authorities through the review of the decision.

Another peculiarity of litigation settlement is that in the application of the law of the administrative authority - even in the changed legal environment - it gives the authority the opportunity to amend or revoke its decision protected by the rights acquired and exercised in good faith during the proceedings. Act on administrative procedure (Act I of 2017 on administrative procedure) explanatory memorandum also emphasizes that "the role of the settlement may play an important role in the context of the widening of the judicial sphere and the limitations of ex officio review possibilities". In this way, the conclusion of a legal settlement gives the administrative body more leeway to shape its decision afterwards. Although Act I of 2017 on administrative procedure Section 83 provides for the possibility for an administrative body to remedy an infringement in an administrative proceeding during the proceedings, in addition to the suspension of the proceedings, this is only within the limits of ex officio review of decisions (e.g. Section 120 of the Act). possible. In contrast, during a court settlement, an earlier decision can be amended in the absence of a breach of the law, or beyond the one-year time limit, or even repeatedly.

Before examining the rules of settlement and mediation, it is necessary to briefly present the difference between the two legal institutions. The relationship between a settlement and mediation can essentially be described as a goal-tool relationship. The purpose of alternative dispute resolution in each case is to reach an agreement between the parties. One possible means of doing this is to use the mediation procedure, in which the parties call on an external mediator to reach an agreement. However, an agreement as an objective may be reached without mediation, either by an agreement between the parties independent of the proceedings or by the assistance of the trial judge.

2.2. Conditions for establishing an agreement

Within the framework of the establishment of the agreement, the Act I of 2017 on administrative procedure it essentially lays down three conditions: a) it is not precluded by law, b) the nature of the dispute allows an agreement to be reached, c) an agreement can be reached within a reasonable time.

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Act I of 2017 on administrative procedure according to the system of conditions, the possibility of concluding an agreement becomes the main rule in the administrative lawsuit, ie in the case of the other two conditions, theoretically any agreement may be reached in proceedings falling within the scope of. However, the possibility of reaching an agreement may be ruled out by the legislator in sectoral rules.

With regard to the nature of the dispute, we have already stated in the introduction that, in principle, an agreement may be reached in cases where the administrative body acts in a discretionary manner. The administrative body acting in its discretion may choose from several legal decision-making possibilities provided by law. (Molnár, 1989) (Fazekas, 2013)

If the law prescribes a binding decision for the authority in the presence of certain conditions, and the authority takes evidence for the examination of these conditions, the result of which is assessed, the decision cannot be classified as a discretionary decision in view of the latter. (Fazekas, 2013)

It can be read from the above that the discretion is basically in the choice of the administrative decision, it provides alternatives in the decision-making process, thus the discretionary activity of the administrative body in the evidentiary procedure cannot be included in this circle, nor the cases when the decision of the body is essentially. Legal framework does not exist outside the definition of decision-making power (discretion).

As a last condition, the Act I of 2017 on administrative procedure mentions that, given the circumstances of the case, there is a chance of reaching an agreement within a reasonable time. This provision reflects the idea that one of the advantages of the settlement is that it speeds up the procedure. The assessment of reasonable time is at the discretion of the trial judge and can only be decided on a case-by-case basis. Presumably, in this situation, it can be considered a reasonable time that does not exceed the expected duration of the termination of the lawsuit without a settlement.

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3. DISPUTES AND RESOLUTIONS

To go deeper into the topic of analysis, clients, natural persons were contacted on the subject. I consulted them on the topic of analysis, the research tool used was a questionnaire. 35 persons were contacted and responded the question. The question of the study focused in asking about the decision in case of public administrative procedure –in case of the possibility of the decision about how to continue the procedure: in litigation or to make a possible agreement, specifically:

1. In case of a conflict, which way of conflict resolution is preferred in your decision? In the procedure of the public administrative court, I WILL:?

The figure shows that 90% of respondents prefer choosing mediation in case of a conflict.

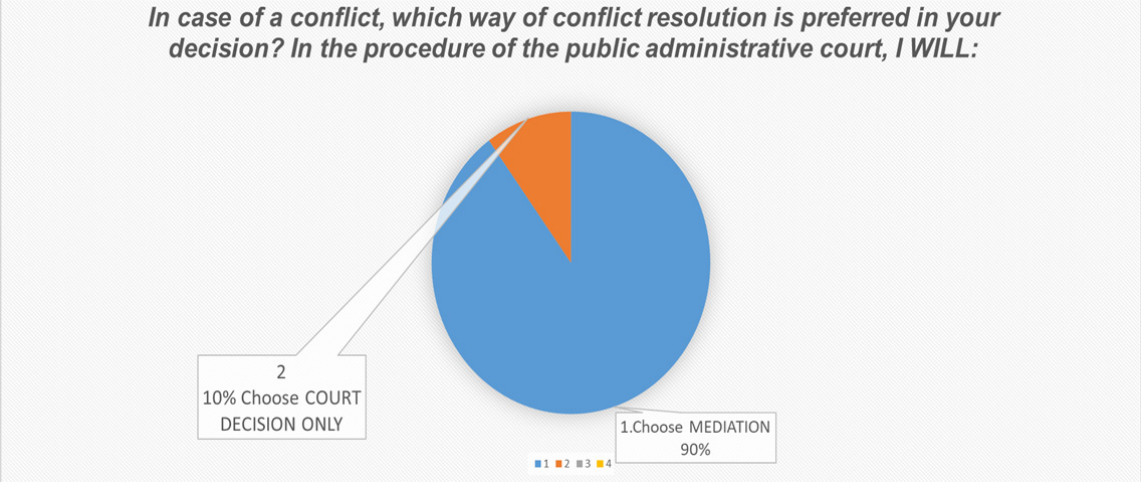

Fig 1. In case of a conflict in public administrative court procedure

Source: own research 2021

The figure shows that only 10 % of respondents would stay in litigation and would choose court decision in case of public administrative conflict.

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4. CONCLUSION

The results of this paper suggest that according to the current data of proceeding fees, alternative dispute resolution in terms of cost, are a more economical alternative in conflict management as they allow a more expedite resolution. In addition to court proceedings, alternative dispute resolution (i.e. mediation, arbitration) is another way to achieve a lasting more peaceful solution to conflicts. As it allows the parties to maintain the negotiation power necessary to conduct the conflict management, it helps them keep communications open. This also seems to be hinted in the respondents' answers to the above question in this study. There is an almost 90% divide in those who prefer to compromise and will even accept a certain loss of power in order to obtain a better resolution. The study highlight the significance of power relationships in public admisitrative conflict management and the selection of ADR, agreement and mediation.

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