ПРИВРЕДНИ УГОВОРИ И СПОРОВИ – СУДСКИ И АРБИТРАЖНИ

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MEDIATION IN GERMANY UNDER THE INFLUENCE OF THE UNION LAW
Implementation of the Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters

Summary

Mediation in Germany still finds itself in a phase of development. For this reason, many issues have been excluded from the draft and left instead to further development by theory and practice. It may well be that Serbia finds itself in a similar position with regard to the Law on Mediation of 2005.

Key words: *mediation, Germany, European Union.*

I Introduction

Mediation is not a traditional concept of the German law. The idea of inviting the parties to participate in the finding of a solution for their dispute as such is not new to German thinking, but the classical method for this is

the conclusion of a court settlement on proposal of, or with the help of the judge as regulated in § 278 of the Civil Procedure Code (ZPO). In the event of such court settlement, the recording of declarations in a court record replaces notarial recording, § 127a Civil Code (BGB). The settlement that has been concluded before a German court constitutes an enforceable title in the meaning of § 794 ZPO.

As is well known, the concept of mediation has found its way to continental Europe mainly as an import from the USA where mediation has been praticed intensively since the 1970's. Among the pioneers of mediation, we also find countries like England, Japan, Australia, China and New Zealand.[1] Since then, mediation has proved to be a singular success story and today, is part of the standard equipment of practically all legal orders, on all five continents. Legal comparison shows, however, substantial differences in the way in which mediation is regulated or functions de facto, depending on the purposes for which mediation is used, national traditions and mentalities, the respective legal framework etc.

Germany has imported the concept of mediation starting from the 1980's, under the influence of reports from the USA which were at the time considered highly attractive. At first, the new legal institution was used purely on a de facto basis. In 1999, a first and very modest attempt for a legal regulation was made.[2] Some other provisions followed which need not be mentioned here. Whereas for example Serbia has adopted a full-fledged Zakon o posredovanju – medijaciji (Law on Mediation) even in the year of 2005,[3] in Germany until now, there has been no systematic regulation on this issue, although in the practice mediation has established itself as a recognized and important means of dispute resolution, supplementing the procedure before the courts.

As in so many other cases, change was triggered under the influence of the European Union, which has manifested its conviction that mediation can provide a cost-effective and quick extrajudicial resolution of disputes through processes tailored to the needs of the parties, and that agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties.[4] The Directive 2008/52/EC of the European Parliament and of the Coun-

1 *Hopt/Steffek* (eds.), Mediation. Rechtstatsachen, Rechtsvergleich, Regelungen (Tübingen 2008).

2 New § 15a EGZPO authorizing the federal states to provide that for certain small claims, an action can only be brought after a prior attempt for alternative dispute resolution; new § 278 para. (5) 2 ZPO authorizing the courts to propose to the parties, in appropriate cases, extrajudicial settlement of their dispute, on a strictly voluntary basis.

3 *Sl.gl.* no. 18/05.

4 6th recital to the Directive.

cil of 21 May 2008 on certain aspects of mediation in civil and commercial matters[5] has determined a general framework for mediation and obliged the Member States to adopt the laws necessary to comply with it before 21 May 2011 (Art. 12 MedDir). The European Code of Conduct for Mediators[6] has served as an additional source of inspiration.

Germany is therefore under an obligation to become more active. The German government has meanwhile elaborated a Draft Law on promotion of mediation and other procedures for alternative dispute resolution[7] which is at this moment being discussed in the German parliament. This draft, although not very long, has been prepared over a substantial period of time. Many basic questions had to be resolved by it for the first time. For this reason, the draft has been based on exceptionally intensive legal comparison. Namely, the Max-Planck-Institute in Hamburg has been asked by the Federal Ministry of Justice to make a comparative survey on mediation in 19 foreign countries, namely: Austria, France, England, Netherlands, USA, Japan, Australia, Bulgaria, China, Ireland, Canada, New Zealand, Norway, Poland, Portugal, Russia, Switzerland, Spain and Hungary. It goes without saying that mediation in Germany is also covered by the authors. The study, with an altogether volume of 1175 pages, has been published in German language in the year of 2008.[8] It offers a detailed and structered overview over the institute of mediation worldwide. Since no other such comprehensive study exists anywhere else, the Institute is currently preparing an updated version in English language.

The topic of mediation has also been discussed intensively on the 67. Deutscher Juristentag (German Jurists Forum) which was held in Erfurt/Thuringia in the year of 2008. This eminent Forum is organized by the Association of German Jurists[9] and meets every two years, in varying locations.

II The German Draft Law

1. General outline

The EU-Mediation-Directive covers only cross-border disputes. The current German draft is broader and includes also purely domestic situations. The regime under the German draft is the same for both national and international mediation. This is in line with the Mediation Directive which

5 *OJ* C 286, 17.11.2005, p.1.

6 See: *http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.*

7 Entwurf eines Gesetzes zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung vom 4.2.2011 (Drucksache 60/11).

8 *Hopt/Steffek* (supra footnote 1).

9 For more details see *www.djt.de*.

says that nothing should prevent Member States from applying the provisions of the Directive also to internal mediation processes.[10]

Furthermore, the Directive applies only to civil and commercial matters. In contrast to this, the German draft could be used as a basis for mediation in the context of civil, family, labour, social and administrative procedure as well as in patent court proceedings. What remains outside is especially the criminal procedure as well as the procedure in matters of finance (taxes). The Directive rightly points out that mediation should not apply to rights and obligations on which the parties are not free to decide themselves under the law (as is frequently the case in family and employment law).[11]

In spite of the manifold fields of application, the German draft is significantly shorter than for example the Serbian Law on Mediation, and consists only of seven articles. Additional individual provisions on mediation shall, however, be introduced into the Civil Procedure Code and some other acts. It is of course not excluded that the paliamentary discussions will lead to the one or other amendment.

Expectations with regard to mediation have been high, sometimes even exuberant when it was first introduced in Germany. Experience has, however, led to a more realistic assessment. In any case it is obvious that the potential of mediation is higher than its present use in Germany. The general intention of the draft is therefore to encourage and support the use of mediation.

2. Legal definitions of mediation and of mediator

Mediation shall be defined by law as a confidential and structured process, whereby the parties attempt, on a voluntary and self dependent basis, to reach an agreement on the settlement of their dispute with the assistance of one or several mediators. The mediator is defined as an independent and neutral person without power of decision, who leads the parties through the mediation. These definitions correspond by and large to Art. 3 MedDir.

3. Kinds of mediation

Three kinds of mediation are provided for in the German draft, namely:

- mediation independently of a court procedure (in the following: out of court mediation[12]);

10 8th recital to the Directive.

11 10th recital to the Directive.

12 German: außergerichtliche Mediation.

- mediation during court proceedings, but outside the court (in the following: court related mediation[13]) and
- mediation during court proceedings before a judge who is, however, not responsible for any judical proceedings concerning the dispute in question (in the following: court mediation[14]).

As regards court mediation, it shall be up to the federal states to offer this possibility and to determine the details of it. Because of possible deviations from state to state, the judge shall always be entitled to propose to the parties court related mediation, as well as out of court mediation. However, in order for the judge to be able to propose court mediation, the respective federal state must first have created the necessary infrastructure in the courts of that particular state. It seems that court mediation is still a controversial topic in Germany but has the full support of the Federal Ministry of Justice[15] which sees a high potential for dispute resolution in this type of mediation.

4. Principle of voluntariness

The Directive leaves it to the national legislator to make the use of mediation compulsory or subject to incentives or sanctions (Art. 5 para. (2) MedDir).[16] However, German law has never known compulsory mediation, and the German draft does not make use of this possibility either. Therefore, only mediation based on the voluntary decision of the parties is provided in it. The draft is also extremely reluctant with regard to sanctions (see infra 13).

5. Recourse to mediation

The proposed new provisions in the procedural laws shall authorize the courts to propose to the parties the use of mediation or of another means of alternative dispute resolution. In case the parties accept the proposal, the judge shall suspend the court proceedings.

It may be interesting to know that the statement of claim should in future also contain information on previous attempts for mediation or other means of alternative dispute resolution, as well as the possible counter-arguments.

Special rules apply in divorce proceedings for which even de lege lata the judge is entitled to "instruct" the parties to participate at no charge in a

13 German: gerichtsnahe Mediation.

14 German: gerichtsinterne Mediation.

15 Speach of the Federal Minister of Justice on the occasion of the first reading of the draft in the Deutscher Bundestag.

16 See also 14th recital to the Directive.

consultation on the possibilities of mediation (§ 135 FamFG). As regards parent and child cases it is said in the law de lege lata that in appropriate cases, the court should "indicate" the parties the possibility to refer to mediation or other means of alternative dispute resolution (§ 156 para. (1) FamFG[17]).

According to the draft, the authority of the judge to "instruct" the parents to participate in a consultation on the possibilities of mediation shall be extended to parent and child cases; the parties shall in such a situation be obliged to present a confirmation on their participation.

For parent and child cases, if the judge has suspended the court proceedings because of the parties' consent to go for mediation, the court proceedings shall as a rule be continued after three months if the parties have not reached an agreement until then (§ 155 para. (4) FamFG).

In labour disputes, when the court has suspended the proceedings so that the parties can make an attempt for mediation, the court shall continue the proceedings after three months unless the parties in unison declare that mediation or another means of alternative dispute resolution is still in process (proposed § 54a ArbGG[18]).

6. The mediator

The mediator will be chosen by the parties. He shall be committed to both parties equally and must see to it that both parties are included in a fair and propper manner in the mediation procedure. With the consent of the parties, he may talk with each party alone.

The mediator shall be obliged to disclose to the parties all circumstances that may affect his independence or neutrality. In case such circumstances exist, he may only act as mediator with the express consent of the parties.

A person that has before the commencement of mediation acted for one of the parties on the same matter, shall always been excluded from being a mediator. Besides this, the mediator is forbidden by law to act for one party, on the same matter, subsequent to the mediation.

On request of the parties, the mediator shall be obliged to inform them about his professional background, his training and experience in the field of mediation.

The provisions of the draft shall apply to all mediators, including judges when they act as mediators.[19]

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17 Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit [Law on proceedings in matters involving family law and jurisdiction over non-contentious matters], BGBl. 2008 I S. 2586.

18 German: Arbeitsgerichtsgesetz.

19 See the official motives of the draft.

7. Questions of procedure

On principle, the only participants in mediation are the parties and the mediator. Third persons, as for example legal representatives of the one or the other party, may only be admitted to the mediation with the consent of all the parties.

Mediation may be terminated by the parties themselves at any time. But also the mediator has the right to terminate the proceedings, namely in case that no self-dependent communication between the parties, or no agreement by the parties is to be expected.

In case the parties reach an agreement, it is the task of the mediator to ensure that they are aware of the circumstances and understand the contents of the agreement.[20] If a party to the mediation has no expert adviser, the mediator shall point out to that party the possibility to have the agreement, as and when required, checked by external advisers.

Unlike the Serbian Law on Mediation (Art. 13 et sequ.), the German draft does not address the topic of the duration of the mediation procedure. This is left in its entirety to the persons concerned. For certain matters that appear especially urgent (parent and child cases, labour disputes), it is indicated by law that the mediation should as rule last no longer than three months (for details see supra 5).

8. Agreement resulting from mediation

With the consent of the parties, their mutual understanding may be documented by way of an agreement.

9. Principle of confidentiality

The mediator as well as the other persons involved in the conducting of the mediation process are under an obligation of secrecy, with only the most strictly necessary exceptions (like considerations of ordre public). In this regard, the German draft follows basically Art. 7 MedDir. Under the German draft, secrecy is expressly excluded in cases of a danger for the well-being of a child that can only be averted by disclosure, e.g. to the police.

De lege lata there is no provision in the German law saying that the mediator as such shall not be compelled to give evidence in judicial proceedings. It is true that the Civil Procedure Code entitles persons to refuse to testify,

20 This is also in line with the Recommendation Rec (2002) 10 of the Committee of Ministers to Member States on mediation in civil matters, *https://wcd.coe.int/wcd/ViewDoc.jsp?id=306401&Site=CM*.

to whom matters are entrusted by virtue of their office, profession or trade, which are to be kept secret due to their nature or by law, with respect to the facts to which the duty of secrecy pertains (§ 383 para. (1) no. 6 ZPO). Such persons are subject to professional discretion. It has, however, been disputed to what extend mediators are included in this regime.[21] In case mediation lies in the hand of a member of the legal profession, the answer is obvious, but apart from that, the legal situation until now has not been well defined.

The new provision proposed by the draft on secrecy shall constitute a clear and undisputed right for all the persons who have been "included in the conducting of the mediation procedure" to refuse to testify.[22] This attribute is to be interpreted in a narrow way and includes namely the mediator and his auxiliary persons; it does not extend to persons who have been included into the procedure by the parties, like experts or family members.

10. Enforceability of agreements resulting from mediation

Ensuring the enforceability of the agreement has been one of the main concerns of the Mediation Directive.

German law already contains provisions on extrajudicial settlement concluded before an attorney (§§ 796a–796c ZPO). The proposed § 796d ZPO extends this regime to agreements that have been reached by way of mediation. Such mediation agreement shall be declared enforceable on written application of all the parties, or on application of one party with the express consent of the other side. In case the agreement compels a party to make a declaration of intent, or the agreement concerns the existence of a tenancy, the possibility of a declaration of the agreement as enforceable shall be excluded.

The competence for declaration of the agreement as enforceable shall lie:

a) with the court (that is, in civil cases: the district court[23] as the lowest court), as well as
b) with the German notaries.

If the mediation has been conducted abroad, the competence shall lie with the Amtsgericht Schöneberg.

21 *Baumbach/Lauterbach/Albers/Hartmann*, Zivilprozessordnung (69th ed., Munich 2011) § 383 Rz. 17.

22 See the official motives of the draft.

23 German: Amtsgericht.

11. Effect of mediation on limitation and prescription periods

Art. 8 of the Mediation Directive deals with the relationship between mediation and limitation. This is a very important issue, since the parties may be prevented from the use of mediation if as a consequence they would run the risk of a limitation of their claim and thus, of losing their right.

The German draft contains no express implementing provision. The German government has seen no need for regulating the matter, because it is already said in § 203 of the German Civil code (BGB), "if negotiations between the obligor and the obligee are in progress in respect of the claim or the circumstances giving rise to the claim, the limitation period is suspended until one party or the other refuses to continue the negotiations. The claim is statute-barred at the earliest three months after the end of the suspension". By this general rule of the German civil law, the requirements of the Directive are already fulfilled.

In the course of the discussion of the draft it has, however, been criticised that the essential characteristics of "negotiations in progress" are not clearly defined. According to some voices, it is also not enough to have the claim statute-barred for only three months after the end of suspension, because namely in big and/or highly complex cases more time for reflection might be considered useful.

Interestingly, the Serbian Law on Mediation takes the opposite view, stating that the opening of the mediation procedure shall not interrupt the legal expiration of the claim (Art. 11 para. (1)). From the standpoint of legal comparison, this solutions may appear unusual. As a matter of fact, many countries provide expressly that the entering into mediation will suspend the limitation period. In other coutries, this question is not regulated but suspension of the limitation period is recognised anyhow.[24]

12. Ensuring the quality of mediation

The Directive expressly invites the Member States to encourage the training of mediators and to introduce effective quality control mechanisms concerning the provision of mediation services.[25]

It must be admitted that the professional qualification of mediators as well as their advanced training has so far not been regulated in any way in Germany. The current draft expressly leaves the matter to the own responsibility of the mediator. It is said there that the mediator himself shall be responsible for ensuring that he disposes of the necessary theoretical knowledge and

24 See *Hopt/Steffek* p. 30 et sequ.

25 16th recital to the Directive.

practical experience for leading the parties through the mediation procedure in a competent manner. He is also obliged to constant retraining.

Expert vocational training is available at many places. For example, the well-known Fern- (Open-) University in Hagen offers a comprehensive set of courses in mediation, including a study course for mediation which is scheduled for two semesters, and qualification as "master of mediation" as an interdisciplinary study program which takes three semesters. Hagen is a distance university that is very popular with people who are already working. The title of master of mediation can also be acquired at the University of Frankfurt/ Oder in Brandenburg.

Many other institutions also offer different kinds of courses in mediation. The Bundesverband Mediation (Federal mediation association)[26] has developed standards and guidelines for vocational training of mediators and offers certification of mediators whose qualification has been verified. A number of other associations offer similar services.

The Federal Ministry of Justice has refrained from regulation by law and endorses rather the creation of a private certification system. Instead of more bureaucracy and costs for the state, the ministry prefers to rely on self-regulation by the occupational groups and associations.

The differences between the Serbian Law on Mediation, which provides for an official "List of mediators" and regulates the requirements for conducting mediation in some detail (Art. 18 et sequ.), and the German draft as regards the qualification of mediators are quite obvious.

13. Questions of costs

The topic of mediation and costs can be seen under different aspects. The Serbian draft regulates the distribution of the costs of mediation between the parties in Art. 28 et sequ. The German draft contains no such provision but leaves this matter to the private autonomy.

Another aspect concerns the question as to who shall be obliged to carry the costs not of the mediation, but of litigation. As has been mentioned before, in parent and child cases the judge has the right to instruct the parties to attend a consultation on the possibilities for mediation. If in such situation a party refuses even to be informed by way of consultation on possible advantages of mediation for the future relations between the parents and the child, under the draft the judge should order that party to carry the whole, or a part of the costs of the ensuing court proceedings (§ 81 para. (2) no. 5 FamFG). This constitutes a new approach that may deserve attention.

26 See: *www.bmev.de.*

14. Mediation and insurance for legal costs

The insurance companies have already reacted to the growing number of cases of mediation and offer protection against the costs of mediation, in different ways. In a comment to the current draft, the Gesamtverband der Deutschen Versicherungswirtschaft (GDV) (that is: the General association of the German insurance business) has complained that the draft does not prescribe quality standards for mediators. The association asks for the introduction of a uniform seal of quality for mediators.[27] Enhanced transparency as to the qualification of the mediator would make it easier for the insurer to decide whether covering the cost of mediation may be acceptable.

15. Liability of mediators

Unlike the Serbian Law on Mediation (Art. 27), the German draft does not deal with the mediators' liability for damages. In the essence, however, there is no discrepancy because the Serbian law simply declares the general rules on liability for damages as applicable.

III Final remarks

The German Federal Minister of Justice Sabine Leutheusser-Schnarrenberger, who is responsible for the draft on mediation has pointed out that mediation in Germany still finds itself in a phase of development. For this reason, many issues have been excluded from the draft and left instead to further developmen by theory and practice. It may well be that Serbia finds itself in a similar position with regard to the Law on Mediation of 2005.

27 See: *http://www.gdv.de/Downloads/Themen_2011/Stellungnahmen/GDV_Stellungnahme_Mediationsgesetz_2011.pdf.*

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МЕДИЈАЦИЈА У НЕМАЧКОЈ ПОД УТИЦАЈЕМ ПРАВА ЕВРОПСКЕ УНИЈЕ
Имплементација Директиве 2008/52/ЕЗ од 21. маја 2008. године о одређеним аспектима медијације у грађанским и трговинским питањима

Резиме

Медијација у Немачкој се још увек налази у фази развоја. Из овог разлога, бројна питања су изостављена из Нацрта закона и препуштена развоју од стране теорије и праксе. Могуће је да ће се Србија наћи у сличној ситуацији када је реч о Закону о медијацији из 2005. године.

Кључне речи: *медијација, Немачка, Европска унија.*