

TAIEX Workshop on Peaceful Resolution of Labour Disputes Internal Market 53276

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Regulations for mediation of Labor Disputes in Austria

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Session

Tuesday: 14:00 – 15:45

Experiences and good practices related to the conciliation and arbitration – study cases

Experience from Austria:

Mediation under the Employment of People with Disabilities Act and the Vocational Training Act

Introduction

Besides the core legal frameworks for mediation in Austria a number of additional mediation-specific rules have found their way into the Austrian legal system.

Worthy of note is that the aims pursued in the respect of labor disputes can be summarised as follows:

Federal Equal Opportunities for Persons with Disabilities Act (Bundes-Behindertengleichstellungsgesetz) and Employment of People with Disabilities Act (Behinderteneinstellungsgesetz) provide for insertions that generate temporary limits on access to court. For instance, these legislative materials each require the parties to attempt a conciliation proceeding before a claim is filed. Inter alia, mediators may be deemed to constitute a legally recognised “conciliation service”. It should be noted in this respect that the legislature only refers to mediators within the meaning of the Civil Law Mediation Act in all these cases. With the Vocational Training Act (Berufsausbildungsgesetz) and the Rural Workers Act (Landarbeitsgesetz) a further form of mediation appears, and one that is truly difficult when examined more closely. Such is obligatory

whenever the trainer intends to end the apprenticeship early. According to this, such an extraordinary termination is also only effective subject to a mediation proceeding having been carried out, unless the apprentice declines in writing to participate in the mediation. In these cases, it also depends on whether the mediation proceeding is carried out by mediators within the meaning of the Civil Law Mediation Act.

Equal treatment of persons with disabilities

Under the Law on Equal Opportunities for Persons with Disabilities (Bundes-Behindertengleichstellungsgesetz – BGStG 2005) and Law on Employment of People with Disabilities (Behinderteneinstellungsgesetz – BeinstG 2005) the conciliators from the Federal (or Regional Social Welfare Office) can suggest mediation to the parties. The parties can choose mediators from list of the Social Welfare Office and the mediator will then be paid by the Social Welfare Office (one mediator, 10 hours, 86€ per mediation hour).

Art. 14 (1) Every regional office of the Federal Social Welfare Office shall conduct conciliation procedures to ensure equality for people with disabilities within the meaning of this Federal Law and equal treatment of people with disabilities at the workplace (Articles 7a to 7q Employment of Disabled Persons Act).

(2) To initiate conciliation procedures a request for conciliation has to be submitted by the person who claims to be subject to discrimination. The provisions of Art. 13 General Administrative Procedure Act shall be applicable with the proviso that the request is to be submitted orally or in writing. The provisions of Articles 32 and 33 of the General Administrative Procedure Act shall apply.

(3) The conciliation proceedings terminate when the dispute has been settled or a communication from the National Social Welfare Office has been delivered to the person claiming discrimination which confirms that it was impossible to reach an amicable settlement. The provisions of Art. 8 of the Delivery of Documents Act (Zustellgesetz, BGBl. Nr. 200/1982) shall apply.

(4) The Federal Social Welfare Office shall communicate the outcome of the conciliation proceedings to the Disabilities Ombudsman (Art. 13b of the Federal Disabled People ActA).

Mediation

Art. 15 (1) The Federal Social Welfare Office shall make every effort to bring about an amicable resolution of the dispute which has arisen between the parties after having examined the availability of services and support for the disabled under federal and land legislation.

(2) Recourse to mediation shall be offered. Mediation shall be delivered by external mediators as defined in the Austrian Mediation Act, Federal Law Gazette I No. 29/2003.

Financial cost of conciliation

Art 16 (1) The financial cost of the mediation and, as the case may be, the cost arising from the employment of experts, interpreters and other specialists is borne by the State in accordance with the guidelines to be adopted by the Federal Minister of Social Security, Generations and Consumer Protection.

(2) Persons who are invited by the Federal Social Welfare Office or the mediator to participate in the conciliation procedure and who accept the invitation can submit a claim for reimbursement for expenses which is equal to the reimbursement received by a witness in a court hearing (Art 3 of the Act governing Fees and Expenses 1975, Federal Law Gazette No. 136). The financial cost is borne by the State.

Experiences will be discussed and an example of a mediation process led by the presenter will be given during the oral presentation.

Vocational Training Act

In the version of its promulgation, Federal Law Gazette 142/1969, as amended by Federal Law Gazette I 148/2011

Early termination of apprenticeship training

Art. 15. (1) During the first three months of the apprenticeship, both the trainer and the apprentice can terminate the apprenticeship training unilaterally and at any time. If the apprentice attends the scheduled classroom training in a vocational training school during the first three months of the apprenticeship, both the trainer and the apprentice can terminate the apprenticeship during the first six weeks of training in the business where the apprentice is receiving training (in the training institution) unilaterally and at any time. The consensual termination of the apprenticeship, the unilateral termination of the apprenticeship by the trainer or the apprentice pursuant to reasons as set out in Sections 3 and 4, as well as extraordinary termination shall be permissible in accordance with Art. 15a.

Extraordinary termination

Art. 15a. (1) Both the trainer and the apprentice can unilaterally and extraordinarily terminate the apprenticeship on the last day of the twelfth month of the apprenticeship, and in the case of apprenticeships with a duration of three, three and a half or four years, on the last day of the twenty-fourth month of the apprenticeship by giving one month's notice.

(2) Sec. 1 does not apply to training contracts in accordance with Art. 8b Sec. 2.

(3) The extraordinary termination of an apprenticeship by the trainer shall only take effect if the trainer has notified the apprentice, the business where the apprentice is receiving training, and, where applicable, also the Works Council as well as the Youth Council of his intention to extraordinarily terminate the apprenticeship and to initiate mediation proceedings no later than on the last day of the ninth or twenty-first month of the apprenticeship, respectively, and if mediation proceedings were conducted and completed in accordance with Sec. 6 before the apprentice received the extraordinary termination notice. Mediation proceedings do not need to be conducted and completed if the apprentice states in writing that he rejects mediation. The apprentice has the right to withdraw the rejection by submitting a statement in writing withdrawing the rejection no later than 14 days after the initial rejection letter was submitted. The letter shall include the name of

the apprentice, his address, the trade or occupation as well as the dates when the apprenticeship began and is due to end. The business where the apprentice is receiving training shall inform the Chamber of Labour about the communication within a reasonable period of time.

(4) Mediation proceedings shall be subject to the Austrian Mediation Act Federal Law Gazette I No. 29/2003.

(5) The trainer shall propose a mediator, who is to conduct the mediation from the List of Registered Mediators in accordance with Art. 8 of the Austrian Mediation Act. The apprentice has the right to immediately reject the proposed mediator. If the trainee does not accept the proposed mediator, the trainer shall propose two further mediators from the List of Registered Mediators in accordance with Art. 8 of the Austrian Mediation Act, of which the trainee has to select one immediately. The trainer shall contact the mediator no later than on the last day of the tenth month or on the last day of the twenty-second month of the apprenticeship, respectively, and request mediation. The mediation shall be attended by the trainer, the apprentice, and if the apprentice is a minor, also the apprentice's legal representative plus a trusted person of his choice, if so requested. The purpose of the mediation is to clarify the issues in a manner which can be comprehended by all parties and to explore whether and under which circumstances the apprenticeship can be continued. The costs of the mediation shall be borne by the trainer.

(6) The mediation proceedings are deemed concluded when an agreement has been reached. An agreement has been reached when the trainer declares that he is prepared not to terminate the apprenticeship, or the apprentice declares that he does not insist on continuation of the apprenticeship. The mediation proceedings are also deemed concluded if the mediator declares that mediation has been concluded. In any event, the mediation proceedings shall end at the beginning of the fifth working day before the last day of the eleventh or twenty-third apprenticeship month, respectively, provided at least one mediation meeting was held which was attended by the trainer or, representing him in his absence, a person in charge of the apprentice's training.

(7) If the apprenticeship is terminated, the trainer shall immediately communicate the extraordinary termination of the apprenticeship to the centre for apprenticeships. The centre for apprenticeships shall immediately notify the regional office of the Labour Market Service of the extraordinary termination of the apprenticeship in order to ensure the prompt extraordinary termination of the apprenticeship.

(8) The provisions of the Protection of Mothers from Dismissal Act 1979, Federal Law Gazette No. 221, Paternity Leave Act, Federal Law Gazette No. 651/1989, the Securing Employment Act 1991, Federal Law Gazette No. 683, the Employment of Disabled Persons Act, Federal Law Gazette No. 22/1979, and for members of the Works Council and the Youth and Training Division the provisions of the Labour Constitutional Act, Federal Law Gazette No. 22/1974, shall apply to the extraordinary termination of an apprenticeship by the trainer. The date when notice of termination is given shall be relevant.

Experiences will be discussed and an example of a mediation process led by the presenter will be given during the oral presentation.

Wednesday: 9.00-10.00

Requirements for selection of arbitrators and conciliators, rights, obligations and responsibilities of mediators and arbitrators and their competencies in individual and collective labour disputes according to EU regulations

Requirements for mediators to become registered, obligations and responsibilities of registered mediators:

The Civil Law Mediation Act (Zivilrechts-Mediations-Gesetz), promulgated in 2003, is indisputably the core mediation-specific piece of legislation. In comparison to other European states, the Austrian legislature decided astoundingly early in favour of a top-down approach to regulating mediation. Moreover, the approach chosen is classically paternalistic in that it reasons that a functioning mediation system requires specific legislation because mediation is still a very young method of conflict resolution and that the general public is only inadequately informed about its basic principles, application fields, processes and its successfulness. Thus, so the approach, it would seem inadvisable to rely on the strengths of a completely free market and to believe that the need for sensibly used, appropriate mediation would be sufficiently satisfied by letting supply and demand dictate. Hence, the conclusion is that it is necessary to secure the quality of mediation by legislation in order to protect the parties involved.

Therefore, the Civil Law Mediation Act (Zivilrechts-Mediations-Gesetz) provides a legal framework on this basis for mediation, on the one hand to facilitate the functioning of such, and on the other to secure sufficient quality standards by specifying a professional requirement profile.

The Civil Law Mediation Act (Zivilrechts-Mediations-Gesetz) thus spans the requirements and official administrative procedures for the registration of mediators and the institutions providing qualification courses in lists to be maintained by the Ministry of Justice, without being intended to overly restrict mediation per se. Besides this, the ordinances extend from continuing education requirements for mediators as well as their rights and duties right up to the legal consequences of mediation.

Nonetheless, this does not mean that mediation is comprehensively regulated. For one thing, the legal scope of the act is restricted to the mediation of conflicts in respect of which –ultimately and abstractly – the ordinary civil courts have jurisdiction. Moreover, the legislature deliberately opted against exclusivity but for the granting of privileges to accredited, registered mediators. Thus, anybody may act as a mediator, even in civil law matters and even without being registered under the new scheme (see chapter III). However, in the case of mediations carried out by the latter, above all the procedural benefits of the far-reaching legal confidentiality (Art. 18 Civil Law Mediation Act) and the ex-lege suspension of substantive law limitation periods during the mediation (Art. 22 Civil Law Mediation Act) do not apply.

Section III

The List of Mediators

Maintenance of the List

Art. 8. The Federal Minister of Justice shall maintain a List of Mediators. In the list shall be shown the first and last name, date of birth, the identification of the other profession of the mediator, his professional address and his academic title. If the mediator gives his professional field of activity or his professional fields of activities, these shall also be included in the list. The List of Mediators shall be published electronically in an appropriate way.

Requirements for Registration

Art. 9. (1) Entitled to registration in the List of Mediators is any person who proves that

1. he is over the age of 28,
2. he is professionally qualified,
3. he is trustworthy and
4. he has taken out professional liability insurance in accordance with Article 19.

(2) The applicant for registration shall identify in his application the premises at which he practises mediation.

Professional Qualification

Art. 10. (1) Professionally qualified is any person who, on the basis of appropriate training (Article 29) is in possession of knowledge and skills of mediation and who is also familiar with its legal and psychosocial basic principles. The training shall be completed in training courses and practical workshops of those institutions, including the universities, which the Federal Minister of Justice has registered in the List of Training Institutions for mediation in civil law matters.

(2) The assessment of the professional qualification shall take into account the knowledge gained by and the level of completion of qualification of the members of specified professions, in particular Psychotherapists, Clinical Psychologists and Health Psychologists, Lawyers, Notaries, Judges, State Prosecutors, Accountants, Civil Engineers, Consultants, Social Workers, Management Consultants, or Secondary School Teachers, in the course of their own training and their professional practice and which may assist in their practice of Mediation.

Application for Registration

Art. 11. (1) The procedure for registration in the List of Mediators is initiated on the basis of the written request of the applicant to the Federal Minister of Justice. The application shall provide the information required by Article 8.

(2) The requirements of Articles 9 and 10 are to be evidenced by appropriate documents, such as references, confirmations and professional certificates. The trustworthiness of the applicant, in so far as it is not a legal requirement of the other professional activity of the applicant, is to be proven by a criminal records statement, which is no older than three months, and which confirms that there has been no conviction which might lead to doubts as to the reliability of practice as a mediator.

(3) In the application shall be included a description of previous professional activities as well as the training undertaken to become a mediator, including a list of the institutions where the training has been completed.

Verification of Requirements

Art. 12. (1) The Federal Minister of Justice shall first verify, on the basis of the application and its attachments, whether the requirements of Article 9 Section 1 subsection 1, 3 and 4 and Section 2 concerning the applicant have been complied with, and whether the documents and certificates necessary for the verification of the requirement in accordance with Article 10 are included with the application. If necessary he shall summon the applicant to submit additional documents within a reasonable time limit. The unjustified non-compliance with this summons amounts to a withdrawal of the application.

(2) If the requirement of Article 10 is obviously not met, then the Federal Minister of Justice may obtain an opinion from the Board of Mediation.

(3) The Federal Minister of Justice and the Board may summon the applicant to a hearing. The unjustified non-compliance with the summons amounts to a withdrawal of the application.

Registration

Art. 13. (1) Those persons who fulfil the requirements for registration in the list shall be registered by the Federal Minister of Justice for the period of five years, with the date of the end of the period being identified. Persons not meeting the requirements shall be informed by formal Decision that they shall not be included in the list.

(2) The mediator may, at the earliest one year and at the latest three months, before termination of the registration period, apply in writing for the continuation of the registration for another ten years. He remains registered in the list until the decision concerning the request filed in due time is made known. Renewed applications to continue the registration for a period of a further ten years are admissible.

(3) In the application for continuation of the registration the mediator shall demonstrate his further training (Article 20). The registration shall be maintained if the professional qualification is guaranteed by attendance at further training programmes and if none of the other requirements of

Article 14 apply. To verify the requirements of continuance of the registration the Federal Minister of Justice may confer with the Board.

Removal from the List

Art. 14. (1) The Federal Minister of Justice shall, if necessary after obtaining an opinion from the Board for Mediation, by a formal Decision remove the mediator from the list if he becomes aware that a requirement of Article 9 has ceased to be met or has not been confirmed, the mediator has not attended to his duties in accordance with Article 20 or he has despite warnings grossly or repeatedly violated his duties.

(2) Furthermore, the mediator shall be removed from the list in the case of his resignation, his decease or because of the expiration of the time limit (Article 13).

(3) In the case of a removal the previous registration shall be kept on the record.

Section IV

Rights and obligations of registered Mediators

General rights and obligations

Art. 15. (1) Whoever is registered in the List of Mediators is

1. entitled to the designation “registered mediator”;
2. obliged to carry this designation when practising mediation.

(2) The mediator shall not receive or promise reimbursement, nor have it guaranteed to him, for the provision or recommendation of persons for mediation. Legal acts which violate this prohibition are void. Payments arising out of such legal dealings may be reclaimed.

Obligations towards the Parties

Art. 16. (1) A person who himself is or has been party, party representative, counsellor or decision-making body in a conflict between the parties, may not act as a mediator in the same conflict. Likewise, a mediator may not represent, advise or decide in a conflict which makes reference to the mediation. However, after the end of the mediation with the approval of all affected parties he may act within the scope of his other professional competences to implement the result of the mediation.

(2) The mediator may only act with the approval of the parties. He shall clarify to the parties the character and the legal consequences of mediation in civil law matters and execute this to the best of his knowledge, in person, directly and impartially towards the parties.

(3) The mediator shall refer the parties to counselling needs, particularly in respect of legal issues which result in the context of the Mediation, as well as refer to the form required for the drawing up of the result of the mediation in order to ensure the implementation thereof.

Art. 17. (1) The mediator shall document the beginning, the circumstances which indicate whether the mediation procedure has been properly followed, as well as the end of the mediation. As the beginning of the mediation, the date on which the parties agreed to resolve the conflict by mediation shall be the applicable date. The mediation ends if one of the parties or the mediator no longer wishes to proceed or if a result is obtained.

(2) On request of the parties the mediator shall in writing record the result of the mediation as well as the steps necessary for the implementation.

(3) The mediator shall keep his records for at least seven years after the termination of the mediation. On request of the parties he shall deliver a true copy of the records to them.

Secrecy, Confidentiality

Art. 18. The mediator is obliged to secrecy about the facts which he has become aware of in the course of the mediation or which have otherwise become known. He shall deal with documents provided or delivered to him in the course of the mediation confidentially. The same applies to the supporting staff of the mediator as well as to persons who act for a mediator, under his direction in the course of a practical training.

Liability Insurance

Art. 19. (1) The mediator shall conclude professional liability insurance with an insurer who is entitled to carry on business operations in Austria to cover any claims for damages which result from his activity and shall maintain it during the period of his registration in the List of Mediators.

(2) For the insurance contract the following must apply:

1. Austrian law must be applicable;
2. A minimum insurance cover for each insurable matter shall be EUR 400,000;
3. The exclusion or a time limitation of the continuing liability of the insurer is not permissible.

(3) The insurers are obliged to notify the Federal Minister of Justice unbidden and immediately of any circumstance which means/or may mean a termination or restraint of the insurance cover or an aberration from the original insurance certificate, and they shall provide information about such circumstances on demand of the Federal Minister of Justice. The mediator shall at all times be capable of evidencing the existence of the liability insurance.

Continuing Education

Art. 20. The mediator shall appropriately undertake continuing professional education, of at least fifty hours within a period of five years and evidence this to the Federal Minister of Justice every five years.

Notification duties

Art. 21. The mediator shall notify the Federal Minister of Justice immediately of any change of circumstances which concern his registration in the List of Mediators. The registration shall be changed accordingly.

Section V

Suspension of time limits

Art. 22. (1) The beginning and the proper continuation of the mediation by a registered mediator suspends the application of the start and running of the statute of limitations as well as other time limits concerning rights and claims which are affected by the mediation.

(2) The parties may agree in writing that the suspension also includes other claims which exist between them and which are not affected by the mediation. If the mediation affects rights and claims of family law the suspension then covers all mutual claims, or other perceived rights and claims at family law the parties may have against each other, even without a written agreement, insofar as the parties do not agree otherwise in writing.

Section VII

Authorisation for issuance of a Regulation

Art. 29. (1) The Federal Minister of Justice shall by Regulation stipulate the specific conditions for the training of mediators after consultation with the Advisory Council for Mediation. In the Regulation the training requirements may be differently defined dependent on the areas of professional expertise.

(2) The theoretical part, divided into specific training areas, shall contain 200–300 training units, the practical part shall contain 100–200 training units.

1. The theoretical part:

a) An introduction to the history of problems and the development of mediation including their basic assumption and models;

- b) Procedural development, methods and phases of mediation with special regard to dispute-oriented and solution-oriented approaches;
- c) Basis of communication, in particular of communication-, problem- and negotiation techniques, the conduct of meetings and moderation with special regard to conflict situations;
- d) Conflict analysis;
- e) Practice areas of mediation;
- f) Theories of personality and psycho-social forms of intervention;
- g) Ethical problems in mediation, in particular the position of the mediator;
- h) Legal problems in mediation, in particular relating to civil law, as well as legal problems in conflicts which are to be particularly considered for a mediation;

2. The practical part:

- a) Individual self-awareness and practical experience seminars to practise techniques of mediation through the use of role play, simulation and reflection;
- b) Peer group work;
- c) Case work and participation in practice supervision in the area of mediation.

(3) The training necessary for a professional group and the practical experience which has been acquired by its exercise shall be considered appropriately (Article 10).

Competencies of mediators:

Art. 1. (1) Mediation is an activity voluntarily entered into by the Parties, whereby a professionally trained neutral facilitator (Mediator) using recognised methods systematically encourages communication between the Parties, with the aim of enabling the Parties to themselves reach a resolution of their dispute.

Art. 16. (1) A person who himself is or has been party, party representative, counsellor or decision-making body in a conflict between the parties, may not act as a mediator in the same conflict. Likewise, a mediator may not represent, advise or decide in a conflict which makes reference to the mediation. However, after the end of the mediation with the approval of all affected parties he may act within the scope of his other professional competences to implement the result of the mediation.

Experiences will be discussed during the oral presentation.

Table of Legislation

Employment for Persons with Disabilities Act, in the version of its promulgation, Federal Law Gazette 22/1970, as amended by Federal Law Gazette I 7/2011

Federal Equal Opportunities for Persons with Disabilities Act, in the version of its promulgation, Federal Law Gazette I 82/2005, as amended by Federal Law Gazette I 7/2011

Federal Law on Mediation in Civil Law Matters (Austrian Mediation Act), in the version of its promulgation, Federal Law Gazette I 29/2003

Regulation of the Federal Minister of Justice concerning the Training of Registered Mediators (Zivilrechts-Mediations-Ausbildungsverordnung), in the version of its promulgation, Federal Law Gazette II 47/2004

Rural Workers Act, in the version of its promulgation, Federal Law Gazette 287/1984, as amended by Federal Law Gazette I 152/2011

Vocational Training Act, in the version of its promulgation, Federal Law Gazette 142/1969, as amended by Federal Law Gazette I 148/2011

For further regulations for mediation in Austria see:

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