



European update — mediation on the move

German law paves the way for mandatory mediation

Nadja Alexander

Introduction

Effective as of 1 January 2000, the Federal Government of Germany has introduced legislation permitting all German states (*Laender*) to introduce mandatory court-connected mediation with respect to certain kinds of civil disputes.

The new §15a *Introductory Law of the Code of Civil Procedure* (EGZPO) has two primary aims. First, the Federal Government envisages that the legislation will promote the practice of mediation as a dispute resolution method among lawyers and disputants, and second, it hopes to dramatically reduce the case load at magistrates court level.

To qualify for mandatory mediation, the disputes must be either:

- financial disputes before the Magistrates Court up to a litigation value of 1500 DM;
- neighbourhood disputes; or
- defamation disputes where the alleged defamation has not occurred through the media.

The federal law empowers state parliaments to legislate to require participation in a mediation as a prerequisite to formally beginning court proceedings. In other words, the form of mandatory mediation envisaged by the Federal Government leaves no discretion with either the parties or the court as to whether the dispute is suitable for mediation. Therefore, where corresponding state legislation is enacted, all disputes that fulfill the above mentioned criteria must be mediated before court proceedings can be instituted.

At the same time, the German Federal Government hopes to encourage innovation and diversity in terms of the mediation models adopted in the various states. Each state will have the opportunity to take into account regional factors, such as the local

disputing culture, available resources and the existing infrastructure, when selecting an appropriate model.

It is important to note that the German states are not obliged to legislate on mandatory mediation — §15a EGZPO merely puts the legal mechanisms to do so at their disposal. To date a number of states have developed mediation models to be incorporated into their respective proposed state mediation laws.

In this article I will outline a proposal that is currently in the form of a Bill before the Bavarian state parliament.

Proposed Bavarian Mediation Law (BaySchlG)

The proposed Bavarian Mediation Law (BaySchlG) states that it is founded on the following principles:

- (1) freedom and 'voluntariness' of the parties in terms of selection of mediation service;
- (2) flexibility of the mediation process;
- (3) professionalism of the mediator;
- (4) use of existing dispute resolution infrastructure; and
- (5) far-reaching privatisation of mediation.

Accordingly, the BaySchlG contains very concrete ideas about mediation services, who the mediators will be and how the process will be conducted.

In terms of mediation services, currently existing conciliation and arbitration services offered by the Chamber of Trade and Commerce and other industry groups will be utilised as a matter of priority. Consistent with this priority, existing venues outside the offices of the courts will be preferred.

Only lawyers and notaries will be permitted to function as mediators within the mandatory program.

With the intention of promoting flexibility of the mediation process, minimal guidelines for conducting a mediation appear in the

Bill. The guidelines include reference to addressing the interests of the parties, joint and private meetings, and the possibility of suggestions for a potential agreement being put forward by the mediator (art 10(II) BaySchlG). Apart from these matters, the process adopted in any given mediation lies within the discretion of the mediator.

The mediator's fee is set out in art 13 BaySchlG and ranges from 50 to 200 Euro. Generally, the mediator's fee will be paid by the applicant (art 14 BaySchlG). All other costs associated with the mediation will be borne by the party incurring those costs (art 17 BaySchlG). Witnesses and experts may not take part in the mediation process unless, first, the parties agree to bear the additional costs associated with bringing the witness or expert to the mediation and, second, the participation of witnesses or experts does not unreasonably delay the mediation (art 10 (III) BaySchlG).

Further, the Bill contains a sunset clause with the effect that the law will cease to have effect on 31 December 2005. Consequently, state parliament will be forced to review and assess the effectiveness of the law in five years' time, thereby maintaining a measure of quality control for the new project.

Comment

The BaySchlG contains two very worthwhile aims: namely, to promote the use of mediation for the resolution of disputes, and to reduce caseload in the Magistrates Courts. At the same time, I have a number of concerns that centre around what appears to me to be a misunderstanding of what mediation means, how it works and where it is suitable.

Despite its references to an interest-based approach and voluntary choice of mediation service, the BaySchlG appears very legalistic, evaluative and results focused in its orientation. Indeed, it seems that in the Bavarian mediation context 'professionalism' of the mediator means that the mediator must be legally qualified. Although mediation is still in its infancy in the Federal Republic of Germany, an inter- ➤

➤ disciplinary approach to the education of mediators and a diversity in the professional background of practising mediators has been a defining hallmark of German mediation developments — and yet it is made very clear that only lawyers and notaries can be mediators under the proposed legislation. Parliamentary explanations of the Bill provide no indication of the reasoning behind this policy.

Experience in Australia, the US and the UK indicates that lawyer-mediators, by virtue of their legal training, tend to possess fairly interventionist mediation styles — in other words, they are more likely to adopt a legalistic and evaluative approach than a non-lawyer. Interestingly, the vast majority of mediation training in Australia, US and Europe (including Germany) promotes an interest-based approach.

The proposed BaySchlG pays lip service to the interest-based model by referring to the interests of the parties in the guidelines set out for the mediation process (art 10 (I) BaySchlG). Yet, in the same paragraph the guidelines refer to the mediator recommending a solution to the parties' dispute, and also to the possibility of conducting a mediation through exchange of documents only.

The capping of costs under the legislation means that disputing costs will be kept to a minimum. Even if the matter continues to trial, the extra costs incurred by the parties are not excessive. In cases where no mediated settlement is reached, mediator fees may be taken into account in an award of costs. At the same time low fees (by legal standards at least) mean that less experienced lawyer-mediators will be likely to take on the mediation work. (Alternatively, compare the fees of experienced non-legal community mediators — they are much lower. So, if the mediation work were open to non-lawyers it would most

likely attract more experienced non-legal mediators.) Again, lawyers with little mediation experience are more likely to adopt a legalistic approach rather than an interest-based one.

Finally, art 10 (I) BaySchlG must be interpreted in light of the federal civil procedure law, §15a EGZPO, that permits the state parliaments to pass mandatory court-connected mediation laws. Essentially, §15a EGZPO provides the framework for routine mandatory mediations for virtually all small claims and neighbourhood disputes as a prerequisite to the institution of court proceedings. In other words, there is no consideration of the suitability of a particular matter for mediation. Yet as it is an express aim of the legislation to reduce the court caseload, the success of the program is likely to be evaluated according to the number of mediated agreements that are reached. Consequently, a mediator's success will be measured according to her strike rate in concluding mediated agreements.

Such a state of affairs will only encourage inexperienced lawyer-mediators to apply their legal training (rather than their mediation training) to recommend 'solutions' to parties fairly early in the process and pressure disputing parties into agreement. Consequently, it will be surprising if an interest based mediation practice is able to develop under this scheme.

When one considers that the first aim of the Bill is to promote mediation as a dispute resolution mechanism, it is worrying that a very narrow and evaluative form of mediation may become the face of mediation in Bavaria. ●

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is a Prospect publication

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SUBSCRIPTIONS:

\$375 a year, posted 10 times a year.

Letters to the editor should be sent to the above address.

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ISSN 1440-4540

Print Post Approved PP 255003-03417

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ACN: 003 316 201



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