Development and current status of mediation in Austria

Introduction

Within the last ten years, mediation has become established in Austria as the main – if not to say the only – variant of "Alternative Dispute Resolution" (ADR\(^1\)). Following the decision in 1993 to pilot test mediation, the method was implemented within the framework of a model experiment on family mediation during the period 1994 – 1995. The highly promising results with regard to the functioning, effect and use of mediation have led to the introduction of a number of legislative measures placing mediation on an increasingly solid legal foundation:

- **1998:** Order concerning Lawyers (*Rechtsanwaltsordnung*) – lawyers must also employ mediation!
- **1999:** Act amending Marriage Law (*Eherechts-Änderungsgesetz*) – mediation can be used in divorce proceedings!
- **1999:** Order concerning Notaries (*Notariatsordnung*) – notaries too must employ mediation!
- **2000:** Implementation Directive concerning § 39c Family Burden Equalization Act (*Ausführungsrichtlinie zu § 39c FLAG*) – family mediation to be promoted by the State!
- **2000:** Environmental Compatibility Inspection Act (*Umweltverträglichkeitsprüfungsgesetz (UVP-G)*) – mediation is provided for in environmental matters!
- **2000:** Act amending Parent and Child Law (*Kindschaftsrechts-Änderungsgesetz*) – mediation can be applied in legal disputes concerning custody and visiting rights!
- **2003/2004:** Civil Law Mediation Act (*Zivilrechts-Mediations-Gesetz - ZivMediatG*)\(^2\) – mediation is generally possible in all civil law conflicts!

Notwithstanding the furious pace of this development – from the "idea" in 1992 through to its present incorporation in the law – it is necessary to point out that mediation through the legislative measures referred to above, as a legally admissible form of alternative dispute resolution (ADR), must play its role alongside and not in place of the judicial process. In other words, mediation has manifestly been intended as a complement to and not as a replacement\(^3\) for the traditional settlement of disputes through counsel and the courts.

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1 Variants on ADR apart from mediation include, *inter alia*, arbitration, mini trial and neutral fact finding.
3 A restriction of access to judicial proceedings would be inadmissible because of the constitutional right to be heard before a judge.
There is no question that this formal recognition of mediation by the legal system is of the highest importance, all the more so as a legal framework has now been created for this alternative form of dispute resolution. This has the following desirable side effects:

- **recognition and endorsement** of this form of dispute resolution by the state and thus also legal policy

- an indispensable protection of the parties (client protection) who have recourse to mediation and thus – understandably – do not want to risk being disadvantaged in any way (e.g. liability issues, time-bar, etc)

- an incentive for the increasing introduction of mediation (rather than arbitration) into contracts, particularly marriage contracts and the like.

However, despite all the justified confidence and the evident euphoria to be seen at the present time, particularly among mediators, it seems to me that it is still too early to predict accurately the extent to which mediation will be able to establish itself in practice as an equal-ranking alternative to adversarial representation in court proceedings.

**First impressions, observations and practical experiences concerning mediation in Austria**

Nevertheless, on the basis of the results of the scientific investigation of the model project on *Family Mediation*, we are in a position today to present at least some first impressions, observations and practical experiences concerning mediation in Austria generally.

In the field investigated in the model project referred to above - namely family disputes brought before the courts - the different types of cases were divided as follows:

<table>
<thead>
<tr>
<th>Table 1</th>
<th>Court proceedings in family disputes (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No-fault divorce</td>
<td>50.0 %</td>
</tr>
<tr>
<td>Contested divorce</td>
<td>14.6 %</td>
</tr>
<tr>
<td>Custody rights matters</td>
<td>19.4 %</td>
</tr>
<tr>
<td>Visiting rights matters</td>
<td>11.3 %</td>
</tr>
<tr>
<td>Other</td>
<td>4.8 %</td>
</tr>
</tbody>
</table>


Despite the fact that there is no compulsion to be legally represented in family matters heard before the courts in Austria, the following picture emerges of legal representation in the different types of proceedings:

**Table 2 Frequency of legal representation (in accordance with the type of proceedings)**

<table>
<thead>
<tr>
<th>Type of proceedings</th>
<th>no legal representation</th>
<th>one party represented</th>
<th>both parties represented</th>
<th>total legal representation</th>
</tr>
</thead>
<tbody>
<tr>
<td>No-fault divorce</td>
<td>35.5 %</td>
<td>25.8 %</td>
<td>38.7 %</td>
<td>64.5 %</td>
</tr>
<tr>
<td>Contested divorce</td>
<td>0.0 %</td>
<td>33.3 %</td>
<td>66.7 %</td>
<td>100.0 %</td>
</tr>
<tr>
<td>Custody / visiting rights</td>
<td>21.1 %</td>
<td>42.1 %</td>
<td>36.8 %</td>
<td>78.9 %</td>
</tr>
</tbody>
</table>


In this connection, it is noteworthy that, in contested divorces (which account for 10% of the total), the parties were legally represented in 100% of cases (66.7 % by both spouses and 33.3 % by one). Moreover, even in no-fault divorces (which account for the other 90%), both spouses had legal representation in 39 % of the cases.

The relatively high frequency of legal representation – even in proceedings where representation is not compulsory – suggests that, in general, those seeking justice are not confident about going to law without the support of a lawyer.

**Timing of the offer of mediation**

The criterion of "timeliness" plays a crucial if not exclusive role in the choice of form taken to deal with a conflict: a decision of the parties to opt for an ADR method such as mediation will be all the more likely the earlier they have in mind the idea of mediation as, in principle, an equal-ranking alternative to court action in dealing with the dispute. It is at this "critical" juncture that the parties will choose

- either to fight “for their rights"
- or to strive (on both sides) for a consensual solution to the problem.
Table 3  Timing of the offer of mediation; ...

<table>
<thead>
<tr>
<th></th>
<th>Numb.</th>
<th>Percent.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bringing of a no-fault divorce</td>
<td>17</td>
<td>17.9 %</td>
</tr>
<tr>
<td>Bringing of contested divorce petition</td>
<td>14</td>
<td>14.7 %</td>
</tr>
<tr>
<td>a court hearing</td>
<td>11</td>
<td>11.6 %</td>
</tr>
<tr>
<td>divorce proceedings already in progress for half a year</td>
<td>9</td>
<td>9.5 %</td>
</tr>
<tr>
<td>Bringing of an application to change custody and/or visiting</td>
<td>18</td>
<td>18.9 %</td>
</tr>
<tr>
<td>rights</td>
<td></td>
<td></td>
</tr>
<tr>
<td>custody and/or visiting rights proceedings already in progress</td>
<td>13</td>
<td>13.7 %</td>
</tr>
<tr>
<td>for half a year</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td>13</td>
<td>13.7 %</td>
</tr>
</tbody>
</table>


In the model experiment, the timing of the offer of mediation came relatively late for the good reason that, at the time (1994-1995), the notion of mediation was virtually unknown to the general public. However, so long as this method of conflict resolution per se is not firmly rooted in the public consciousness – i.e. people know little about the function, course and (legal) effect of mediation – precious time will be lost, during which, inter alia, an avoidable legal dispute could be prevented.

Thus, whether or not mediation will "emancipate" itself from adversarial conflict resolution in the medium or long term and establish itself as a "genuine alternative", will depend largely on the following:

- the extent to which the notion of "mediation" penetrates and finds general acceptance in the world of politics, among jurists, lawyers, notaries and judges and, above all, in the mind of the general public;

- the extent to which the image of mediation develops, in other words:
  - how far people in difficult situations are ready to trust in the effectiveness of mediation (and the mediators),
  - how far mediation succeeds in finally resolving disputes.

Indeed, the word "mediation" was confused with a no less well known relaxation technique, with the result that a typographical error had to be corrected (BGBl. I No. 106/2000).
the extent to which people have the means to afford mediation.

No-one wants "a pig-in-a-poke"

When people find themselves in difficulties that they cannot get out of by their own efforts, they crave a sense of certainty. What they do not want is to experiment and risk buying a pig-in-a-poke. For this reason, the top priority in establishing family mediation is to ensure the professional quality of the mediators. To this end, the "co-mediation model" was laid down in the system of state-sponsored family mediation. In this model, family mediation can be practised only jointly by one mediator with a legal background and another with a psychotherapy background, both of whom have sufficient practical experience in family law disputes.

This uncompromising stand on the professional competence of the mediators, it should be made clear that the client – already in a difficult situation – must be able to have the certainty that, if things get serious, the mediators (or mediation team) are up to the level of the "traditional players" – the lawyers, judges or psychologists – and that they are not going to be short-changed.

In this connection, it may be noted that, during the first euphoric days, the mediators did not by any means win friends by calling to be placed on an equal footing with the lawyers, the traditional top dogs of the court room, because the existing handicap naturally prevented many enthusiastic but not yet sufficiently battle-hardened mediators from exercising their activity in the so-called "quasi-judicial" (gerichtsnah) arena. Hence, despite all the thoroughly justified euphoria over mediation as a dispute resolution model, it must never be forgotten that, whereas successful mediations serve to improve the image of the profession only to a small extent, a single mediation that goes really wrong can do it incalculable harm.

Success – benefits of mediation

The question of when we can speak of the success of a mediation is a matter for debate not only at the academic level but also among practitioners. It may be said that a mediation is a success when the outcome of the process is a comprehensive or at least partial agreement. Moreover, even if a mediation ends without success, this does not always mean that it was a "failure". In not a few cases where agreement proves impossible to reach between the parties within the framework of the mediation, there can, in certain circumstances, be at least an improvement in the climate of discussion, which permits certain points at issue to left aside (even without a formal settlement) or may even allow the parties to arrive at a consensus at a later point in time – i.e. outside the framework of the mediation.

As may be seen from Table 4, the success rate in the "Family mediation" model project (1994/1995) was less than earth-shattering. Nevertheless, given the circumstances, it was a promising indication. One possible explanation for the rate of "only" 46% of cases completely resolved could be the fact that the judges sent the model project only their slow-moving stock - i.e. cases that had dragged on inconclusively for years through the courts – to give the mediators at long last a chance to show their mettle.
With family mediation now having moved on from the model phase to the real world and state sponsorship, it may be concluded from the experiences reported by the mediators that the "success rate" has risen to around 90% and is holding steady at this level. This high rate may be explained by the fact that the parties who engage in a mediation procedure have “invested” a great deal and want to reap the fruits of all their efforts.

Hypotheses on future scenarios of mediation – the general prospects and some (cautious) recommendations

Contrary to the current status of the discussion concerning the EU Commission Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, the aim of improving access to the law cannot be seen as the primary incentive for the development and establishment of mediation, at least not in functioning legal systems. The ongoing establishment of mediation in countries such as France, Germany, Italy, Switzerland and - not least - Austria, does not represent a reaction to the failure of the state governed by law itself or to the state shrugging off its responsibility as the court of last resort for settling disputes, as the cheap slogan “Less state, more private” would suggest. On the contrary, it is the expression of a growing effort by the citizens of the state to take greater charge of their (legal) disputes themselves. More recently, new legislation has been taking this striving for independent action into account.

It must be admitted, however, that, at the present point in time, knowledge of mediation in continental Europe remains unsystematic and, above all, less than widespread. The situation with regard to family mediation is better for the following
reasons: adversarial proceedings were increasingly being perceived by society as "undesirable" in the sensitive area of family disputes

- state commitment in this domain was easy to justify for the very same reason
- hence, mediation in family disputes was "tried out" in many countries
- and word finally began to get around about the purpose and benefits of family mediation.

In Austria, mediation in the domain of divorce and other family disputes has become established largely through pressure from the state authorities and from the commitment of associations of mediators. Meanwhile, demand is booming, thanks to state-sponsored mediation (*geforderten Mediation*)\(^5\), a system in which mediation tariffs are graduated in relation to income in much the same way as with legal aid.

In any event, it is an observable fact that mediation as an alternative method of dispute resolution is spreading rapidly in other domains of social life in Austria, even though conditions here by no means approach those of the US, where the litigiousness of the American citizen is proverbial and the financial risks of going to court enormous.

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\(^5\) § 15
Refund of costs\(^5\)

1) In order to permit all persons who find themselves involved in disputes concerning family and children's law cases to have recourse to mediation, persons who for economic reasons could not, or could only under unreasonable financial hardship, have recourse to mediation, may be granted, in accordance with their ability to pay\(^5\), a correspondingly graduated refund of costs per mediation hour (60 minutes), at the standardised tariff of Euro 180 per mediation hour in accordance with § 39c FLAG, up to a maximum number of hours determined by the Federal Minister for Social Security and Generations, within the framework of the promotion of legal entities.

2) Every mediation session shall last between 1 and 2 hours and be conducted jointly by the mediator team and a couple. The costs of a session and their refund will be calculated in accordance with the actual duration of the session.

3) The refund of costs of the Federal Minister for Social Security and Generations will be graduated in accordance with the (aggregate) net family income of the couple and the number of their dependent children. Net family income will be understood as the average net monthly income of the couple, excluding family benefits.

The refund of costs per mediation (co-mediation) hour is graduated in accordance with the following scale:

<table>
<thead>
<tr>
<th>Tariff level</th>
<th>Income in euros</th>
<th>Couples with no dependent children</th>
<th>Parents with one dependent child</th>
<th>Parents with two dependent children</th>
<th>Parents with three dependent children</th>
<th>Parents with four dependent children</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>up to 1 100</td>
<td>180</td>
<td>180</td>
<td>180</td>
<td>180</td>
<td>180</td>
</tr>
<tr>
<td>B</td>
<td>1 100 – 1 500</td>
<td>167</td>
<td>174</td>
<td>174</td>
<td>180</td>
<td>180</td>
</tr>
<tr>
<td>C</td>
<td>1 500 – 1 820</td>
<td>138</td>
<td>167</td>
<td>174</td>
<td>174</td>
<td>180</td>
</tr>
<tr>
<td>D</td>
<td>1 820 – 2 200</td>
<td>109</td>
<td>138</td>
<td>167</td>
<td>174</td>
<td>174</td>
</tr>
<tr>
<td>E</td>
<td>2 200 – 2 550</td>
<td>55</td>
<td>109</td>
<td>138</td>
<td>167</td>
<td>174</td>
</tr>
<tr>
<td>F</td>
<td>2 550 – 2 950</td>
<td>20</td>
<td>55</td>
<td>109</td>
<td>138</td>
<td>174</td>
</tr>
<tr>
<td>G</td>
<td>over 2 950</td>
<td>0</td>
<td>20</td>
<td>55</td>
<td>109</td>
<td>138</td>
</tr>
</tbody>
</table>
Though people in the states of Central Europe basically have confidence in the administration of justice, this is somewhat qualified by:

- the fact that proceedings often last far too long
- the great uncertainty over what will finally emerge from the legal labyrinth.

The funds available from the public purse are dwindling and that includes funds for legal proceedings. At the same time, court staffing is being cut, while the costs for the product "Law" are increasingly being shifted onto the shoulders of the citizen. It goes without saying that these two developments can only serve to favour mediation, quite apart from the fact that, compared with the traditional adversarial dispute resolution procedure, mediation is a more modern and attractive alternative.

If mediation is to succeed, it must provide proof before all else that, compared with the courtroom procedure, it offers **clear advantages**:

- **speed** of the mediation process (no long wait for a court hearing, etc)
- easier to **predict** and **calculate** the costs
- **costs** no worse than those of the "traditional" adversarial confrontation of lawyers before a court
- **non-pecuniary benefit** of settling a divorce or any other dispute in a fair and decent manner
- in any event, the **harvest** brought home through mediation must be **no worse** than that of a comparable judicial procedure.

My own personal prediction is that mediation could sweep to victory in every domain and in every country if the mediators succeed in communicating to their clients the insight and judgement needed to enable them to "foresee" to what result their particular dispute would lead before the court (with a probability bordering on certainty).

For mediation, irrespective of the domain, this means the following:

1. Mediation should be legally regulated\(^6\) to the extent necessary to ensure primarily the protection of the clients having recourse this form of dispute resolution.

2. Mediation should always be offered only in conjunction with the possibility of "traditional" legal action and indeed even as an **alternative** to the familiar adversarial confrontation between lawyers. After all, it may be assumed that anyone may – quite understandably – feel reluctant to have recourse to mediation

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\(^6\) For example, Austria's Civil Law Mediation Act (Zivilrechts-Mediations-Gesetz) has established a legal framework for mediation to ensure its functioning, to secure quality standards and to strengthen public confidence in this new method of dispute management. The law is intended to make the term "mediation" be understood as "mediation in civil law matters". Here, mediation is positioned "upstream" of the ordinary courts and serves to resolve or at least to prepare disputes which the ordinary civil courts would, in the end, have the competence to settle.
if he has the slightest feeling (fear) that the outcome is bound to be a compromise and that he will perhaps not get what he is entitled to.

3. Parties to a dispute should always be given a genuine choice as to how they want the dispute to proceed. In other words, they must have the alternative possibility of

- seeking a court decision in a traditional legal action
- managing the legal action themselves from the outset with the help of a mediator
- beginning a traditional adversarial action with lawyers before the court and then **switching to mediation** once their initial rage has died down or they have grown tired of the law's delays
- **switching to traditional court proceedings** if the mediation does not result in a success.

If the alternative nature of mediation is preserved for the parties to the dispute and they do not have to be afraid that they are, as it were, being "dispatched" in a fast and cheap procedure, this can predispose them to mediation much more than if they are **obliged** to decide on mediation from the outset.

1) If mediation is structurally positioned upstream of conventional proceedings with lawyers before a judge (more or less bridging the period up to the fixing of a trial date) then

   a) not only is access to the law **not restricted** but access to a solution is also potentially **broadened**;
   
   b) the **automatic** response that "the matter is now in the hands of the lawyer is cut short;"
   
   c) the **individual responsibility** of the parties to bring about the settlement of the dispute is once again brought to the fore.

2) The foregoing postulates are based on the fundamental presupposition that there is manifestly a supply of mediators who **know their business** and whose competence must be **discernible** to their clients. In other words, if clients decide to have recourse to mediation, they must be able to feel confident that they are almost at the end of the road to a better result than they could otherwise obtain.

3) The mediators commissioned by a legal expenses insurer must satisfy the highest performance standards for, after all, they represent the public face of the insurer.

4) In the best possible scenario, the parties to the dispute would have the opportunity of being informed, recommended or proposed mediation through a so-called **mediator exchange** independent of the legal expenses insurers⁷.

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⁷ As mediators have to be impartial and neutral, they must always be independent of those who commission them.
Closing remark

Not wishing to sound over-optimistic, I would like to conclude this paper with at least one argument to show why mediation, though gaining in significance, will never replace the adversarial form of dispute resolution by lawyers before the court, namely the fact that mediation may be bit too peaceful – the human need for right and wrong, for guilt and atonement, remains as strong as ever.