What makes court-referred mediation effective?

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Abstract

Purpose – The purpose of this paper is to obtain insight into court-referred mediation in the Israeli Labor Courts, by analyzing its processes and outcomes, as a function of tactics used by both the disputants and the mediator.

Design/methodology/approach – Observation of 103 court-referred mediations, for each of which a detailed process and outcome were documented. Data on disputants' refusal to participate in the mediation was also collected. At the end of each mediation case, disputants were given a questionnaire in which they expressed their satisfaction with the outcome and their evaluation of the mediator's contribution.

Findings – A low rate of refusal to participate in court-referred mediation was found. Also, the higher the ratio of soft tactics to pressure tactics employed (by all parties involved) during the process, the higher the rate of agreements. Mediators use significantly more soft tactics than disputants, and are more active in using tactics. The two significant variables that predict the mediation's agreement are the ratio between soft tactics to pressure tactics used by all parties, and mediator contribution to the process.

Practical implications – The significant role of soft tactics in the process, outcome, and satisfaction of court-referred mediation may serve as a guideline for disputants and mediators.

Originality/value – This unique research, which examines the impact of tactics on court-referred mediation, may provide added and significant theoretical insight into its process and outcome, as well as a better understanding of other "hybrid" (compulsory at the beginning, voluntary at the end) mediations.

Keywords ADR, Court-referred mediation, Disputants, Litigation, Pressure tactics, Soft tactics

Paper type Research paper

1. Introduction

Imagine a case of massive arbitrary layoffs. The employees, who are hurt mentally but also suffer financially and, at times, physically (physical illness is common among the unemployed), demand increased compensation from their employer. They negotiate their demands but, unfortunately, the negotiations end in an impasse. The employees sue the employer in the Labor Court, in the hope that the Labor Court will rule in their favor. However, instead of litigation, they receive an invitation to participate in a mediation process, under the auspices of the Labor Court. Usually, mediation means a compromise, in which the employees, in this case as plaintiffs, are not interested. In their view, mediation is worthless since they have already exhausted all options to achieve a settlement during their negotiations. The court insists on mediation previous to litigation in order to resolve their dispute without litigation.

Such court-referred mediation raises various questions: how do the disputing parties perceive such mediation? Do they accept it willingly? How do they interact with

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the mediator? Is such court-referred mediation more effective than litigation in resolving disputes? And, if so, which variables would make referred mediation an effective procedure in resolving labor disputes, in particular, and perhaps in resolving disputes, in general? The aim of the current research is to investigate all these questions by closely observing Labor Court referred mediation in process.

Conflicts, in various forms, are common in labor relations and consume heavy resources such as the time, energy, emotions and money of both disputants and Labor Courts. Therefore, in recent decades, court-referred mediation has been looked upon as a favorable method of Alternative Dispute Resolution (ADR) in the Israeli Labor Courts. By and large, in Israel, as in many other countries, mediation is supposed to be a voluntary form of dispute intervention, in which the parties retain their control of both the process and the outcome – i.e. have the freedom to choose the mediators and either accept or reject their proposals. However, in the case of court-referred mediation, the courts' disputants are strongly "encouraged" to consent to internal court mediation. In addition, they are also strongly encouraged to reach a settlement within the mediation process. In this sense, Labor Courts' referred mediation is a kind of hybrid mediation – mandatory at the beginning, but voluntary at the end.

The substantial theories and prior research that have been published have served to construct a mediation image in which the mediator helps the parties to reach an agreement by facilitating discussion around their interest. Very little attention has been given to the tactics by which such agreements have been achieved (Kressel, 2007). Moreover, most studies have mainly focused on mediation results and disputants' satisfaction (Wissler, 2004). Less research has addressed the process by which such results have actually been reached (Sinclair and Stuart, 2007). The relatively few research studies that have examined the interaction between mediators and disputants were rarely able to detect the direct effects of such interaction on mediation results: agreement/no agreement. For example, Wall and Chan-Serafin (2009), could not find the direct effects of mediator behavior on mediation results. Posthuma *et al.* (2002) found that the likelihood of achieving a settlement through mediation is mainly related to the source of the dispute, rather than the mediation process or the mediator's tactics. Wissler (2004) argued that a majority of studies found that neither the case type nor the disputants' relationship is related to the mediation outcome. The impact of the interaction between the mediators and the disputants on the final result is still, to a great extent, a "black box" (Garcia, 1995).

The current study is a process-focused research. It attempts to penetrate the court-referred mediation "black box" by studying its processes and outcomes, as a function of tactics used by both the disputants and the mediator. Furthermore, most previous research focused on voluntary mediation, while empirical research on court-referred mediation has mainly focused on civil cases in the US (Wissler, 2004). This research examines the impact of court-referred and linked mediation in the Israeli Labor-Courts, which may be compared to the process and outcomes of court-referred mediation in other courts and other countries.

2. Mediation characteristics of Israeli Labor Courts

2.1 Israeli Labor Courts

Israeli Labor Courts were established by the Labor Court Law in 1969. According to this law, Labor Courts' jurisdiction encompasses all matters relating to work – both

individual and public. The Labor Courts consist of two instances: Regional Courts, which serve as trial courts and the National Labor Court, which serves as an appellate court. Both regional courts and the National Labor Court are composed of professional judges and lay judges (public representatives). The lay judges are practically appointed by the Labor Court, and formally appointed by two Ministers: the Minister of Justice and the Minister of Industry, Commerce and Employment.

2.2 Court-referred mediation within the Labor Court setting

Mediation was formally established in the Israeli court system according to an amendment of the Courts Law. The amendment (1992) granted all courts, including Labor Courts, the authority to refer disputes to mediation. Labor Court-referred mediation was mainly established due to the inadequate number of judges and increasing litigiousness, and was intended to reduce the Labor Courts' load along with extended delays in case handling and allow for the saving of public resources.

Labor Court-referred mediation within the court setting ("internal mediation") is conducted by lay judges (public representatives). According to the law, if the disputants fail to reach an agreement during the mediation sessions, which usually takes place within the setting of the Labor Court, the mediation is followed by a litigation process. In order to prevent the disputants' reluctance to reveal information during the mediation phase, the lay judges who mediated the dispute do not serve as lay judges in the consequent litigation process.

The lay judges who serve as internal mediators for the Labor Courts receive remuneration from the Labor Courts for their mediations. However, Labor Courts' internal mediation is free of charge for the disputants. Internal mediation deals with both individual disputes and national interest conflicts. A special court division is supposed to screen appropriate cases and refer them for internal mediation

Labor Court disputants are required to attend mediation sessions and are pressured to do so, although they are not forced to agree to a mediated agreement. There are "penalties" for non-participation, which might have an impact on both mediation and litigation. If one or both parties object, they have to justify their reluctance and sign a formal document. At this stage, there is quite strong judicial "encouragement" of the disputants to engage in the mediation process. The litigants are summoned to mediation in the court before the scheduled trial date. However, it is not unusual for Labor Court judges to also pressure litigates to refer to mediation during the trial hearings, by suggesting that they might "do better" if they availed themselves again to the court-appointed mediator. In this sense, participation in the mediation process is, to a large extent, practically mandatory. Figure 1 depicts the referred mediation model within the Labor Court setting.

3. Theory and hypotheses

3.1 The theory of "psychological distancing" and its application to court-referred mediation

Disputants may receive court-referred mediation with negative feelings. In many cases, the outcome of their previous negotiations may have resulted in an impasse, which amplified their conflict and created "bad blood" between the parties. Their last recourse seems to be a court ruling. Yet, disputants who seek a court ruling are strongly referred to mediation by the labor court. This prolongs their previous negotiations (albeit with

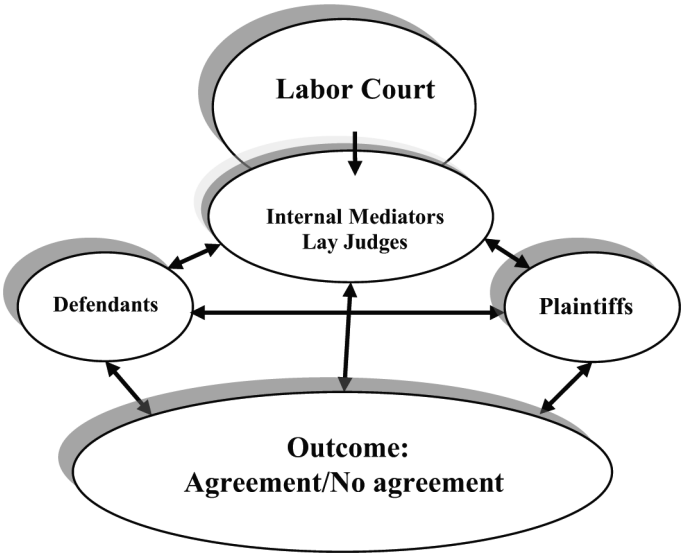


Figure 1.
The referred mediation model within the Labor Court setting

the intervention of a third-party) before proceeding to trial. For the plaintiffs, the enforced mediation may be perceived as blocking their access to litigation. For the defendants, the enforced mediation may be perceived as a process that forces them to compromise. Thus, it is reasonable to assume that disputants would be unwilling to take part in any type of court-referred mediation with an appointed, rather than a voluntary and chosen, mediator.

However, according to the distancing theory (Liberman *et al.*, 2007; Liberman and Trope, 1998; Tal *et al.*, 2009) when a goal-directed activity consists of several steps, accessibility to the intermediate step in the sequence may cause people to apply this step without referring to the step that would normally precede it (Xu and Wyer, 2007). Furthermore, feasibility has a greater influence on choices related to the near future, whereas desirability has a greater influence over choices related to a distant future.

Accordingly, when disputants are confronted with a choice between two alternatives – mediation or proceeding litigation – they have to decide which alternative to choose. On the basis of the distancing theory, it can be assumed that the immediate accessibility and feasibility of free-of-charge, pre-litigation mediation would make mediation more attractive to the disputants than a future court ruling. The decision to willingly participate in court-referred mediation within the Labor Courts would be despite disputants' possible objection to enforced mediation. Thus, we hypothesize that mediation accessibility and feasibility would be increasingly weighted and favored by the disputants over a future court ruling:

H1. Most disputants would willingly choose to participate in mandatory mediation.

3.2 The theory of procedural justice and its application to court-referred mediation

The theory of procedural justice (Lind and Tyler, 1988) emphasizes the importance of a fair and just procedure to achieve an outcome. It could be assumed that procedural justice is important to disputants because fair procedures, compared to unfair

procedures, are more likely to result in fair and satisfactory outcomes. Research findings reveal, for example, that a manager's trustworthiness may be damaged if disputants perceive unfairness in the decision-making procedure, even when the outcome is acceptable or reasonable (Potter, 2006). Alberts *et al.* (2005) argue that for the disputants, a sense of procedural justice is an important component of the mediation process. They found that the mediator's use of a facilitative style was associated with the perception of fairness and satisfaction. Carnevale and Pegnetter (1985) maintain that the disputants' motivation to reach an agreement via the mediation processes is an important factor affecting mediation effectiveness. However, the disputing parties may lose their motivation if they perceive mediation as unfair. Wissler (1997) argues that coercion into the mediation process may be interpreted as coercion into the mediation outcome.

Court-referred mediation, at least legally, cannot force the involved parties to reach an agreement, despite the court's desire to reduce the load on the system and on the professional judges (Zack, 2005). As a result, in cases of court-referred mediation, the process is of high importance. The disputants, who perceive the use of mediation as unjust, may have less motivation to promote "open" communication. They may also tend to suspect and doubt the mediators' motives (Smith, 1998). Moreover, pressure from the judiciary to participate in the mediation process may induce the fear of being judged unfairly, having refused to mediate (Zack, 2005). However, disputants are often more interested in the process than in its outcome. For example, disputants may use the mediation process as a stage of inquiry, in which to expose the other side's "cards", as it were, in order to use the information in subsequent litigation. Smith (1998) argued that if mediation is forced upon unwilling disputants, the most likely consequence will be to damage the usefulness and effectiveness of the mediation process.

It is noteworthy that there is a difference between outcome-based and process-based reactions to mediation and mediators. The mediation process was found to have a more important impact on mediation effectiveness than the nature of the dispute or the disposition of the disputants (Wissler, 1995). During their compulsory participation in the mediation process, the parties may be conscious of coercion and suspect the mediators' motives. They may believe that the appointed mediators are making efforts to reach an agreement in order to protect their own interests, as well as those of the courts. Disputants can receive a favorable mediation outcome, but still be dissatisfied with what they believe is an unfair process. An unsatisfactory process may, in turn, lead to an impasse. Indeed, when comparing the outcome of mandatory and voluntary mediation in empirical studies, one can observe a clear difference. Agreement rates are lower when mediation is mandatory, as compared to when it is voluntary (Wissler, 1997).

Procedural justice may mediate between the conception of mandatory mediation and the conception of a fair procedure, by changing the interpretation of the underlying motive of a mandatory process to a fair one. In this case, even in mandatory mediation, disputants may be satisfied with the procedure. Procedural justice may increase the positive perception of the mediation process, raise general satisfaction with the process, and even with its outcome. What would cause disputants to perceive the mediation process as a fair procedure? At least partially, the use of "soft" tactics (such as consulting, trying to bridge a gap, tension relief tactics) by either party or the mediator, during the mediation process, may lead to this improved perception. Using pressure tactics (such as threats, breaking off contact, misleading), on the other hand, may cause disputants to suspect that the court-referred mediation is an unfair process

(Vidmar, 1985). Using pressure tactics may yield negative feelings of resentment towards the mediation process, which may end with a no-agreement outcome, whereas the use of soft tactics may produce disputants' positive attitudes and a general acceptance of the process, resulting in an agreement outcome. Thus, if procedural justice prevails, all participants involved in court-referred mediation use a relatively high rate of soft tactics. Therefore, we hypothesized:

H2a. The use of soft tactics by all participants involved in court-referred mediation is higher than the use of pressure tactics. High use of soft tactics, relative to pressure tactics, may also yield a higher rate of agreements. Therefore, we hypothesized:

H2b. The higher the employed ratio of soft tactics to pressure tactics (by all parties involved) during the mediation process, the higher the rate of agreements.

The mediator has an important role in enhancing the sense of procedural justice during mandatory mediation processes. According to the "western perspective", mediation usually refers to voluntary mediation. Accordingly, mediators are neutral parties with limited power who are seldom involved in enforced agreement (Wall and Lynn, 1993). This may not be always the case, particularly when the mediators have an interest and the power to influence the outcome. Watkins and Winter (1997) argue that in referred court mediation, mediators are well empowered, and often have a strong personal and court-related interest to achieve an agreement at all costs. As a result, court-referred mediation may not be a particularly durable technique for dispute resolution (Feuille and Kolb, 1994). In a completely voluntary case of mediation, disputants rely on the fair conduct of the chosen mediator and are willing to follow the mediator's "road map" to achieve a solution. In contrast, in the case of court-referred mediation, the disputants may suspect the mediator's interests and biases. Disputants who suspect mediators' underlying motives, in regard to court-referred mediation, may still be convinced over the course of the mediation process of the mediators' good intentions by observing their behavior. The higher the rate of soft tactics used by the mediators, the more convinced the disputants are that the mediators are being just and fair.

Therefore, in court-referred mediation, mediators must work intensively to demonstrate a fair and just procedure, in order to achieve the disputants' trust and reach a reasonable settlement. Such efforts may convince the disputants that the process is fair and, as a result, may build positive attitudes towards the mediator. The mediator must employ a high rate of soft tactics, as compared to the other participants – the plaintiffs and the defendants. Therefore, we hypothesized:

H2c. The rate of soft tactics used by the mediator in court-referred mediation is significantly higher than the use of soft tactics by the other participants.

In addition, the disputants' sense of the mediator's assistance in solving their problems during the process will serve to strengthen the perception of procedural justice, thus increasing the disputants' willingness to reach an agreement. Therefore, we hypothesized:

H2d. A high evaluation of the mediator, on the part of the disputants, contributes towards solving the conflict and yields a higher level of agreements and a higher level of disputants' satisfaction.

3.3 The prospect theory

The motives of the parties involved in the mediation process are rarely symmetrical (Feuille and Kolb, 1994). Court-referred mediation is asymmetrical as one disputant – the plaintiff – wants to change the status quo, while the other – the defendant – wants to maintain it; thus, the plaintiff often practically drags the defendant into court-referred mediation. Such asymmetry may affect the mediation process and the mediation perception (Ufkes *et al.*, 2012). The loss of the plaintiff's motivation to re-establish the relationship with the other party may also diminish the probability of reaching an agreement (Poitras, 2009).

Prospect theory may help to explain such asymmetry. Prospect theory (Kahneman and Tversky, 1979) implies that people's perceptions of their outcomes as either gain or loss may determine their attitudes and behavior. Identical gains and losses have different meanings for different people, since losses are typically perceived as being larger than gains. This characteristic leads to interesting behavior. When gains are expected, people avoid risk (referred to as "loss aversion" behavior). In contrast, when losses are expected, people seek risk (referred to as "risk seeking" behavior) (Kahneman and Tversky, 1979; Kahneman and Knetsch, 1992; Tversky and Kahneman, 1986).

Applying prospect theory, loss aversion disputants, in order to avoid risk, would be willing to make concessions or reduce their demands. Risk-seeking disputants would prefer to raise their stakes by setting high demands (Neale and Bazerman, 1998). In court-referred mediation, the mediator's task is usually to induce a concession from each side, thereby persuading the plaintiffs to accept a less significant result than what was expected, and the defendants to agree to a higher settlement offer than was desired; in other words, both sides have to make concessions. Since the plaintiffs are the ones who apply to the court and seek its ruling, it may be assumed that they believe the court ruling will be in their favor. As a result of pre-court mediation, together with the mediator's pressure to make concessions, plaintiffs may sustain the view that the mediation process is a "loss", as they could have received a better outcome in court. Accordingly, plaintiffs may display "risk-seeking" behavior, i.e. using pressure tactics during the mediation process, and being generally unwilling to make concessions, less satisfied with the mediator contribution, and less satisfied with the mediation outcome. Wall and Chan-Serfin (2009), who investigated civil mediation cases in the US, found that in most top cases the plaintiffs began the mediation process with extreme demands and, as a result, the mediator employed many pressure tactics. Since the plaintiffs expect to lose a lot, and therefore become "risk-takers", they may display high goals and expectations. In contrast, the defendants who are dragged to court and do not know what to expect from the court ruling, may see the mediation process as a gain and display "loss aversion" behavior during the mediation process, i.e. use relatively more soft tactics, be ready to make concessions, display satisfaction with the mediator's contribution and the mediation outcome.

Therefore, we hypothesize:

H3a. Plaintiffs in court-referred mediation use a relatively high level of pressure tactics, compared to the defendants.

H3b. Plaintiffs in court-referred mediation make fewer concessions than defendants.

H3c. Plaintiffs in court-referred mediation are less satisfied with the mediation than the defendants.

H3d. Plaintiffs will be less satisfied with the agreement than the defendants.

4. The study

4.1 The sample

A close observation of a sample of 103 mediated disputes within the Tel Aviv Labor Court (the largest regional Labor Court in Israel) was conducted over a one-year period, with the approval of both mediators and disputants. All mediators were lay judges appointed by the Labor Court as mediators. The disputants were employees and employers – usually the employees were the plaintiffs and the employers were the defendants.

4.2 Procedure and data collection

Many mediation studies are based solely on the participants' post-mediation survey. McDermott and Obar (2004), for example, required disputants and mediators to complete a survey at the end of each mediation session. In their study, Alberts *et al.* (2005) videotaped each mediation process. However, the videotapes were only used for one variable – the outcome. All other variables that relate to the process were measured by a post-mediation questionnaire. Respondents' replies to a post-mediation questionnaire can be biased. When answering a questionnaire, respondents may describe not what actually happened, but what they believe should have happened. Consequently, in this study, we decided to observe and record each mediation process and, upon its conclusion, to distribute a questionnaire in which the disputants evaluate, rather than describe, the process. The procedure was, therefore, divided into two sections: the observation section and the disputants' evaluation survey section.

4.2.1 The observation section. In each mediation case, the full details of the process and its outcome were documented by trained field researchers. The field researchers were instructed to give special attention to the mediation tactics, i.e. to write the sentences that describe the tactics used by both the mediator and the disputants. We assumed that the use of tactics during the mediation process is the main feature of the process, and has a pivotal effect on mediation outcomes, i.e. agreement/no agreement and the parties' satisfaction level.

In Charkoudian *et al.*'s (2009) study, the coding was done during the observation by two researchers-observers who were assigned to each mediation. One researcher coded all the participants' activities, while the other coded all the mediator's activities. In this study, another coding method was chosen. We assumed that coding during the observation might put too much pressure on the observers, who have to decide, on the spot, what kind of tactics they are observing. Therefore, researchers were instructed to document all sentences that denote the use of tactics, as they are presented during the mediation process by both disputants and mediators. Thus, the documentation included sentences that revealed the use of various tactics by either the mediator or the participants. At the end of the observations, these sentences were taken from the observers' documents and given to three objective trained raters, who were unaware of the research hypotheses. The raters were asked to code and classify the tactic sentences into generic categories. When the three raters did not agree on a specific sentence's classification, the sentence was deleted. As result, we obtained three generic

categories: pressure tactics, soft tactics, and tensions-relief tactics. These categories are somewhat similar to the three groups of tactics mentioned in Wall and Lyne (1993):

(1) Substantive pressing tactics – somewhat similar to our pressure tactics.

(2) Substantive suggesting – somewhat similar to our soft tactics.

(3) Substantive face-saving – somewhat similar to our tensions-relief tactics.

(1) The pressure tactics category communicates rigidity, threats and a tendency to "close the door". Examples of sentences classified as pressure tactics are:
   - I don't intend to continue. We'll finish this in court.
   - I'm not giving up. I don't mind paying the court fees.
   - We haven't involved the police up till now – now, we'll have to.

(2) The soft tactics category communicates a willingness to consent, compromise and strive towards agreement. Examples of sentences classified as pressure tactics are:
   - We are ready to compromise, despite the importance of the principle.
   - The gap is small. We are half-way there.
   - Tell them we are almost ready to close a deal.

(3) The tension-relief tactics category communicates a diversion of the topic in order to "cool down the atmosphere". Examples of sentences classified as tension-relief are:
   - Can I "buy" your smile?
   - What you say makes sense. Women are smart.

Out of the 103 court-referred mediations, the use of pressure tactics by all parties was 37 percent, the percentage of soft tactics was 57 percent, while the use of tension-relief tactics was minimal – 6 percent. Therefore, we decided to analyze only the impacts of pressure and soft tactics.

Data on the refusal of one or both parties to participate in the Labor Court referred-mediation was also collected.

4.2.2 The disputants' evaluation survey. At the end of each mediated dispute, disputants were given a questionnaire in which they expressed their satisfaction with the outcome, their evaluation of the mediator's contribution to the process, and their perception of the amount of concessions they and the other parties made during the mediation.

- Satisfaction was measured on a four-point scale: 1 = very satisfied to 4 = not satisfied at all.
- The evaluation of the mediator's contribution was measured on a four-point scale: 1 = with the help of the mediator, we could solve the dispute to 4 = the mediator did not help solve the dispute at all.

The evaluation of concessions made by the disputants was measured on a four-point scale from 1 = I made more concessions than the other party" to 4 = "neither of us made concessions".

4.3 The variables

The independent variables were as follows:

- Disputants and the mediator's tactics during mediation.
- Percentage of pressure and soft tactics used during the mediation process.
- Evaluation of the mediator's contribution to solving the conflict.
- Demographic data of both disputants and mediators.

The dependent variables were as follows:

- Disputants' satisfaction with the mediation process.
- Mediation outcome: agreement/no agreement.

5. Results

5.1 Findings relating to the theory of psychological distancing

Based on psychological distancing theory, we hypothesized that mediation accessibility and feasibility would be increasingly weighted and favored by the disputants over a future court ruling. Thus, in accordance with *H1*, most disputing parties would prefer to participate in court-referred mediation, than to wait for a distant future court ruling. Our hypothesis was supported. According to statistics provided by the Labor Court administration, over a period of 8 months 734 litigations were referred for mediation within the Tel Aviv Regional Labor Court. In 86 percent (632) of the litigation cases, the parties chose to participate in the court-referred mediation process. Only in 14 percent (102) of the litigation cases did one or both parties refuse to participate in the referred mediation within the Labor Court.

However, in the National Labor Court the rate of refusals to participate in the court-referred mediation was higher. During the same period of time, out of 64 appeals to the National Labor Court, which were referred for mediation, in 23 percent (15 appeals) of the cases one or both parties refused to participate in the mediation process. One possible explanation for this is that the parties who appeal to the National Labor Court have usually already gone through mediation processes in the regional court, which apparently fail to end with an agreement. On the basis of their experience with previous court-referred mediation, they now seek a court ruling. The relatively high rate of participation (and the low rate of refusal to participate) in the court-referred mediation support our *H1*.

5.2 Findings relating to procedural justice theory

5.2.1 The use of soft tactics and pressure tactics. The mean use of soft tactics, by all parties involved in court-referred mediation, is higher compared to the use of pressure tactics during the process. Table I depicts the means, range, and standard deviation of hard and soft tactics used during the mediation process (see Table I). The difference is significant. This may lead disputants to experience a sense of procedural justice and supports our *H2a*.

To investigate the impact of tactics on court-referred mediation we conducted a two-way (between and within) mixed Analysis of Variance, with the means of pressure tactics and soft tactics in the mediation process as the independent variables, and the mediation's outcome as the dependent variable. The results indicate a higher probability to reach an agreement according to the tactics used. A relatively high use of soft tactics, combined with a relatively low use of pressure tactics yielded a significantly higher probability to reach an agreement $F(1.88) = 21.88$, $p < 0.001$. To further explore these findings, we used Spearman's correlation between the ratio of soft to pressure tactics and court-referred mediation outcome (agreement/no agreement). The correlation coefficient of 0.25 was significant at the 0.05 level (two-tailed). Accordingly, our *H2b* hypothesis was also supported. The higher the ratio of soft tactics to pressure tactics employed (by all parties involved) during the mediation process, the higher the rate of agreements.

Table II, as well as Figure 2, present the percentage of soft and hard tactics displayed during the mediation process by the different participants. The difference in the use of tactics between the plaintiffs and the defendants is not highly noteworthy. However, the difference between the disputants and the mediators' use of soft tactics is highly significant. See Table II, which presents the percentages of soft tactics and pressure tactics employed by disputants and the mediators during the mediation process.

Figure 2 depicts the interaction between participants in the mediation process and the type of tactics employed in the mediation process (ANOVA).

To examine the origin of the interaction (see Figure 2), we employed the Bonferroni method. Results were significant at $p < 0.01$. Thus, the mediator used a significantly higher percentage of soft tactics ($M = 27.5$ percent) than pressure tactics ($M = 10.8$ percent), whereas significant differences between the percentage of soft tactics and pressure tactics were not found for both plaintiff and defendants.

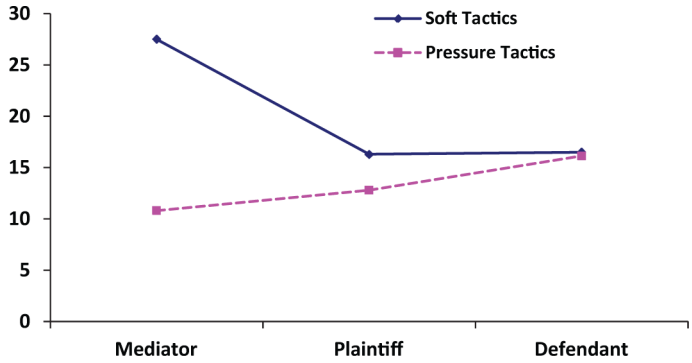
Furthermore, it was found that the mediator uses a significantly higher percentage of soft tactics than both the plaintiff and the defendant; in addition, the mediator is also more active in the mediation than either the plaintiff or the defendant. The mediator

Tactics	Mean	SD	Range	*n* (number of mediations)	*t*
Pressure tactics	6.4	5.8	1-32	103	$t = -5.09$
Soft tactics	10.1	10.4	1-55	103	df = 102
					$p < 0.0001$

Table I.
Use of pressure tactics and soft tactics by all participants: *t* test

Tactics	Mean	Std deviation	*n* (number of mediations included)
Plaintiffs' % of pressure tactics	12.8	13.2	103
Plaintiffs' % of soft tactics	16.3	17.7	103
Defendants' % of pressure tactics	16.1	13.4	103
Defendants' % of soft tactics	16.5	15.6	103
Mediators' % of pressure tactics	10.8	12.9	103
Mediators' % of soft tactics	27.5	23.2	103
Total	100%	–	103

Table II.
Percentages of soft tactics and pressure tactics employed by disputants and mediators during the mediation process



F Participants (2.204) = 2.66 $p < 0.1$
F Type of tactic (1.204) = 22.79 $p < 0.001$
F Participants type of tactic (2.204) = 12.3 $p < 0.001$

Figure 2.
Interaction between participants in the mediation process and the type of tactics employed in the mediation process – ANOVA

also makes intensive use of tactics, compared to the disputants, as more than a third (38.3 percent) of all mediation tactics are employed by the mediator.

Hence, our *H2c* is supported. The rate of soft tactics used by the mediator in court-referred mediation is indeed significantly higher than the use of soft tactics by the other participants.

5.2.2 Mediator contribution to the mediation outcome. A Spearman's correlation was employed in order to investigate mediator contribution to the mediation outcome (agreement/no agreement), according to the disputants' evaluation. The correlation coefficient for the plaintiffs' evaluation of the mediator's contribution to the outcome is 0.58 (significant at a 0.001 level), whereas the correlation coefficient for the defendants' evaluation is 0.54 (significant at a 0.001 level). According to the findings, it is evident that the disputants (both plaintiffs and defendants) give a high evaluation to the mediator's contribution as regards reaching an agreement.

Having found that soft tactics employed by the mediator, as well as the evolution of the mediator's contribution to the outcome, we further explored our findings concerning predictors related to mediation outcome. For this purpose, we employed a logistic regression. The logistic regression yielded two significant variables that predict the mediation's agreement: the ratio between soft tactics to pressure tactics and mediator contribution. Table III depicts the logistic regression coefficients of the predicting variables of agreement.

The results of the logistic regression show that the extent of mediator contribution to the mediation outcome is outstanding (Exp(B) = 67.72 $p < 0.01$). In other words, the

	B	S.E	Wald (df = 1)	Exp(B)	95% confidence interval
Mediator contribution	4.21	1.26	11.19	67.72**	5.7-800.5
Ratio of soft tactics to pressure tactics	1.80	0.86	4.34	6.04*	1.1-32.8
Constant	−12.49	3.83	10.62	1	

Notes: *$p < 0.05$; **$p < 0.01$

Table III.
Variables predicting agreement through court-referred mediation: logistic regression coefficients

prospect of agreement is multiplied by 67.72, due to an increase of one unit of mediator contribution. Moreover, the ratio of soft tactics to pressure tactics (Exp(B) = 6.04 $p < 0.05$) is significantly important for the prospect of reaching an agreement: the prospect of reaching an agreement is multiplied by 6.04, due to each increment of one point in the ratio of soft tactics to pressure tactics. The findings of the logistic regression support our *H2d*.

Thus, if a sense of procedural justice is expressed by the use of soft tactics during the mediation process by all involved parties, and especially by the mediator, then procedural justice during the court-referred mediation process is extremely important.

5.3 Findings relating to prospect theory

In accordance with prospect theory, we hypothesized (*H3a*) that the plaintiff, who might lose more as a result of court-referred mediation, would tend to use more pressure tactics, as compared to the defendant. Table IV depicts the use of pressure tactics by plaintiffs and defendants.

The findings contradict our hypothesis. If anything, the defendants use more hard tactics than the plaintiffs. This may be in line with Wall and Chan-Sefrin's (2009) reasoning, according to which plaintiffs do not possess their demands; therefore, they do not expect to suffer any loss. The defendants are the ones who may suffer a tangible loss and therefore may be more demanding, using more pressure tactics. However, this reasoning is also not strongly supported by our findings – the difference between the plaintiffs and the defendants is of low significance (see Table IV).

We also assumed that plaintiffs in court-referred mediation make fewer concessions than defendants (*H3b*). However, we found that both parties claim that they made more concessions than the other party; hence, there is no significant difference between the parties in regard to this issue. Moreover, no significant correlation was found between the disputants' readiness to make concessions and their satisfaction with the mediation process. Furthermore, no significant correlation was found between the disputants' readiness to make concessions and the mediation outcome (agreement/no agreement). Thus, our *H3b* hypothesis was not supported.

At times, mediators cannot overcome either party's desire for a win over the other through court litigation. Thus, the court's "strong encouragement" to participate in mediation prior to litigation may create some antagonism towards the mediation outcome.

Therefore, we hypothesized (*H3c*) that plaintiffs, who might feel a greater loss than defendants, would be less satisfied with the mediation process than defendants. However, we discovered that in 64 mediations plaintiffs were slightly, but significantly, more satisfied with the mediation process. Plaintiffs' mean of satisfaction with the mediation process was 2.3, whereas defendants' satisfaction level was 2.7 ($t = -2.29$ $df = 63$ $p < 0.05$). Therefore, the significant difference between plaintiffs and defendants' satisfaction with the process contradicts our hypothesis.

Disputants	Mean	Std deviation	n – Mediations
Plaintiffs' % of pressure tactics	12.17	13.22	103
Defendants' % of pressure tactics	15.35	13.45	103

Notes: $t = 1{,}81$; $df = 102$; $sig < 0.07$

Table IV.
The use of pressure tactics by disputants during the mediation process (in percentages) – t test

We also assumed (*H3d*) that plaintiffs would be less satisfied with the outcome than defendants. This was supported by a significant *t*-test where $t = 2.30$ and $p < 0.025$. As can be seen in Table V, which presents plaintiffs' and defendants' satisfaction of the mediation specific outcome-agreement/no agreement, plaintiffs are indeed less satisfied with the mediation agreement than defendants. Therefore, the significant difference between plaintiffs and defendants' satisfaction with the mediation outcome supports our hypothesis.

6. Discussion

The current study aimed to achieve insight into the behavior and preferences of the parties involved in the court-referred mediation process which, in a sense, is a hybrid type of mediation – mandatory at the beginning and voluntary at the end. We also aimed to achieve a better understanding regarding the impact of the parties' behavior on the outcome of court-referred mediation. We found three generic categories of tactics used by the involved parties during the mediation process: pressure tactics, soft tactics and tension-relief tactics. At first, we were surprised to discover how seldom the parties actually employ tension-relief tactics – only 6 percent of all tactics used during the mediation process. However, the intensive use of soft tactics found in the study may be of some merit in providing an explanation. It seems that when all parties involved in the mediation process use a lot of soft tactics, they do not need to relieve as much tension.

There has been a certain amount of controversy as to the establishment of court-referred mediation. It has been argued that judiciary "encouragement" to participate in the process, which is opposed to the prevailing conception of voluntary mediation, may lead the parties to mediate unwillingly. The asymmetrical nature of court-referred mediation may also lead the parties to object to the mediation process (Ufkes *et al.*, 2012). In addition, it has been argued that under court-referred mediation, disputants (especially the plaintiffs) often refuse to compromise, resulting in a low agreements rate and only low-level satisfaction from the mediation outcome. None of these arguments were supported in this study. We found that more than half of the mediations in our sample ended in agreement. Psychological distancing theory explains why, in many disputes, disputants may choose to willingly participate in court-referred mediation, despite its mandatory element. Prospect theory fails to explain the parties' tactics during the court-referred mediation process. However, it does explain the plaintiffs' lower level of satisfaction with the mediation outcome. The Procedural Justice theory explains the changing perception of court-referred mediation – from a process fraught with pressure to a softer one – often leads disputants to accept court-referred mediation as a just and fair procedure. Thus, even mandatory

Satisfaction	Outcome	*n*	Mean satisfaction	Std deviation	*t*	df
Plaintiffs	No agreement	20	1.71	0.90	-3.47^{**}	66
	Agreement	48	2.50	0.85		
Defendants	No agreement	20	2.00	1.12	-3.27^{*}	66
	Agreement	48	2.83	0.88		

Notes: Sig. (two-tailed); $^{*}p < 0.05$; $^{**}p < 0.001$

Table V.
Disputants' satisfaction and mediation outcome: *t*-test

mediation can be perceived as a fair and satisfactory process when soft tactics are used by all participants. Wissler (2004), for example, argues that in civil court-referred mediation, the participants view both the process and the outcome as fair and just. McDermott and Obar (2004) also indicate the perceived fairness of the mediation procedure. In this study, we found that the general sense of fairness linked to the process may be established when all involved parties – plaintiffs, defendants and especially mediators – use relatively more soft tactics than pressure tactics.

Despite mediators' power, stemming from being appointed by the courts, they do not use, as is often alleged, a high level of pressure tactics in order to promote their own interests or those of the court; neither do they strive to reach an agreement at all costs. According to the disputants' evaluation, mediators try to be helpful, without being overbearing. The greater the number of soft tactics the mediators use during the mediation process, the more helpful they are perceived to be by the disputants, and the more effective is the mediation. Mediators who employ too many pressure tactics may weaken the disputants' perception of the mediation process as a just procedure and, even more importantly, also damage the possibility of obtaining a long-lasting sense of compliance with the mediated agreements (Watkins and Winter, 1997). This conclusion contradicts the most interesting study by Wall and Chan-Sefrin (2009), who found that in cases of civil mediations in the US, pressure tactics increased mediation effectiveness. However, they were not able to detect any effect of mediator behavior on either disputants' behavior or mediation outcome (agreement/no agreement). In contrast, we found that intensive use of soft tactics by the disputants, and especially by mediators, results in more agreements. It seems that the difference between the Wall and Chan-Sefrin study and the current study lies in the research focus. They focused on the interaction between the disputants' behavior and the mediator's pressure tactics, while the current study takes all tactics (pressure and soft) used by all participants during the process of court-referred mediation into consideration. By analyzing court-referred mediation through correlating observations' derived data and evaluation surveys, and by taking a comprehensive approach, the current study sheds additional light on the process and its applications in regard to the results of a hybrid type of mediation.

In this study, we did not examine the issue of agreement durability; however, Wissler (2004) reports that in several previous studies, which examined compliance with mediated agreement, compliance with mediated agreement was found to be greater than compliance with a trial verdict.

While the present study focuses on court-referred mediation, we wonder whether such hybrid mediation (both mandatory and voluntary) could be applicable when it comes to resolving other conflict situations, such as conflict between organizations or even within or between rival communities or nations. This could lead to improved conflict resolution and, in turn, to better quality of life.

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