

Mediation in Austria *

Walter H. RECHBERGER **

Traditionally, disputing parties in Austria are used to seeing third parties — such as judges and arbitrators — decide their disputes, with a reasonably high level of satisfaction. This however does not prevent the development of other forms of dispute resolution. The parties may, in principle, choose freely from all alternative dispute resolution (ADR) methods, including, of course, mediation.

1. The Austrian Concept of Mediation — Dual Approaches

The Austrian legal concept of mediation is based on the facilitative and transformative models of mediation. It focuses on the voluntariness of the parties to settle their disputes on their own — enabled through the help of a neutral, independent third person. In order to ensure this elemental but loose principle the Austrian legislature established a **registration system**: a list of mediators is kept at the federal Ministry of Justice. Furthermore, a centralised, administrative procedure that governs the preconditions for and effects of being registered was introduced. The Austrian law on civil mediation thereby sets out basic professional duties registered mediators need to fulfil.

However, it is possible to conduct mediation **without being listed**, and without being bound to those high standards mentioned. Since persons without mediation training or experience can conduct mediation,¹⁾ mediation in Austria is “freelance work” as opposed to a court-related institution.²⁾

Let me use this lecture to firstly give you an **overview** of the major legal bases for mediation and the mediation proceedings under the law of the country I am representing. In my second point, I will present the impact of mediation on the Austrian dispute resolution culture, practicing lawyers, courts and – finally – arbitration.

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** Em. o. Univ. -Prof. DDr. h.c. Dr. Walter H. Rechberger, Department of Civil Procedure Law, Faculty of Law, University of Vienna.

1) Certain parts of this article are based on: *Ulrike Frauenberge-Pfeiler*, ‘Austria’, in *Carlos Esplugues, José Luis Iglesias and Guillermo Palao* (eds), *Civil and Commercial Mediation in Europe*, vol 1 (Insentia 2012), which is recommended for more comprehensive insights into mediation in Austria.

2) *Johann J. Hagen and Cristina Lenz*, *Wirtschaftsmediation — Theorie, Verfahren, Technik, Praxis* (Manz 2008) 169.

The **main regulations** regarding mediation provided by the Austrian legislator are to be found in the *Austrian Code of Mediation in Civil Matters (ACM)* and in cross-border cases within the EU the *Code of EU Mediation (CEUM)*. Additionally, mediation is explicitly mentioned in various other legal sources that regulate its use in particular areas of application, such as: the *Environmental Impact Assessment Act*³⁾ which encourages mediation in environmental matters in case of conflicts occurring during the permission process⁴⁾; regulations found within the *Federal Law on Equality of Treatment of Persons with Disabilities*⁵⁾; the *Law on Professional Training*⁶⁾ and the *Law on Agriculture and Forestry Employment*⁷⁾ define even mandatory mediation for cases concerning premature termination of apprenticeships; further specific rules regarding mediation can be found in family matters, because such mediation is funded by public authorities.⁸⁾ Rules regarding mediation exist in other codes as well, namely the Austrian Code of Civil Procedure (*Zivilprozessordnung*)⁹⁾ (CCP) and the Code of Criminal Procedure (*Strafprozessordnung*).¹⁰⁾

The *Austrian Code of Mediation in Civil Matters*¹¹⁾ (ACM) is applicable if the mediation is conducted by a registered mediator, no matter whether the case is national or international. Because of the adoption of EU Directive 2008/52/EC (Enactment of the CEUM), civil mediation conducted by non-listed mediators in EU-cross-border cases (see below) is regulated by the *Code of EU Mediation (CEUM)*. Mediation conducted by non-listed mediators in national and non-EU-cross-border cases is not explicitly regulated by law. If mediation in national and non-EU-cross-border cases is conducted by non-listed mediators, but professionals, whose competence includes mediation, the relevant laws governing the respective profession are applicable.

The core of **national mediation** regulations is codified in the **ACM**. Section 1 contains a legal definition of mediation: ‘*Mediation is a process based on the parties’ voluntariness. A professional qualified, impartial mediator, using recognised methods, systematically encourages the communication between the disputing parties, who shall achieve a mutually agreeable solution on their own.*’

According to section 2, which summarises the law’s subject matter, the ACM is to regulate the following issues: the establishment of an advisory board for mediation, the conditions and process for registering as a mediator, the conditions and process for regis-

3) BGBl I 2000/89.

4) Environmental Impact Assessment Act (*Umweltverträglichkeits-Prüfungs-Gesetz*) 2000, sec. 16.

5) BGBl I 2005/82; Austrian Disability Equality Act (*Bundes-Behindertengleichstellungsgesetz*) 2008, sec. 14, 16. According to sec. 15 para 2 mediation based on the Mediation Act must be offered, according to sec. 16 the competent Fed’l Ministry pays an allowance.

6) BGBl 1969/142; Law on Professional Training (*Berufsausbildungsgesetz*) 1969, sec. 15a.

7) BGBl 1986/612; Law on Agriculture and Forestry Employment (*Landarbeitsgesetz*) 1984, sec. 135.

8) Austrian Family Charges Equalisation Act (*Familienlastenausgleichsgesetz*) 1967, sec. 39c.

9) RGBI 1895/113 in the version amended by BGBl I 2003/29, sec. 320 item 4.

10) BGBl 1975/631 in the version amended by BGBl 2003/29, sec. 157 para 1 item 3.

11) BGBl I 2003/29.

tering as a training facility for mediators, the rights and duties of registered mediators, and the suspension of time limits caused by mediation procedures. The ACM applies only to cases that, if referred to court, would fall under the jurisdiction of the civil courts. In this field, mediation can be particularly appropriate in sensitive areas like family law, labour law and disputes between neighbours, as these areas are all characterised by the close relationship between the parties.

Mediation in **cross-border cases within the EU** is codified in the *Code of EU Mediation*¹²⁾ (*EU-Mediationsgesetz*, hereinafter called CEUM). It defines the scope nearly identical to that under Council Directive 2008/52/EC. The Directive applies in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*) (Art 1 item 2). The provisions of the Directive apply only to mediation in cross-border disputes in all EU-member-states except Denmark; deviating from that, the CEUM includes Denmark. A cross-border dispute is one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which: (a) the parties agree to use mediation after the dispute has arisen; (b) mediation is ordered by a court; (c) an obligation to use mediation arises under national law; or (d) for the purposes of Art 5 an invitation is made to the parties. Notwithstanding para 1, for the purposes of Art 7 and 8 (confidentiality and limitation and prescription periods) a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c). Under the Directive Mediation means *a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.*

It has to be pointed out, that according to sec. 5 para 1 CEUM, notwithstanding its legal provisions, the ACM applies to registered mediators conducting EU-cross-border-mediations. That means, that the advantages of and assurance of quality provided by using a registered mediator also apply when an EU-cross-border case is mediated by a registered mediator.¹³⁾

There are no specific rules regarding **mediation in cross-border cases outside the EU**. Private international law specifies the law applicable in such cases. If the parties choose a registered mediator according to Austrian law and if Austrian law is specified as applicable, the ACM is applicable.

12) BGBl I 2011/21.

13) Code of EU Mediation (*EU-Mediationsgesetz*) 2011, sec. 5.

2. Statute of Limitation

There are different rules concerning **the suspension of time** limits for court proceedings, depending on whether the mediator is registered or not.

According to the **ACM**, the beginning and the appropriate continuing of mediation by a registered mediator suspends the beginning and the continuation of limitations and other time limits foreseen for initiating court proceedings and claiming the rights, which are subject to mediation.¹⁴⁾ This means that the limitation period for court proceedings does not run for the duration of the mediation and resumes only when the mediation procedure has ended (*Fortlaufshemmung*). It is a suspension of progress, suspending time limits of preclusion but not procedural time limits.¹⁵⁾

Different rules apply if the mediation is conducted by a **non-registered mediator**. In such mediations, the time limits for court proceedings continue to run despite the on-going mediation procedure. However, as long as mediation continues, the time limit cannot expire (*Ablaufshemmung*). If the mediation exceeds the litigation time limit, the latter is extended until the end of the mediation procedure.

3. Confidentiality

This brings me to a cornerstone of mediation — the **confidentiality** between the parties and the mediator. Indeed, information revealed during the mediation process is confidential and must not be made public, unless the parties expressly permit it. Therefore, confidentiality — together with voluntary participation of the parties and neutrality of the mediator — is seen as one of the three core characteristics of mediation.¹⁶⁾

As with time limits, there are different consequences concerning confidentiality, depending on the chosen mediator. Non-registered mediators, who **do not conduct mediation in the exercise of a legal or social profession** (e.g. like lawyers or notaries), are solely bound by the mediation contract signed with the parties. Non-registered mediators must testify in court; a contractual commitment to refuse testimony has no impact on this obligation in court proceedings. Non-registered mediators conducting mediation **in the exercise of a legal or social profession** (e.g. lawyers or notaries) can refuse to testify before court, based on the relevant rules of professional conduct¹⁷⁾ under section 321 of the Austrian CCP.¹⁸⁾

14) Austrian Code of Mediation in Civil Matters (*Zivilrechts-Mediations-Gesetz*) 2003, sec. 22 para 1.

15) Sec. 22 para 2, 2nd sentence ACM.

16) *Felix Steffek*, Mediation in the European Union: An Introduction (June 2012). www.diamesolavisi.net/kiosk/documentation/Steffek_Mediation_in_the_European_Union.pdf.

17) I.e. Rules of Professional Conduct for Lawyers (*Rechtsanwaltsordnung*) 1898, sec 9 para 2.

18) Code of Civil Procedure (*Zivilprozessordnung*) 1895, sec 321 para 1 item 3.

In international disputes, non-registered mediators can refuse to testify before court according to section 3 of the CEUM and section 321 of the Austrian CCP. Exceptions to confidentiality are made with regard to *ordre public* especially to safeguard the protection of the best interest of the child or to prevent a violation of physical or moral integrity of a person and if the disclosure of mediation agreement is necessary to apply it or to enforce it.

Registered mediators must comply with section 18 of the ACM, which states that the mediator has the obligation to uphold secrecy about the facts he/ she was entrusted with by the parties or which he/ she became aware of in any other way in the course of the mediation procedure. The mediator also has to keep confidential the provided or submitted documents within the mediation. The same applies to the supporting staff and also to persons, who act under the guidance of the mediator in the course of their practical training.¹⁹⁾

The Austrian CCP prohibits registered mediators from giving evidence concerning the mediation in civil court proceedings.²⁰⁾ There are no exceptions to confidentiality, i.e. neither breach of duty, nor threat of future violence or harm to others, nor proving the existence of a settlement agreement is sufficient to force registered mediators to testify. However, two additional facts must be pointed out: First, none of the regulations bars the possibility that the parties submit facts revealed during mediation and testify about within court proceedings for tactical reasons. Second, if registered mediators violate their obligation to maintain secrecy, there is no prohibition on using that information during trial; the judge may freely consider information that should have been kept confidential.²¹⁾

4. Mediation's Impact on the Dispute Resolution Culture

Turning to the second part of my paper, I will start by elaborating on *Mediation's Impact on the Dispute Resolution Culture*. Civil mediation in Austria began with a project initiated before the enactment of the ACM. Family Counselling in Court Mediation-Assistance for Children whose Parents are Separating or Divorcing was a pilot project on co-mediation in family matters and took place in 1994/95 at courts in Vienna and Salzburg.²²⁾ Within this project, instead of taking court action, married couples who wanted divorce were asked to handle their legal and economic matters on their own, supported by an independent third person on a voluntary basis. The most important objective was a mutual agreement about their future role as parents and the wellbeing of the children af-

19) Austrian Code of Mediation in Civil Matters (*Zivilrechts-Mediations-Gesetz*) 2003, sec 18.

20) Walter H. Rechberger and Daphne-Ariane Simotta, *Grundriss des österreichischen Zivilprozessrechts* (8th edn, MANZ'sche Verlags- und Universitätsbuchhandlung 2010) para 803.

21) Rechberger and Simotta (note 20) para 773.

22) Cf. *Ena-Marlis Bajons*, 'Mediation: Der Weg von einem österreichischen Pilotprojekt bis zur EU-Mediation-Richtlinie' in Rolf Stürner, Hiroyuki Matsumoto, Wolfgang Lüke and Masahisa Deguchi (eds) *Festschrift für Dieter Leipold zum 70. Geburtstag* (Mohr Siebeck 2009) 500.

fectured by divorce.²³⁾ The children were also heard. The success of this project launched the use of mediation in family law.²⁴⁾ Mediation could be recommended to disputing couples concerning divorce, guardianship and contact rights. Corresponding rules concerning confidentiality were enacted. Finally, in 2004, the ACM was enacted, covering recent developments and extending the existing regulations to all matters underlying civil justice.²⁵⁾

Mediation is mainly used if it is **funded or obligatory**; this applies in family law, labour law (termination of apprenticeships) and criminal law (restorative justice). It is also used in general civil law, other than family law, on a voluntary basis. Beside the aforementioned areas, a private pilot project of mediation in civil and commercial matters also exists in civil-law courts of first instance in Vienna and some other Austrian cities.²⁶⁾ In this pilot project, mediators attend court proceedings; if the dispute is suitable for mediation, the mediators can propose mediation to the parties.

Although it is encouraged under the Environmental Impact Assessment Act, in practice, mediation is **not used** in environmental permission projects. The law permits mediation as a recognised method to solve disputes in this area, but does not provide a specific regulatory framework for the parties to make concrete use of mediation. Mediation is also rarely practiced in disputes regarding neighbours and disabled people, because parties have the option of entering conciliation first, which they often prefer.

In the Austrian judicial system the basic allocation of roles between the judge and the parties is like follows: it is up to the parties to submit the facts, to make allegations and to provide corresponding evidence.²⁷⁾ Proceedings are, generally speaking, not initiated *ex officio*. The judge depends on the parties' allegations as asserted in their respective documents (the claim, defence and further writs). He leads proceedings actively, directing the course of fact-finding, asking questions and advising the parties. The claimant may withdraw his claim at any time.²⁸⁾ Parties are free to settle their dispute at any time of the proceedings. As reaching a settlement was and is one of the primary goals of any civil proceedings, the judge may at any stage encourage an amicable settlement between the parties. The roles allocated to the judge and the parties encourage attempts to settle out of court.

23) Ewald Filler, 'Einführung' in Ewald Filler (ed), *Familienberatung bei Gericht — Mediation — Kinder — begleitung bei Trennung der Eltern* (Verlag Österreich 1997) 19.

24) Amendment Act of Marriage Law (*Eherechts-Änderungsgesetz*, BGBl I 1999/125) 1999 and the Amendment Act of the Law related to Parent and Child (*Kindschaftsrechts-Änderungsgesetz*, BGBl I 2000/135) 2001.

25) Martina Pruckner, *Recht der Mediation* (Linde Verlag 2003) 69.

26) Karl Pramhofer and Andrea Michalitsch, *Mediation als ergänzende Alternative zum Gerichtsverfahren* [2012] RZ (Richterzeitung) 275.

27) Walter H. Rechberger, *Social Civil Proceedings. The Concept of the Austrian Civil Procedural Law* according to Franz Klein, Teise 2007/65 (Vilnius University Publishing House) 158.

28) Rechberger and Simotta (n 20) para 401.

As a part of the Austrian cultural background, disputing parties are used to taking court action, if alternative dispute resolution fails. In this light, mediation does not conflict with traditional litigation culture but offers another way to resolve the dispute.

5. Mediation's Impact on Practising Lawyers

Austrian Guidelines for the Post-graduate Training of Future Lawyers stipulate that prior to taking the bar exam, would-be lawyers must attend 42 mandatory half-days of seminars.²⁹⁾ Among the available education programmes there are some that focus on ADR, but none are mandatory.

Thus, a lawyer who has not chosen to study mediation either during his legal studies or afterwards will usually have no experience whatsoever in the field. Accordingly, mediation and other methods of ADR are not regularly utilized by lawyers. In addition, the traditional way of dealing with disputes is still firmly embedded in the Austrian mentality. In the public's perception, there usually is nothing suspicious or shameful about suing or even being sued. ADR is however slowly starting to be established as a real alternative, not only in the legal system but also in the minds of its practitioners.

6. Mediation's Impact on Scholars

Mediation has yet to become a special focus within legal education at Austrian universities. Mediation classes may be taken as elective courses at universities in four of the five cities in which degrees in law or business law are offered. The University of Vienna gives law students the opportunity to study mediation by offering an elective subject group called 'Mediation and ADR'.³⁰⁾ While offering over 20 courses in alternative dispute resolution, our University is proud to be the only Austrian institution of higher-level education to send teams to International Competitions in mediation, with students participating in such events in Paris since 2011 and in Hong Kong since 2012.

7. Mediation's Impact on Courts

Reaching a settlement is the preferred way of resolving disputes in the course of civil proceedings in Austria. The judge may, therefore, at any stage of the proceedings seek to reach an amicable settlement between the parties. This judicial encouragement to settle should not be mistaken for mediation (as defined by the ACM).

Furthermore, a person considering filing a lawsuit may request that his or her adversa-

²⁹⁾ Austrian Guidelines for the Post-graduate Training of Future Lawyers (*Richtlinie für die Ausbildung von Rechtsanwaltsanwärtern*) 2009, sec 1.

³⁰⁾ This elective subject group is overseen by Dr. *Ulrike Frauenberger-Pfeiler*.

ry be summoned before the district court in order to reach a settlement (so-called *prätorischer Vergleich*). In some cases, this type of settlement is chosen by those who have already settled their dispute without the involvement of the court; although the law does not provide for a court settlement in such a case, the parties can register their agreement as an enforceable notarial deed.³¹⁾ Both types of settlement reflect international standards: the judge is responsible for seeking an amicable settlement of the dispute at the commencement or at any other appropriate stage of legal proceedings.

In some cases, reaching a settlement in court may not be with good prospects. It could be, however, if other institutions are involved. Therefore, according to a 2003 amendment to the Austrian CCP, judges must advise parties of the availability of extrajudicial dispute resolution services offered by special institutions if and when appropriate.

While the ACM does not define the **legal nature of agreements to mediate**, they seem to be hybrid in nature, being something between procedural and substantive law. According to the principles of civil procedure, agreements to mediate have no influence on court proceedings — neither the initiation, nor the stay of pending proceedings.³²⁾ In my opinion, an agreement to mediate may constitute a temporary waiver of the right to file a claim before court. The action should be rejected as temporarily inadmissible or the court should stay the proceedings. The stay of proceedings is preferable due to the advantage of lower costs and suspension of time limits.³³⁾

An alternative way to stay pending proceedings is an agreement between the parties to suspend court proceedings under section 168 of the Austrian CCP. According to section 29 of the Austrian Law on Non-Contentious Jurisdiction in Civil Matters³⁴⁾ proceedings can be stayed ex officio, if the parties state their interest in resolving their dispute by an amicable settlement including mediation.

In contrast to the uncertain effect of an agreement to mediate, a failed mediation clearly has no influence on pleadings before courts and arbitration tribunals.

As opposed to other European countries, the Austrian legal framework does not provide for a form of institutionalised mediation within the court system yet. A pilot project may lead to some form of such an institutionalised mediation in the future.

The ACM contains no formal requirements concerning type, form or content of mediated settlements. The mediator must, of course, document the end of the mediation procedure and inform the parties about the ways in which a mediated settlement can be formal-

31) Robert Fucik, § 433⁴ in Walter H. Rechberger, ZPO. Zivilprozessordnung. Kommentar (4th edn, Springer 2014) para 6.

32) Markus Roth and David Gherdane, Mediation in Österreich — Zivilrechts-Mediations-Gesetz: Rechtlicher Rahmen und praktische Erfahrungen, in Klaus J. Hopt and Felix Steffek (eds), Mediation (Mohr Siebeck 2008) 27.

33) For further comments on the German approach see Nadja Alexander, International and Comparative Mediation, Legal Perspectives (Kluwer Law International BV 2009) 206.

34) *Außerstreitgesetz* (BGBl I 2003/111).

ised, in order to ensure its effectiveness and, if desired, enforceability.

The agreement reached by parties in mediation is commonly formalised through an out-of-court-settlement (*Vergleich*). In Austria, a settlement is a contract renewing and overruling contentious or doubtful legal relationships. Since parties are free to resolve disputes as they see fit, each mediation agreement can be formed differently.

Mediation settlements can thus take different forms, such as non-binding agreements, standard legal contracts, various categories of settlement deeds, court orders and arbitral awards. The enforceability of the mediation settlement, however, depends on the chosen legal form.

As long as there is no existing order covering the issue at hand, the parties may initiate a claim at court in the case of a breach of the settlement. The parties may sue for specific performance of the contractual obligations, and the court is free to hear evidence. Even if the settlement contract was concluded before a court or a notary, without a decision/order, there is no *res judicata* effect, which refers to the various aspects of the binding nature of a judgement.

A settlement is enforceable if it was acknowledged by the court (under section 433a of the Austrian CCP — *Mediationsvergleich*), or notarized by a notary. Within the European Union these settlements can be enforced according to the Brussels I Regulation.

8. Mediation's Impact on Arbitration

Last but not least: ***Mediation may have an impact on Arbitration.*** The Vienna Rules applied by the Vienna International Arbitral Centre (VIAC) provide for the possibility of proceedings being terminated following the parties' mutual request, or an amicable settlement.³⁵⁾ In the latter case, the parties can request that a record be made of the settlement or that an award be made thereof.³⁶⁾ There are no regulations concerning the process by which such an agreement might be reached. Mediation in particular is not specifically mentioned. Despite this, it would make sense that any type of ADR might be used to reach settlement, including mediation.

The impact of mediation and other such methods on arbitration has not been studied in Austria. There are, unfortunately, no relevant publications yet and no statistics that might give insight into how the deployment of mediation has influenced arbitration in Austria.

³⁵⁾ Rules of Arbitration of the International Arbitral Centre of the Austrian Federal Economic Chamber (Vienna Rules) 2013, art 34.

³⁶⁾ Vienna Rules 2013, art 38.

9. Conclusion

To conclude: almost 20 years have elapsed since mediation was introduced into the Austrian judicial system. After a probationary period, the Austrian legislature encouraged mediation by enacting the ACM and other supplementary laws. During this period, mediation has become a valid option in the field of ADR, more important than conciliation but not as well accepted as arbitration. Since there is no legal obligation to use mediation in general, the use of mediation depends on the individual attitude of the disputing parties.

Traditionally, disputing parties in Austria are used to seeing third parties decide their disputes. The reason is quite clear: Compared to other countries, Austria is proud for having a generally efficient court system. According to a report from the European Commission for the Efficiency of Justice (CEPEJ) from the year 2010, Austria is cited as one of three Council of Europe member states which, while having a high number of disputes, still manage to handle relatively quickly significant volumes of cases.

In my opinion, there are two main ways to promote mediation in Austria. The quickest way would be to make mediation mandatory before taking court action. This however currently seems not to be the intention of our legislature. The other, much more sustainable way is the active development of individual responsibility in resolving disputes. In any case, further developments in this area are certain.