Mediation as an economic instrument for small businesses

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ABSTRACT

This paper will analyze the mediation as a new financial assistance opportunity for small businesses. In the field of business, the question of existence of adequate forms of dispute resolution has significant economy effect because of the high litigation cost both direct and indirect, as well as the cost in time. Small businesses often have difficulties finding the funding. On the other hand, the latest research worldwide indicates that mediation costs are much lower than litigation costs. The Paper begins with the presentation of the characteristics of the relationship between mediation and small businesses. The first part analyzes the mediation process and the benefits offers for small businesses. The second part, is dedicated to the perception and use of mediation by small businesses in the European Union (hereinafter: EU), United States of America (hereinafter: USA) and People’s Republic of China (hereinafter: PRC). The conclusion includes assessments of these analyses and recommendations for the further treatment of the relationship between small business and mediation in the Republic of Macedonia. Results in this paper are generated by analyzing official legal documents and political acts and using literature and studies connected with the issue.

KEYWORDS: small business, mediation, alternative dispute resolution.

Introduction

Small business is a relative concept so it is difficult to come to a precise definition of the term. What qualifies as “small business” varies widely, both: from state to state and from sector to sector. However there is general agreement that the development of small businesses is one of the key elements in achieving rapid economic growth and increasing employment. The analysis of the role of mediation in small businesses in this paper should be understood in this context. Mediation is an informal process in which a neutral third party assists the opposing parties to reach a voluntary, negotiated resolution of a charge of discrimination. Mediation services worldwide see mediation as a lifesaver for small businesses.

In developed countries, small businesses occupy for more than 50% of total employment and GDP. Their development means strengthening competitiveness and entrepreneurship, which in turn directly affects the improvement of efficiency, productivity and the level of innovation in the economy of a country. On the other hand, despite macroeconomic stability, emerging economies around the world are implementing microeconomic policies aimed at removing barriers that hinder the growth of small businesses.

In the Republic of Macedonia (hereinafter: RM) the sector of small businesses is 99% of the total number of existing enterprises, which indicates the immense importance of this sector for the economy in the RM. Policy makers believe that the future growth of our economy should be based on

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growth and development of small businesses. Small businesses also employ 78% of formally employed persons in the RM, and they generate 60% of gross domestic product. The main characteristic of this sector is the constant need for improving the access to finance. In order to support this sector we believe that particular attention should be paid to providing information and activities in the field of dispute resolution, because this assistance, albeit initially non-financial, will ultimately emerge as a *sui generis* funding source. For small businesses, disputes can be a huge challenge, primarily because of the costs resolution. Therefore, the selection of resolution method does matter. Practice shows that between alternative methods for resolving business disputes, mediation is distinguished - because of the benefits it offers, especially savings in time and money.

1. **Mediation process and the benefits of its use for small businesses**

   1.1. **Mediation process**

   Mediation helps people resolve disputes, manage conflicts, retain relationships, and reach wanted goals. Mediation is a confidential process in which disputes are resolved without court appearances and lengthy litigation. The mediation process is a structured procedure, but it does not have the rigidity of the court proceedings. It is a voluntary, private and informal procedure, which features a structured exchange of information through a neutral third party as a mutually accepted mediator. This procedure allows the parties to integrate into its schedule freely and seamlessly, including above all, the creation of a mutually acceptable solution.

   Between theorists and practitioners there is no unified position on how many and what the stages of the process of mediation are. We consider that a typical mediation procedure, as a flexible and adaptive process, consists of the following four stages, through there is no rigid distinction between these stages: introduction, research, negotiation and conclusion. Each of these stages may vary in duration, and the order may also change. It is important to be noted that the parties are completely free to agree for the way on which the mediation procedure will be conducted.

   1.1.1. **Introduction**

   Usually the first stage of mediation begins with an open session when the mediator presents him or herself and introduces the parties. Then the mediator explains the mediation procedure, its purpose, the basic rules, its role, the role of other participants in the procedure, the extent of the obligation of confidentiality, compensation, legal aspects of the agreement on mediation, legal aspects related to the final settlement. The mediator also answers the questions of the participants might have about the opening statement (such as for example, fees of the procedure, the duration of the procedure, who must attend meetings, etc.). After the mediator’s opening statement, the procedure continues with party’s presentation of their views on the dispute they want to resolve. Basic principle for the parties during this presentation is not to interrupt and blame one another. Mediation meetings are completely confidential, no information should be transmitted to the other party, unless there is explicit consent of the party who gave the information. And finally, no information should be delivered outside of the mediation procedure.3

   1.1.2. **Research**

   At this stage the mediator and the parties identify the disputed issues and partys interests. Legal positions are left behind and the parties begin to explore the interests, concerns, expectations, priorities, assumptions, hopes and beliefs of each other. In this stage of the mediation procedure parties are more open to each other, which can be the start of mutual understanding.

   1.1.3. **Negotiation**

   At this stage of the mediation procedure the parties, separately present a possible solution, one with which the party would be satisfied. It should be borne in mind that these proposals are a possible agreement. During this stage, the parties are not allowed to criticize the proposed solutions. The aim of the negotiations is not always a settlement. The main purpose of negotiating for the parties is to determine which solutions of the dispute will meet their interests best.

   1.1.4. **Conclusion of the mediation process**

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The mediation procedure usually ends in one of the following three ways: the parties reach an agreement on comprehensive settlement of the dispute; the parties reach an agreement to resolve only certain issues of the dispute, but not the dispute as a whole and finally the mediation ends without any settlement. Regardless of whether or not an agreement is reached, mediation may result in various positive achievements, depending on the level of conflict that existed between the parties, achievements such as: stopping an altercation, agreement on the essential points of conflict, resolve the reason for the dispute, rebuilding relationships.4

Especially important fact is that mediation does not mean disabling or restricting the right to free access to court.

1.2. Advantages of mediation for small business

From all mentioned above, we can conclude that mediation is an informal procedure aimed at creating a climate of trust, facilitating and enabling communication between the parties, removing conflict points, identifying common needs, creating options and finally finding a solution that meets the needs of the dispute parties. Therefor the main benefits that mediation produce for small business include:

- low cost,
- speedy resolution,
- flexibility in the process and
- control over outcome.

Those financial and non-financial benefits have a significant economic impact on small businesses. We were unable to locate any research at EU level done specifically for small business involving a comparison of the costs and time of mediation versus those of litigation for the same case, but there are some empirical researches at the EU level in terms of saving time and money by solving disputes through mediation. These studies indicate the following: at the EU level litigation costs are not harmonized and are governed by national legislation. Thus, costs vary from one member state to another, but in the European Commission’s Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union, the five main sources of costs in the Member States are as follows: court fees, lawyer’s fees, bailiffs’ fees (the cost for the judgement enforcement), expert fees, and translation fees.5 According to the European Commission’s Study on the mediation6 the average cost of a mediation in the EU is €3.371 compared with €9.179 for litigating the same dispute. This study shows that the cost of a mediation can vary from €420 in Bulgaria up to €10,000 in Austria, while a litigation in court have variation from €2,252 in Poland to €24,974 in Sweden. As for the duration of the mediation procedure in respect of litigation, the average duration of a mediation in the EU is 43 days compared with 566 for litigating similar dispute, which has been calculated in the Doing Business 2014 Report of the World Bank. According to the above mentioned European Commission’s Study the duration of a mediation can vary from 30 days in Ireland up to 68 days in Cyprus, while a litigation in court have a much wider variation from 300 days in Lithuania to 1300 days in Greece.

In 1995 empirical research on the relationship of small businesses to mediation was conducted in USA.7 The results of this research show that mediation has been viewed as the most positive method compared to arbitration and court proceeding. According to the authors of this study one explanation

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for this may be that there is a popular conception that mediation is a panacea for dispute resolution. Also, this study shows that mediation has been viewed as a cost effective method by 93% of the survey respondents and more than 95% of those who have used mediation, cited it as cost effective technique.

Before 2000, the American Arbitration Association (hereinafter: AAA) reported that more than 85% of all disputes that went to mediation resulted in a settlement.\(^8\) In February of 2003, AAA undertook a major research study aimed at examining the attitudes and experiences associated with the use of non-judicial dispute resolution. The survey found that economic benefits are closely connected with dispute-wise business management practices.\(^9\) A 2003 AAA study concluded that a “stream of evidence has long suggested that there is a real business value to the rapid, comparative inexpensive, and easily accessed alternative to the judicial system that ADR represents.”\(^10\) For example, the Toro Company, a manufacturer of professional and homeowner outdoor maintenance machinery, reported that “it had not been involved in a jury trial nor had any discovery of its documents since 1994” because of its mediation approach to conflict management.\(^11\)

Legal guides for starting and running a small business in USA recommend mediation as cost effective method for dispute resolution and especially sample mediation clauses that can be included in business contracts.\(^12\)

From this analysis we can conclude that the process of mediation compared to court proceedings is shorter, cheaper and in the same time, is effective. Also, per analogem it can be concluded that the mediation would positively affect the budget of small businesses and would mean direct cost savings in time and money, also other savings and shift to other needs and further develop.

There are also numerous potential non-financial benefits of mediating business disputes. Some of the major advantages that mediation offers in this area are:
- all aspects of mediation are confidential and private and participants find them highly attractive - confidentiality and privacy are powerful encouragement for agreement;\(^13\)
- mediation’s flexibility and informality allow the parties to devise the procedures and solutions that are best suited to the resolution of their specific dispute;\(^14\)
- mediation allows flexible solutions and settlements and an outcome that parties agree to, which is generally far preferable to one that is imposed on the parties.\(^15\)

All of those non-financial benefits have the potential to rebuild and strengthen relationships which are critical for small business success and allow the parties to find a creative long term solution. Mediation allows commercial realities of small business to work for the party’s interest and to find practical solutions that result in outcomes to minimize the downtime and costs of the organization. In the end, it is clear that all benefits mediation offers boil down to the same line: economic profit for small businesses.

2. **Mediation practiced by small businesses**

Mediation is widely used in different kinds of business disputes, workplace issues, and disputes with clients as well as partnerships disputes.

2.1. **Mediation practiced by small businesses in the USA**

Companies in USA have recognized the value of mediation and they implement programs to take advantage of it. According to the Lampe and Ellis’s study dedicated only to small business, in 1995 only 20% of the respondents involved in disputes actually utilized mediation as a means of

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dispute resolution, while three times as many 61%, reported using court proceedings as a method of dispute resolution. In 2011, a Cornell University sponsored survey of 1,000 U.S. corporations found that an overwhelming 87% of survey respondents preferre mediation to other third party neutral facilitated alternative dispute resolution methods. The results show that 73% out of the 92% who responded incorporated some level of mediation practice in their business plan.16 As a result of the recognised benefits of the mediation and its widespread acceptance, by the late 1990s provisions for mediation were being integrated in commercial contract dispute resolution clauses as a preliminary step or precondition for arbitration or litigation.17

On the basis of the mentioned studies we can conclude that currently in the USA, mediation appears to be more widely used for business dispute resolution.

2.2. Mediation practiced by small businesses in the EU

EU has taken a number of different measures to encourage the development of small businesses in Europe as well as on the global market. According to Antonio Tajani, European commissioner for industry and entrepreneurship, small businesses are crucial for economic recovery and therefore we should urge them whenever we can.18 We believe that the new EU legislation concerning the alternative dispute resolution (ADR) in the European Union is managed in this sense. On 21 May 2013, new legislation on Alternative Dispute Resolution (Directive 2013/11/EU)19 and Online Dispute Resolution (Regulation (EU) No 524/2013, Regulation on consumer ODR)20 was adopted at EU level. This legislation is primarily intended for cross-border disputes. In 2010, one in five consumers in the EU encountered problems when buying goods or services in the Single Market, leading to financial losses estimated at 0.4% of the EU's GDP. Only a small fraction of consumers sought and secured effective redress. It is estimated that if EU consumers can rely on well-functioning and transparent ADR for their disputes they could save around €22.5 billion a year, corresponding to 0.19% of EU GDP. This data only includes direct financial savings, and does not account factors such as increased confidence, trust, customer relations and business reputation, which are also very important for successful business.21 The main goal is for consumers and traders to be able to solve their disputes online or offline, and at local or cross-border levels, through out-of-court dispute resolution entities (ADR entities).

While on the one hand the EU takes a series of measures to revive a small businesses and mediation, can not help but notice the fact that the website of the EU that is dedicated to small businesses does not contain any information on resolving disputes through mediation.22 According to the aforementioned objectives of the EU, we believe that this omission should be corrected as soon as possible.

2.3. Mediation practiced by small businesses in the PRC

Mediation in PRC has long history. Most cases are actually resolved outside the courts, only in extreme cases do people go to court. According to statistics, there are 205 arbitration committees in

mainland Chinese totally, of which more than 50% has established mediation commission especially for the settlement of commercial disputes.\textsuperscript{23} This is result of the goal of building a harmonious society.

In his Guide for small business in China, David Howell states that Chinese will do almost anything to save face and it means that the main advice is to use mediation where is possible.\textsuperscript{24} China’s economy develop rapidly over the last decades, many foreign enterprises have invested in the country and are now doing business with Chinese partners, so it is important to notice that the Chine’s mediation contains elements that may be unfamiliar to a western business. Actually, China focuses largely on an arbitration-mediation process in which arbitration is commenced and then the tribunal, sometimes by request of the parties and sometimes \textit{sua sponte} conducts a conciliation process.\textsuperscript{25}

Unlike the USA and the EU, where the usage of mediation is justified, above all, with its features as low cost and effective efficiency, the use of mediation in PRC due to cultural characteristics and well-known Chinese old sayings: “Harmony is most precious”, “Harmony brings wealth”, “Dropping suit” and “More friends, more opportunities; more enemies, more fields of fighting” and as such, it can not be dismissed as a constitute part of the strategy for development of small businesses. Also, significant feature of mediation in PRC is its continuous development i.e. despite the long tradition in which we can freely talk about “culture of mediation”, PRC consistently continuous to improve the mediation through legislative changes and cooperation and exchange of experience in this area, with other countries.

**CONCLUSION AND RECOMMENDATIONS**

In the present economic circumstances, much of the small businesses are facing difficulties because of the cash flow, the bureaucratic administration and the global economic downturn. Therefore, small businesses need help and the abolition of barriers of any kind. This aid will allow or contribute for creating favorable conditions for business ventures. Mediation as a method of dispute resolution should be perceived in this direction. Namely, mediation allows them to avoid formal and expensive procedures, and offers them considerable flexibility to resolve disputes in a way that favors their policy priorities and bureaucratic interests. On the other hand, mediation saves businesses significant money. This means direct savings, investments, and hiring. Mediation also, reduces conflict in the workplace. People enter into legally binding business relationships with little thought as to how they will harness their differences into a positive force. By using mediation they do it without bruising their egos. And in \textit{ultima linea}, all of this generates more tax income for the government. Actually, mediation directly saves money. Small business should use mediation with the aim of improving the overall business climate and this will have an impact on its sustainable development.

In the Republic of Macedonia, the main problems small businesses include difficult access to capital, the large number of administrative barriers, the excessive regulation and legal uncertainty.\textsuperscript{26} We believe that very important part of the policies and measures for the development of small bussinesses, is balanced application of methods for resolving disputes between and within companies and between companies and consumers. Although mediation in the RM for the first time was introduced by the Law on mediation in 2006 until December 2016, there is no statistic at all if any dispute relating to small businesses was resolved through mediation. In order to stay competitive, businesses need to keep up-to-date with the latest developments. Therefore, the world trends in this area should be followed. Mediation should be regarded as a business priority for faster development and as one of the key elements for resolving weaknesses in the judiciary and the functioning of other relevant state institutions. The functioning of mediation should be improved by improving overall conditions, especially by improving the legal and functional framework needed for mediation development. To reach this goal, it is necessary to create a close and constant link between small

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businesses and state authorities. In the era of knowledge economy, researches should be directed toward the goals of effective tailoring mediation and other dispute resolution techniques according to the needs of the parties and the type of dispute. Therefore it is also necessary to establish a sustainable cooperation between small businesses and universities. For this purpose, the funds from the EU program "Horizon 2020" can be used. Small businesses should be constantly encouraged to integrate mediation in their daily operations. Also, the lawyers should be encouraged to prepare themselves and their clients for mediation procedure, which can make a big difference to the success of mediation. Dispute parties should have an adequate knowledge and understanding for the mediation process and should be aware that they should be open to review their positions on the basis of discussions in the mediation procedure.

Previous analysis shows that the perception of mediation depends on the overall economic, political and social conditions in the particular state. For the peoples of the Balkans the notion prevails that they are prone to "litigation" - a culture vastly different from that of PRC and because of this the "culture of agreement" which is not characteristic of us, can not be an incentive for the development of mediation. But, there are some other inspiring measures too. A variety of companies saw drastic reduction in costs associated with dispute resolution, as well as gains from mediation in the form of retaining a customer base, saving valuable company resources, and creating more efficient working environments among employees. Today’s corporations ought to follow in the footsteps of the pioneers who have reaped the benefits of in-house ADR policies and procedures.

As a general conclusion, we can say that mediation has significant financial impact on small business and the greatest obstacle to increased use of mediation in small business is a lack of awareness of how mediation can be beneficial.

References

5. Directive 2009/22/EC (Regulation on consumer ODR);