

Mediation

Maintaining Business Collaboration Despite Conflict

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Abstract

Disputes are part of everyday business life. Mostly these disputes concern minor disagreements that can be resolved through bilateral negotiations. Some disputes, however, are not resolved so easily. Sometimes, on the face of it, both parties' positions seem irreconcilable. Such conflicts can easily become major problems to the companies concerned. They can hinder further progress in a project or even bring a project to a total standstill.

Those responsible then have to decide what action to take: Going to court makes it very difficult to preserve a working relationship. Of course, one can just terminate the cooperation, abandon possible claims and hope for better luck next time. But maybe there is an alternative...

This paper presents the pattern **Conflict Resolution through Mediation** as one possible approach to conflict resolution. It also presents a collection of associated patterns that deal with smaller aspects that arise when using or thinking about using the pattern **Conflict Resolution through Mediation** to resolve business conflicts. Many of these associated patterns address liabilities that arise when using the pattern **Conflict Resolution through Mediation**. As the author comes from a German background it is addressed especially to German companies and freelancers.

Conflict Resolution through Mediation

“How many mediators do you need to get a light-bulb screwed in?”

Mediator: “So what I hear you saying is that you would like the room to be brighter.”

Context

You are one of the parties in a business relationship in Germany¹ and are working on a common project together with the other party (or parties²). You are in the middle of a conflict over some issue. Bilateral negotiations have failed.

Problem

How can you solve the conflict and maintain good business relationships?

Forces

- Reaching an agreement about the controversial issues and achieving a resolution of the conflict are essential for further successful progress in the project. Ignoring the conflict is not an option any more because it is costing too much effort and is threatening to bring the productive work on the project to a standstill. You do not have the time or the money to carry on the dispute indefinitely. You both want a quick solution. Going to court takes time – time that could have been much more effectively used to make money or to further the project.
- But neither you nor the other parties are prepared to draw back from your positions completely. You both want the resolution of the conflict to meet your company’s interests.
- Both of you want to have a decisive influence on the outcome of the discussions. So taking the conflict to court is not really in your interest since the outcome of a lawsuit is not very predictable. A court often does not possess expert knowledge in the branch of business in question. And even if it does: no one knows the background of the concrete business project better than you and your business partner do yourselves.

¹ This paper is based on the German business world. Because of this certain facts are specific to mediation processes in Germany.

² Mediation is applicable to conflicts between two parties and more parties. As mediation is mostly used to solve conflicts between two parties this paper concentrates on conflicts between two parties. A lot of the patterns can be applied to conflicts involving more than two parties.

- Both of you want to spend as little money as possible on solving the conflict or in connection with the conflict.
- It may be essential or important for the conflict to be dealt with confidentially.
- It seems to you that there would be a better solution to the conflict than paying financial compensation, for example by deciding on future projects or agreeing on special terms for software-maintenance.
- One of the negotiation partners may not really want to be responsible for the agreement that has been achieved. Someone, for example, his boss might criticize him for conceding too much. He would much rather be able to shift the responsibility to someone else.
- You want a lasting solution. You do not want the same conflict to arise again later.
- You want to be sure the conflict will actually be solved.

Solution

Call in a mediator and use mediation to resolve your differences.

Mediation is a voluntary³ settlement process in which parties agree to work with a professional neutral – a mediator – in order to define their respective interests and generate options for mutual gain. The mediator, who is trained in communication skills, moderates and structures the discussions and helps the parties to reach their fairest and most constructive agreement. He has no authority to make a decision.

Consequences

Benefits

Mediation is often a great solution because of its numerous benefits.

❖ High Success Rate

Mediation mostly ends with a mutual agreement that is acceptable to both parties. As of yet there are no statistics about the success rate of mediation in Germany. According to several US-statistics mediation cases in the USA are resolved successfully in around 80 %⁴ of the cases.

³ Each party can terminate mediation for any or no reason.

⁴ Duve p. 60.

❖ **Cost Effectiveness**

The cost of mediation is generally less than the expense of litigation or even arbitration. The cost of going to court in Germany depends on the amount in dispute⁵ and whether the judge needs to solicit an expert opinion or not⁶. The mediator (and the accompanying lawyers) are paid on an hourly basis. The mediation process usually takes one day or at the most several days. Because the length of a mediation process cannot be calculated exactly beforehand, the break-even point can not be calculated exactly either. At the moment (mid-2004) it lies approximately at an amount of dispute of 200,000.00 EURO⁷.

But a comparison of the costs is not the only thing that should be taken into account:

The mediation process is a lot shorter than litigation, with the result that the agreement comes into effect very much sooner than the verdict. The benefits of the agreement can be invested again sooner.

Mediation also saves the cost of time, effort and manpower that would have to be invested in litigation. It also preserves the business relationship and in this way preserves the possibility of profitable cooperation in future.

❖ **Time Saving, Rapid Settlement**

Mediation is a means of producing rapid results so that the parties can get on with business. The sessions are usually scheduled quickly. The short duration of the mediation process (the actual mediation processes (without the planning beforehand) takes a few days) stands in contrast to the duration of lawsuits in Germany (often over a year⁸).

When one party relies on another to carry out his part of the contract quickly, time plays a vital role. For example, if a software firm is integrating a new program for warehousing in another firm, there is usually an amount of time during which neither the old software nor the new software can be used. If a conflict arises at this point the software firm often refuses to carry on integrating the software until the conflict is resolved. It is then essential for the firm that the conflict is dealt with rapidly. Every day of delay costs the firm a lot of money.

⁵ The higher the amount in dispute the higher the cost of going to court.

⁶ If a judge does not have sufficient knowledge of the branch of business in question he will solicit an expert opinion on the relevant question. This obviously costs money.

⁷ Risse p. 495 with a calculation in detail.

⁸ In North-Rhine Westfalia (NRW) in 2002 the average length of a lawsuit in the first instance was 7.2 months (www.justiz.nrw.de/IndexSeite/Organisation/statistiken/landgerichte/index.html). In 2002 the average length for a lawsuit in the second instance was 8.4 months (www.justiz.nrw.de/IndexSeite/Organisation/statistiken/landgerichte/index.html).

❖ **Greater Degree of Control and Predictability of Outcome/ Risk Control: Self-determined Outcome**

Parties who negotiate their own settlements have more control over the outcome of their dispute. Due to the fact that in mediation no decision is made by a third party, nothing can be imposed on the parties. In contrast, the outcome of a court case is only predictable to a certain extent.

❖ **Confidentiality**

In Germany court cases are held publicly. The mediation sessions are confidential. This is a benefit if either or both parties do not want the public to know about the conflict or become acquainted with the details of the conflict.

❖ **Mediator's Expert Knowledge**

Since the parties can decide which mediator to hire they can employ one who has sufficient knowledge in their branch of business to be able to moderate well. They obviously cannot decide on the judge in a court case.

❖ **Maintaining Cordial and Constructive Business Relationships**

Many disputes occur in the context of relationships that will continue over future years. Mediation improves communication and understanding between parties while strengthening personal and business relationships. By suggesting mediation as a way of solving a dispute you show that you are looking for a constructive solution – this is an important step towards solving the dispute.

❖ **Mutually Satisfactory Outcomes**

Parties are generally more satisfied with solutions that have been mutually agreed upon, as opposed to solutions that are imposed by a third party decision-maker.

Research findings show that parties are more satisfied at the end of a negotiation process than after a decision process. Having actively participated in finding the solution, each party is satisfied with the agreement reached. Each party is convinced he has negotiated an advantageous agreement regardless of the agreement's actual benefits and disadvantages⁹.

⁹ Risse p. 505.

❖ **Comprehensive and Customised Agreements**

Mediation addresses both legal and extralegal issues. The agreement often covers issues that are outside the scope of law. The parties can tailor their settlement to their particular situation and thus reach an agreement that solves the conflict on more levels than a court verdict would. Mediated agreements can include specially tailored procedures for how the decision will be carried out. Mediation furthers creative solutions and also allows for the complexity of the context.

❖ **High Rate of Compliance**

In general, the terms of a mutually reached agreement are more likely to be complied with than the terms of a verdict imposed by a third party because the parties identify with their agreement.

❖ **Decisions that Hold over Time**

Mediated settlements tend to solve the conflict in the long run since they address the parties' interests and not their positions and bring about a better understanding between the parties.

❖ **Lasting Solution Likely.**

The solution achieved by mediation is more likely to be a lasting solution than a solution by a third party because the mediation parties have a make a decisive contribution towards finding the solution. Their interests have been taken into account in the solution so they have a sense of satisfaction that this specific problem has been solved.

❖ **Common Good.**

If mediation starts to play a bigger role in today's business world then it will improve the way people treat each other. If people start concentrating on their mutual underlying interests instead of their differences and their conflict, many differences of opinions might be solved before they reach an emotional level.

Liabilities

❖ Mediation Can Fail!

Mediation cannot guarantee a successful resolution of a conflict even though the chances of reaching a mutual agreement are very good. If the parties fail to reach an agreement, mediation fails. Although the solution “Call in a mediator and use mediation to resolve your differences” is definite, clear and precise, the outcome is fuzzy and not totally predictable

❖ Agreeing on Mediation in the Middle of a Conflict is Difficult

When you are in the middle of a conflict it is very difficult to agree on anything. Because of this it is often too late to agree on mediation when the conflict has already arisen and bilateral negotiations have failed. This limitation can be solved beforehand by using the pattern **Mediation Clause**. In the middle of the conflict the use of **Mediation Suggestion** may help the parties agree to use mediation.

❖ Mediation is Confidential

In some contexts mediation is not appropriate. When, for example, one party is compelled to “send a message” to a larger audience (e.g. a company wants the business world to know it will prosecute certain behaviour as a violation of patent rights), mediation should not be chosen.

❖ The Conditions of the Mutual Agreement Cannot Immediately Enforced by the Process of Execution

At the end of a mediation process the parties have a legally binding document (settlement). However, if one party does not comply, the other party cannot immediately enforce the agreement by execution. He/She first has to take the other party to court. The verdict can then be enforced by execution. In all probability the prosecuting party will win the trial as the conditions of the agreement are in writing. But he loses time.

However, the parties do have the possibility of making the settlement executable: they can either go to a notary who can make the agreement executable (for a fee) or they can authorize their lawyers to agree on an “Anwaltsvergleich” (lawyers’ settlement), which can easily be made executable.

The parties can also help enforce compliance by including a contractual penalty clause in the settlement. Above all, as stated above, most parties comply. Having managed to solve the conflict out of court and having invested a lot of effort in finding the solution they do not want the conflict to break out again.

❖ **More Cost if Mediation Fails**

If the mediation process fails then the cost for litigation has to be paid in addition to the cost for mediation.

❖ **Differences in Bargaining Power**

Often the parties in a conflict are not equal negotiation partners:

- One party involved in the conflict might have less competence in communication than the other party, or
- one party might be more emotionally involved than the other party, or
- one party might have more business experience than the other party.

Even in such contexts the mediator is not allowed to take sides with the weaker party as he is committed to being neutral. He can only objectively state the consequences a suggested agreement has for both parties.

Inequality of negotiation partners combined with the mediator's obligation to be neutral can result in an unfair agreement being reached. In such cases the result of a court case might have been fairer.

However this liability does not necessarily mean that mediation cannot be employed if the parties are not equal negotiation partners. The inequality can be compensated by the presence of the parties' lawyers (cf. **Lawyer as Equaliser**). The parties' lawyers are partial and can advise their parties if a suggested option is one-sided and unfair.

❖ **Deliberate Procrastination Possible**

There is of course the possibility of one party deliberately using the mediation process for his/her own advantage by trying to use the atmosphere of trust created by mediation in order to find out information that could be useful in a later court case. In actual fact it is not very likely that this will happen:

- First of all, even though the parties are negotiating in a confidential atmosphere it is unlikely that they will trust the other party so implicitly as to impart more vital information than is needed in the negotiations.
- Secondly, it is doubtful to what extent any additional knowledge could benefit the other party since in a court case the parties are compelled to be truthful.
- Thirdly, if lawyers are present they will warn their client about knowledge that might be used against them.
- Fourthly, the mediator is trained to notice if one party is not interested in reaching an agreement. He will broach the matter and, if he comes to the

conclusion that one party does not want to reach an agreement, he will terminate the mediation process.

❖ **Third Parties are not Bound by the Solution**

Another potential liability is that the mediation settlement is not binding for third parties.

In litigation in Germany you can involve a third party in a court case if you want to subrogate against them after the court case (“Streitverkündung” = “third party notice”). They are thus bound to the judgement in later court cases. In mediation only the parties involved are bound by the agreement so you would have to involve a possible third party in the mediation process if you wish them also to be bound by the agreement. This is often not possible.

❖ **Burden of Responsibility**

In mediation the parties remain in control of the agreement. But sometimes the parties want to be able to shift the responsibility for the outcome of a negotiation to someone else. They want to be able to blame someone else for the outcome. They do not want their bosses (who also often put pressure on their assistants to reach “the ideal agreement”) to hold them accountable for the terms of the agreement. The assistants then prefer arbitration or litigation to mediation even if the outcome or the expected outcome is worse for the company they work for.

Known Uses

- Conflicts between business partners of different companies
- Conflicts within businesses between employees .
- Conflicts between partners or shareholders in one company

References

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Associated Patterns

Mediation Clause

Context:

You are in the middle of negotiating a contract with a business partner as a basis for working together on a common project.

Problem:

How do you ensure that mediation is used to resolve future conflicts?

Forces:

- You want to deal with every important aspect and want to do what you can to prevent future conflicts from escalating. Maybe you are already cooperating as business partners and do not have a conflict but you decide you want to take precautions in case a conflict arises.
- You do not want the contract to be too long.
- You cannot imagine ever having a conflict with such a nice business partner ;-)
- You want to start the business relationship with mutual trust.
- An oral agreement is easily forgotten or not remembered precisely.
- If a conflict has arisen and bilateral negotiations have failed it is difficult to agree on anything. If mediation has not been agreed on beforehand the conflicting parties probably will not agree to it during the conflict.

Solution:

Have the agreement to settle disputes by mediation included in the original contract.

Consequences:

- + When the conflict arises you remember the intention of trying to solve the conflict in a constructive way and you remember that you want to work together on a basis of trust. This can change the atmosphere of the negotiations and of the conflict.
- + Adding this clause helps to uphold and increase trust as a basis for the business relationship. By clearly stating that you want to solve every conflict constructively you demonstrate trust in the other party's willingness to work together constructively.
- + By agreeing on mediation as the way to solve disputes you set up a standard of interaction that furthers trust and the constructive search for solutions both in small problems where you do not need a third party mediator and in serious conflicts in which you do.

- You cannot force mediation on people. Even if you have agreed on using mediation to solve conflicts that arise you cannot force a party to cooperate during a mediation process. The most you might be able to do is to force the parties to participate in mediation talks. But you can never force a person to be constructive.

Mediation Suggestion

Context:

You are in the middle of a conflict in which bilateral negotiations have failed and want to solve it through mediation. But you have not included a mediation clause in your contract. This pattern addresses one of the business parties involved in the conflict.

Problem:

How do you bring about mediation talks?

Forces:

- You are convinced that mediation could bring about a solution that is a lot more satisfactory than a solution imposed through a court of law or court of arbitration. (cf. the forces in the pattern **Conflict Resolution through Mediation**)
- Each party may identify personally and emotionally with his position in the conflict. He wants a third party to confirm he is right.
- One party may want a court decision in order to take revenge.
- You do not want to appear to be the weaker party.

Solution:

Suggest using mediation to your business partner. Explain that it is important to you to solve the conflict but you also want to maintain the business relationship. If necessary explain the basics of mediation and the structure of the mediation process. In this way you make it clear that you are not prepared to back off from your position completely but you appreciate the business relationship and do not want to terminate it.

Consequences:

- + Even if **Mediation Suggestion** does not bring about mediation talks, it helps make the atmosphere more constructive.
- + By **Suggesting Mediation** you achieve a negotiation position in which you have made it clear that you are not prepared to accept the other party's position but you have the bonus of being the constructive party. The other party may have a bad

conscience... Also, if the conflict does go to court, it makes a good impression on the judges if you have been constructive.

- This approach may fail. When people are in the middle of a conflict, they tend to lose sight of the overall perspective that a compromise might be best for both parties. They tend to insist on being right because they identify personally with their positions. Also, during a conflict very many decisions are influenced by emotions.
- After suggesting mediation you have implied that you are prepared to compromise. If you want to convey the impression that you are an uncompromising party – then this approach is not the right one for you.

Pair Mediation

Context:

You are in the middle of a conflict in a business relationship. You and the other business party have decided to use mediation to settle your differences. Now you need to find a good mediator.

Problem:

How do I find a mediator who meets my expectations?

Forces:

- You want a mediator who is a lawyer by profession or has graduated in law because you want the settlement to be written precisely and to be legally effectual. You want the mediator to be able to draft the settlement for you¹⁰.
- You also want a mediator with knowledge of and experience in your field of business. You expect he will be able to moderate better and have a better chance of noticing if an important practical point has been omitted during the drafting of the settlement.
- There may not be trained mediators in your field of business.

Solution:

Hire two mediators; one lawyer and one who has experience in your branch of business. The non-legal mediator does not even have to be a trained mediator if he is willing to comply with the mediation rules and, above all, to stay neutral.

Consequences

- + You have expert knowledge in the areas you need it in.

¹⁰ In Germany mediators who are not lawyers are not allowed to draft the settlement (or even help with drafting) or advise the parties concerning the content of the settlement.

- + The mediator can draft the settlement so that you have an effective agreement at the end of the mediation talks. After finishing the mediation talks with a written settlement both parties have the confidence that the conflict is actually solved. There is not the uncertainty of the conflict arising again over the later legal drafting of the agreement that has been reached.
- + Two people are able to observe more than one person. Two people can also complement each other. They are more likely to discern the underlying interests behind the problem.
- Even so, there is no guarantee the settlement will be perfect - even lawyers make mistakes and even trusted third parties can overlook important points.
- It is more expensive. This means the conflict must either involve a large amount of money or be of vital importance in order for the application of this pattern to be worth the larger expense.
- There is of course always the (unlikely) possibility that the two mediators do not get along well enough to work together constructively.

Trust Your Instinct

Context:

You are in the middle of a conflict in a business relationship. You and the other business party have decided to use mediation to settle your differences. Now you need to find a good mediator.

Problem:

How do I decide on a mediator?

Forces:

- You want the best mediator.
- You need to find a mediator.

Solution:

Do something instead of nothing. Find several candidates. Ask them questions about their qualifications, experience and methods and then trust your instinct. In mediation it is important that both parties can relate to the mediator. Then they respond best to the mediator and the mediator can create a constructive atmosphere more easily. Because of this it is better to trust your feeling than to decide only on the basis of a list of qualifications.

Consequences

- + If your instinct has led you to choose a certain mediator then this is the best prerequisite for an atmosphere of trust between your mediator and you. And this atmosphere of trust is essential for a positive conclusion of the mediation process.
- Your instinct may be wrong.

Stick to Your Choice

Context:

You are in the middle of a conflict in a business relationship. You and the other business party have decided to use mediation to settle your differences. You have decided on a mediator. And the mediation process has started.

Problem:

How can you know if you have chosen the best mediator?

Forces:

- You want the best mediator.
- You are not sure if another mediator might not have been better and might have been a more effective moderator in the mediation talks.
- You actually want to start the mediation talks and find a solution quickly.

Solution:

You can never be absolutely sure, but it is best to stick to your choice instead of chopping and changing (unless, of course, for one reason or another it is out of the question for you to continue trusting that the mediator is impartial). You usually do not need the very best mediator. You just need one who is good.

Consequences:

- + You get round to the mediation talks and to the conflict resolution quickly.
- + You can concentrate on the more important issues at hand (i.e. the solving of the conflict) as you stop worrying whether the mediator you have really chosen the best mediator.

Delegation

Context:

You are in the middle of a conflict in a business relationship. You and the other business party have decided to use mediation to settle your differences. Now you need to find a good mediator.

Problem:

You cannot agree on a mediator.

Forces:

- You really want to use mediation to resolve your conflict.
- Neither party trusts the mediator the other party has suggested.
- You want to be sure that the mediator is impartial. If the other party has suggested the mediator he may not be neutral.

Solution:

Let a third party (e.g. a mediation society) decide on the mediator.

Consequences:

- + If you are not able to agree on a mediator, mediation fails. So, **Delegation** helps mediation to succeed.
- The third party will probably also want money for suggesting a mediator.
- You are not able to test the quality of the mediator, or find out whether you trust him or not beforehand.
- The mediator will probably not have knowledge of or experience in your business sector.

Each Party Brings A Mediator

Context:

You are in the middle of a conflict in a business relationship. You and the other business party have decided to use mediation to settle your differences. Now you need to find a good mediator.

Problem:

You cannot agree on a mediator.

Forces:

- You really want to use mediation to resolve your conflict.
- Neither party trusts the mediator the other party has suggested.
- You want to be sure the mediator is impartial. If the other party has suggested the mediator he may not be neutral.

Solution:

Both parties bring a mediator to the mediation talks.

Consequences:

- + Each party is able to have one mediator he has confidence in.
- + If you are not able to agree on a mediator, mediation fails. By using this pattern you can ensure that mediation takes place.
- + Two people are able to observe more than one person can. Two people can also complement each other. They are more likely to discern the underlying interests behind the problem.
- There is the danger that the parties do not bring impartial mediators but biased consultants to the talks, so that the mediation talks are actually not mediation talks but are conflict-centred negotiations.
- It costs more!

Agreement on Mediator in Advance

Context:

You are in the middle of negotiating a contract with a business partner as a basis for working together on a common project.

Problem:

How do you ensure that in a future conflict mediation does not fail because the parties cannot agree on a mediator?

Forces:

- You want to deal with every important aspect in the contract and want to do what you can to avoid future conflicts from escalating. You have decided to use the pattern **Mediation Clause**. You also want to avoid the situation that when conflict arises you cannot agree on a mediator and the mediation talks fail because of this.

- You do not want the contract to be too long.
- You cannot imagine ever having a conflict with such a nice partner ;-)
- You cannot imagine not being able to agree on such a trivial point.

Solution:

Agree on a specific mediator beforehand. At the beginning of the business relationship both parties trust each other. Their judgement is not clouded by negative emotions. It is probably a lot easier to find a trusted third party under these conditions.

Consequences:

- + Since both parties have agreed on the mediator, they are likely to accept him
- + No valuable time is lost searching for a mediator when you want the conflict to be solved as quickly as possible.
- + The mediator knows that he may be called in as mediator in a conflict, so he can look into the background of the business project.
- + Because a mediator has already been chosen, the parties will tend to call in the mediator sooner – even before the conflict has escalated to a point where the parties cannot seem to see any possible solution. Then the chances of reaching an agreement are even better.
- The mediator may not be available when the conflict arises.
- Something may have happened in the meantime to cause one of the parties to believe that the mediator is no longer impartial anymore.

Lawyer as Equaliser

Context:

You are in the middle of a conflict in a business relationship. You and the other business party have decided to use mediation to settle your differences. Or you are the mediator mediating between the two parties. The two business parties are not equal negotiating partners because of differences in bargaining powers.

Problem:

How can you compensate for differences in bargaining powers?

Forces:

Differences in bargaining powers are a risk to the mediation process. One party may give in and agree to a settlement that is not in his interest. Then the conflict is only apparently solved and is likely to break out again at the slightest pretext. Also the

business relationship is damaged because the weaker party feels that he has been cheated.

Solution:

Ask each party to include his lawyer in the mediation talks.

Consequences:

- + Before reaching an agreement the parties can confer with their lawyers, who can explain the legal consequences of a settlement without having to try to remain impartial. The lawyers can prevent one party from domineering the talks and dictating the agreement.
- + Lawyers are not as personally involved as the parties so that they can often remain objective and analyse a suggestion for a solution without their emotions clouding their judgement.
- Since the parties have to pay their lawyers as well as the mediator the mediation talks become more expensive
- Lawyers can often be a hindrance to a constructive negotiation because they want to reach the solution that they think is best for their party. Sometimes the lawyer cannot perceive which solution is really best for the party. The lawyer sometimes does not realise that compromise is better than a court case.

Other Patterns that Help find a Mediator:

Using the patterns: **Ask for Help**¹¹ and **Small World**¹² can also help find a mediator

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¹¹ in: Fearless Change – Introducing Patterns into Organizations, Linda Rising/Mary L. Manns, 2004.

¹² in: Patterns for Building a Beautiful Company, Rising/King/May/Sanchez, PloP Proceedings 2003.