Why is mediation not used more often as a means of alternative dispute resolution?

Abstract
This briefing paper tries to explore why mediation is not used more often as a means of dispute resolution. It identifies a number of reasons why mediation is not resorted to more frequently and presents proposals on how legislation could respond to these obstacles. The author wishes to highlight that, ideally, removing these obstacles will lead to an even less frequent use of mediation.
Why is mediation not used more often as a means of alternative dispute resolution?

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EXECUTIVE SUMMARY

1. Purpose of this paper

This briefing paper wants to explore the reasons why mediation is not used more often and tries to find answers and solutions for this issue.

2. Clarification of the issue at stake and angle from which answers are looked for

2.1. On what is the assumption based that mediation is insufficiently relied on?

The author of this paper is not aware on which information the assumption underlying this question is based.

2.2. Brief overview of the legal situation in Austria

Some ten years ago, the Act on Civil-Law Mediation (Zivilrechts-Mediationsgesetz) was enacted in Austria. It created ‘registered mediators’ and defined their qualifications profile as well as their rights and duties.

2.3. On my perspective as a practitioner

As a practicing notary, I apply the knowledge and techniques acquired in the course of my training as a mediator in my day-to-day work.

3. What are the obstacles preventing a stronger use of mediation?

3.1. Financial support for, or costs of, mediation

3.1.1. Financial support for mediation

Financial support for persons seeking mediation raises demand for mediation.

3.1.2. Financial costs of written mediation agreements

The charging of public fees for written mediation agreements as out-of-court settlements increases the costs of mediation in an unjustified manner or leads to legal uncertainty.

3.1.3. Insufficient information on mediation

3.1.3.1. Advertising mediation

Advertising for mediation by referring to its low cost, especially as against high legal costs, is a doubtful line of reasoning. Mediation and legal counseling should be complementary, both a legal counsel and a mediator should be worth their pay.

3.1.3.2. Information provided by a court

Judges who are familiar with the possibilities of mediation will inform the litigant parties about the opportunities of mediation with conviction and in a convincing manner.

3.2. Avoidance of conflicts by pre-mediation legal counselling

3.2.1. Notaries
3.2.1.1. Drafting of contracts

Notaries who are familiar with mediation will be particularly attentive to the future viability of legal and economic relations between the parties when drafting a contract.

3.2.1.2. Notaries as court commissioners in probate proceedings

Seven years ago, the statutory provisions on probate in Austria were amended and introduced an obligation for notaries to bring about a settlement in case of a conflict between heirs, or between heirs and creditors. Notaries who have undergone mediator training are better positioned to reach such a settlement.

3.2.2. Lawyers

Lawyers who seek to avert disputes in order to protect their clients legally and economically, act in the very own interest of their clients. This presupposes high legal competence and mediation training.

3.4.3. Mandatory minimum training in mediation

As a prerequisite for accessing their profession, notaries and lawyers should undergo basic training in mediation.

4. Language

Language and thinking are interrelated.

4.1. Language of EU institutions in the context of mediation

The language used by the EU institutions in the context of mediation should not be legal jargon. It should be unexpected and kindle curiosity in mediation.

4.2. Communication between persons involved in a dispute

The likelihood of conflicts being solved rises with the degree of respect and appreciation in communication. This requires a proper general attitude which should be learnt in the early years. Ethics and communication must be taught early on at school.

5. Rule of law

5.1. Mediation as a complementary conflict-resolution model when the rule of law is well developed

Incessant reference to tedious and costly court proceedings is a poor testimony for a state that is governed by the rule of law. Using mediation as a stop gap is a sign of weakness.

5.2. Creation of a referral context that is laid down in law

In pending proceedings courts should have the possibility not only to refer to mediation, but to rely more heavily on mediation in consultation and with the agreement of the parties. How a dispute is referred to mediation and which mediator is appointed must be laid down in law.

5.2.1. Neighbourhood disputes
In the opinion of the author, the current dispute resolution model has not proven successful.

5.2.2. VMG – Association for Mediation of Pending Court Cases

Starting with a pilot project at the Vienna Commercial Court, a pool of mediators has been set up who must submit proof of special qualifications and to whom mediation cases can be referred.

5.2.3. Amendment of the Law on Children’s Rights

The amendment of the law on children’s rights is to give judges the possibility to oblige the parties to take part in a first mediation session in the interest of the child’s wellbeing. Mediator associations have called for a mandatory first briefing on mediation.

6. Who does not have (sufficient) interest in a well-functioning ‘mediation scene’?

6.1. Notaries

Notaries often see themselves as ‘born mediators’. Mediator training would change this belief and would enhance the quality of notarial work.

6.2. Lawyers

Mediators are sometimes called the ‘natural enemies’ of lawyers. Agreement should be reached on areas in which conflicts of interest exist, and areas where lawyers and mediators could complement one another. Many lawyers are also mediators. Lawyers are crucial for the success of the ‘mediation project’.

7. Setting up a (protected) profession in its own right

7.1. Mediator - A profession in its own right

The debate on the establishment of a separate profession is still on-going.

7.2. A licence for exercising the profession

In the interest of quality assurance and consumer protection, the obligation to undergo training and further education and certification of mediators is an idea that merits consideration.

8. The social dimension of mediation: A vision

Mediation has a social dimension. It has the potential to contribute greatly to social peace. What is required is a defined framework which must be created at the political level.
Why is mediation not used more often as a means of alternative dispute resolution?

PREAMBLE

Aurea prima sata est aetas, quae vindice nullo,
sponte sua, sine lege fidem rectumque colebat.
poea metusque aberant nec verba minantia fixo
aere legebantur nec supplex turba timebat
iudicis ora sui, sed erant sine vindice tuti.

The golden age was born first, which, with no redresser of wrong, cultivated faith and rectitude by its own free will, without law. Punishment and fear were absent, nor were threatening words read on brass fixed up, nor did the suppliant multitude fear the looks of its judge, but they were safe without such redresser. (Ovid, 12 seq.)

In the first book of the Metamorphoses, which dates back some two thousand years, the Roman writer Ovid described an ideal-type situation in which the first humans lived. He pictured not so much a reality, but a vision, a visionary, idealist perspective of human coexistence. While such a perspective may seem gratifying to mediators at first glance, one will have to admit that their role would be utterly superfluous in such an ideal world. I will start out my presentation of the subject assigned to me with this statement and try to retain a double focus: will the efforts to promote a more frequent use of mediation not lead to a situation where mediation as such must of necessity become superfluous over the course of time?

1. OBJECTIVE OF THIS PAPER

This paper wants to explore the question why people involved in a conflict do not resort to mediation more often. It is a fact that mediation has become better known in recent years and is seen and recognized as an enrichment to existing dispute resolution models. In the assessment of the European institutions this is not happening to the anticipated and desired extent. What, then, are the obstacles and how can they be overcome?
2. CLARIFICATION OF THE ISSUE AT STAKE AND THE ANGLE FROM WHICH ANSWERS ARE LOOKED FOR

I was invited to this conference in my capacity as president of the (Austrian) Society for Mediation in the Notariat and asked to address the topic of mediation in civil and commercial matters from the perspective of a practitioner. In particular, I was asked to share my experiences as a mediator and take a closer look at the reasons why mediation is not being resorted to more often in the European Union as an alternative to civil and commercial litigation.

2.1. On what is the assumption based that mediation is underused?

The question which has been put to me suggests that the number of cases where mediation is resorted to has not yet reached a desired level. I am uncertain on which premises this assumption rests, which is why I can neither share nor refute it. In the course of this paper I will be assuming, without evidence to corroborate this assumption, that mediation, while serving as an alternative means of dispute resolution in civil and commercial litigation, is still underused in the eyes of the European Parliament. A number of reasons come into play here.

2.2. Brief overview of the legal situation in Austria

In Austria, the Civil Law Mediation Act (Zivilrechts-Mediations-Gesetz, ZivMediatG, promulgated on 6 June 2003) was enacted in 2004. Specifically, it governs the requirements candidates must meet for being included on the list of mediators kept with the Federal Ministry of Justice. The extent of training units to be covered is governed by a separate ordinance. As regards mediators, the law spells out the following: requirements for inclusion on the list of registered mediators (e.g. minimum age of 28 years, mandatory third-party liability insurance), professional qualification, further education and training, and conditions for strike-off from the list.

The above law also set up an advisory board with the Federal Ministry of Justice, which advises the Federal Minister of Justice on mediation matters. The advisory board elects from among its members a committee which in turn assists the Federal Minister of Justice in decision-making on mediation issues by submitting expert opinions.

2.3. My vantage point as a practitioner

I was born in 1960; I am married and have 2 sons. My wife is Italian. I was admitted to the profession of a notary in February 1987, since January 2003 I have been practicing in Vienna as a notary in my own office. I have been a court certified and sworn translator for Italian registered with the Vienna Regional Court for Civil Matters since 1989. In 2005, I was admitted to the list of registered mediators that is maintained by the Federal Ministry of Justice.

For a number of years, I have served as president of the (Austrian) Society for Mediation in the Notariat and as a member of the advisory board referred to under 2.2. that is set up with the Federal Ministry of Justice, as well as of the committee that is elected by said advisory board. When the Directive 2008/250 EC of the European Parliament and the Council of 21/05/2008 on certain aspects of mediation in civil and commercial matters was transposed into Austrian law, I was appointed by the Austrian Chamber of Civil-Law Notaries to serve on a commission set up with the Federal Ministry of Justice to prepare the implementation of the directive in law.
Why is mediation not used more often as a means of alternative dispute resolution?

The Vienna district in which I run my notary office (Wien-Meidling) has approx. 90,000 inhabitants, of which more than 20% are of non-Austrian background, coming mostly from the former Yugoslavia and Turkey.

With what I have described so far I am highlighting a situation that is shared by many colleagues who are trained mediators. As good as no one can make a living exclusively from mediation work. Many colleagues, however, manage to combine mediation work with their original profession, and many put the tools they have acquired in the course of mediator training and continuous education to good use in their first-hand profession. I consider myself a mediator who falls in this category.

Sometimes, I am asked how much mediation work I do, and my usual answer is evasive, either none at all, or five to ten cases a day.

I am not alien to conflicts, either when I am involved on a personal level, or in the exercise of my original profession; and there is always a linguistic and transcultural reference context. I hope that I have been able to sketch the angle from which I will be addressing the subject at hand.
3. WHAT ARE THE REASONS PREVENTING A MORE FREQUENT USE OF MEDIATION

We are constantly faced with having to take decisions. Not always can you have your cake and eat it, rather it will be an either/or choice. Decisions are taken from the angle of benefit. If the choice is between Scylla and Charybdis, we generally tend to opt for the lesser evil. If there is a choice between several favourable options, the – subjectively – more advantageous one will be chosen. But then, what do we mean by advantage? Do we not frequently, and very unreflectedly, simply mean the augmentation of financial wealth, or the realisation of financial savings? In other words: everything which serves to “... increase prosperity [...] quantifiable in the category of possession of desired combinations of goods ..." (Kallhoff, 315) is advantageous. Let us not underrate the role of money, but does it really rule the world?

3.1. Financial support for, or costs of, mediation

3.1.1. Financial support for mediation

Experience to date in Austria has shown that mediation is used specifically where the parties involved in a dispute are granted financial support. This is true in particular in the area of family mediation. As far as I am aware, financial support for mediation or free-of-charge mediation services are available also in other EU countries. (Green Paper, p. 7)

It goes without saying that financial support is conducive to mediation being resorted to.

3.1.2. Charges on written mediation agreements

According to sec 33 para 20 of the Austrian Fees Act (Gebühren gesetz, GebG), the written execution of the outcome of mediation together with the signature of the parties to a dispute qualifies as an out-of-court settlement and is subject to a fee of 1% of the applicable assessment base. As a consequence, written outcomes of mediation either remain shelved, with the risk of impending fiscal criminal proceedings, or the parties renounce putting down the results of mediation in writing altogether. In the latter case, the intended legal certainty cannot be achieved to the desired extent, given that Austrian civil law does not impose formal requirements for agreements. Government authorities, in particular the courts, then end up being seized, given the ambiguity of agreements reached. And this is, after all, exactly what mediation is to prevent in the first place.

In this context I refer to para (85) of the Green Paper on alternative dispute resolution in civil and commercial law which stated on agreements arising from ADR mechanisms: “All these arrangements are in fact ‘transactions’ whatever name is applied to them.”

I am not aware of how much revenue is generated in Austria from what is called the ‘settlement fee’. Sanctioning a written outcome of mediation by imposing a fee is crassly counterproductive (along these lines cf. also Wolff, 511). The law should provide for an exemption from this fee, at least for those settlements which are concluded in the wake of mediation proceedings and in which a provenly qualified mediator is involved (in Austria this would cover the mediators registered in the list of mediators of the Federal Ministry of Justice). Deleting this statutory provision entirely would presumably be even preferable.
If mediation is to promote better citizen access to legal certainty, the fees imposed on mediation settlements under the Austrian Fees Act can be considered an obstacle to mediation and should be removed.

3.1.3. Lack of information on mediation

3.1.3.1. Advertising mediation

Like any other product or service, mediation can be advertised, from the office sign that attracts attention, to folders disseminated in courts and in notarial offices, to newspaper ads and telephone hotlines that provide information. These forms of advertising are non-controversial. I do however have reservations against excessive reference to the fact that information is free of charge, and against the sheer omnipresent argument that mediation is considerably less expensive than court proceedings, and especially much less costly than legal counsel. A good legal counsel, perhaps one with mediator training, is always a sound investment. And a good mediator comes at a price too, without factoring in the auxiliary costs of mediation proceedings such as expert opinions.

While the cost argument undeniably has some merit, it should be used with care.

3.1.3.2. Information provided by the court

Judges can suggest mediation in civil litigation. They will do so if they consider mediation as promising in the pending case. This however presupposes that judges are familiar with the potential of mediation and can correctly assess the opportunities it offers.

It seems expedient for judges to undergo basic mediation training.

3.2. Avoidance of conflicts by pre-mediation legal counselling

3.2.1. Notaries

3.2.1.1. Drafting of contracts

As a notary it is my duty to safeguard the legal and economic interests of all parties to an agreement in a balanced manner. This professional duty is non-negotiable and will be all the easier to deliver the more I have dealt with dispute resolution in complementary professional further education. The forward-looking approach of mediation virtually forces one to address future conflict scenarios when drafting a contract and will be a powerful quality argument for averting future conflicts. Yet statistically this is difficult to prove.

3.2.1.2. Notaries as court commissioners in probate proceedings

In 2005, sections 160 and 174 were added to the Austrian Act on Non-Contentious Court Proceedings (Ausserstreitgesetz, AußSrG) according to which notaries, acting as court commissioners, must try to bring about a settlement or agreement in probate cases in the case of conflicts between the heirs, or between heirs and creditors of the deceased. In this sphere, techniques which can be acquired in mediator training have proven most useful.

3.2.2. Lawyers

It is the first and foremost duty of a lawyer to protect and represent client interests. Whenever the facts or the legal situation are unclear, information provided to the client on the possibility of mediation may have a conflict-averting effect. I am aware that this
carries some risks for lawyers. One cannot exclude that criticism might be voiced in respect of a situation having being assessed wrongly, and of a breach of duty having been committed vis–à–vis clients who will then have themselves represented by a lawyer who is more adverse to mediation. Still I am convinced that experienced lawyers who act as mediators can significantly contribute to averting conflicts.

3.2.3. Mandatory minimum training in mediation

As outlined under 3.2.1.1., 3.2.1.2. and 3.2.2. above, mediation training empowers lawyers who frequently have to deal with conflicts in their professional work to act in a reconciliatory manner and avert conflicts, or, to put it briefly, to mediate.

Notaries and lawyers should have undergone mandatory minimum training in mediation as a prerequisite for accessing their professions.
4. LANGUAGE

When enacting legislation, the EU institutions use written language. Persons involved in a dispute also use written language, but much more often they will resort to spoken language. Given that there is a link between language and reasoning, “because reasoning is a largely linguistic function” (Zuberbühler, 51 et seq.), one cannot overrate the importance of the ability to communicate, either of institutions or of individuals.

4.1. The language of EU institutions in the context of mediation

Reading the relevant legal acts which are published in the Official Journal of the European Communities, from the Commission Recommendation of 30/03/1998 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes to Directive 2008/52/EC of the European Parliament and the Council of 21/05/2008 on certain aspects of mediation in civil and commercial matters, or the Green Paper on alternative dispute resolution in civil and commercial law of 19/04/2002, one wonders what interesting and positively surprising matters a layperson who is not trained in the law may discover and comprehend?

These legal acts are primarily addressed to the legislative institutions of the member states; however, one can hardly expect that the national implementing acts will use language apt to attract more attention. Too many law experts are spoiling the broth!

Time and again we read about the ‘better functioning of the internal market’, about making ‘better use of the internal market’, of ‘easier access to justice’. We should remain aware that all this boils down to a means to an end, but that it remains unclear just what exactly that end is. This can be illustrated by the widely popular slogan ‘It's the economy, stupid!’ which has been used to success in the U.S. electoral campaign. The economy is the means, but what is the end? In my opinion, the end can best be described by ‘quality of living’. This notion certainly holds a seductive attraction. If the legislative institutions were to engage in a discourse with psychologists, sociologists, and philosophers, and consider the outcome of such discourse in further legislation, relying on this notion could serve the cause of mediation without the risk of getting caught in platitudes or empty phrases.

Mediation does not only place demands on mediators, it also presupposes and promotes competencies of the parties in dispute of which they are generally not aware in the outset, and which can be brought to the fore with the help of a mediator.

If, by using a new language which catches people unawares, we manage to raise awareness in individuals that they themselves have the means and abilities to significantly impact and design their own quality of living, we will – hopefully – be able to kindle positive curiosity in mediation and more interest in this dispute resolution mechanism.

4.2. Communication between the parties in a dispute

As briefly stated, people have the skills which allow them to solve conflicts themselves. Their ability to actually use those skills in a given situation will have an impact on whether they can do so without support from a third party (in Austria, people tend to say “we can make do without a judge”), whether they require third-party guidance, e.g. that of a mediator, or whether the dispute is settled in court. The way young people are shaped during their formative years will often play a role. The success of mediation rests on an appreciative attitude vis-à-vis others in general, and on a communication style...
which keeps the dialogue alive even if one disagrees with the counterpart. These are the inputs required from the parties to a dispute. The sooner people are held to deal with ethical issues and to develop awareness for successful communication, all while considering different cultural and/or linguistic backgrounds, the better will they be able to settle conflicts in later life. The fundamentals of ethics and of communication should be taught at school as early as possible. In Austria, we are currently discussing how ethics instruction can be fitted into the curriculum. It remains to be seen whether this can be done successfully without pitching ethics instruction against religious instruction. (Friedrich/Helmberger, 4 et seq.; Mitlöhner, 5.)

Young people should be made familiar as early as possible with the advantages of an appreciative attitude vis-à-vis others and discover early on what it means to communicate successfully with others (cf also Pieper, 143 et seq.), and if it were simply to acquire the ability to listen. This will promote the use of mediation.
5. RULE OF LAW

5.1. Mediation as a complementary conflict resolution model where the rule of law is well developed

Easier access to justice is an argument often used in the context of mediation. Reference to costly and time-consuming court proceedings (e.g. Communication from the Commission of 04/04/2001, introduction) or to the costs and time spent on litigation (e.g. Recommendation of the Commission of 4 April 2001, (8)) makes the rule of law seem weak and dysfunctional. This does not serve the cause of mediation. Mediation should be offered as an alternative to formal proceedings in court and integrated in the internal system of legal safeguards in a state. Mediation ought to enrich the means available to a state that is governed by the rule of law in delivering its tasks, in particular in maintaining social peace. It must not evolve as a retreat from the rule of law nor derive its justification from its weaknesses. This would open the way for mediation being abused, e.g. as regards the provisions on the suspension of statute limitation.

It is, I believe, in the interest of mediation that the national judiciary can build on a functional system of legal protection that is endowed with sufficient funding and staff.

5.2. Setting up a statutory referral context

Voluntariness is one of the fundamental principles of mediation. Imposing mediation by law is widely rejected for good reason. However, there is no argument against defining a distinct referral context in law and supporting the use of mediation in given cases. I will explain this by three examples.

5.2.1. Neighbourhood disputes

Austrian law introduced a mandatory attempt at reconciliation as a prerequisite for filing actions in the area of neighbourhood disputes (Amendment to the Civil Code 2004, Zivilrechts-Änderungsgesetz 2004, ZivRÄG 2004). As member of the reconciliation board appointed by the Austrian Chamber of Civil–Law Notaries my experience has not been encouraging. In every case referred to me, I had to issue a confirmation on the failure of the reconciliation attempt. I am not aware of any statistics on the outcome of reconciliation attempts, nor of any scientific study. Moreover, there is no definition of what reconciliation proceedings actually mean.

5.2.2. VMG – Association for Mediation of Pending Court Cases

The Austrian Association for Mediation of Pending Court Cases emerged from a pilot project that was launched at the Vienna Commercial Court in 2008. Its promoters were the Society for Business Mediation, the Forum for Business Mediation, and the Society for Mediation in the Notariat. One of the purposes of this association is to “promote mediation of disputes at the point of being brought to court, especially disputes of an economic nature having an economic impact.” (Article 1 of the Articles, retrievable on the Association’s website). This system is currently being practiced at seven other courts, and others have already shown interest. From 2009 to 2012 (data as of 30/10/2012), 28 cases were referred to mediation with the consent of the parties in dispute. 14 mediation cases ended in an agreement, 11 were discontinued and referred back to court, 3 cases are still pending. 22 judges at the Vienna Commercial Court were able to gather experience in mediation. These figures and the commitment of the mediators and judges involved give reason for optimism. The referral context outlined earlier is to be laid down in law. Based on the current statutory provisions governing certified court experts and
their appointment by courts, a legal framework for selecting and mandating mediators by courts is to be created.

Once a bridge between courts and mediation has been erected under the umbrella of the rule of law, this will be a milestone for mediation. Support on the part of the judicial administration is critical here.

5.2.3. Amendment of the Law on Children’s Rights

On 10 October 2012, the Austrian Federal Ministry of Justice sent a draft bill amending the Act on Non-Contentious Court Proceedings (Aussertreitgesetz, AußStrG, retrievable on the website of the Federal Ministry of Justice) to various bodies, including the Austrian Federation for Mediation (ÖBM). A new clause is to be introduced in existing legislation (sec 107 Aussertreitgesetz) which will be most relevant for mediation. Accordingly, the court will rely on bodies composed of psychologists and social workers in what is called ‘family court aid’ to support it in ascertaining the facts. Furthermore it will be able, as one possible measure, to order ‘participation in a first session providing information on mediation or reconciliation procedures’. A joint comment to this draft bill by the Austrian Network for Mediation (ÖNM) and the Austrian Federation for Mediation (ÖBM), the two leading mediation associations in Austria, welcomed the legal embedding of mediation, but recommended ‘mandatory participation in at least such a first information session’. It remains to be seen whether this comment will be taken up by parliament. It must be clarified how and by whom a ‘mandatory first session’ is to be held and what the financial modalities will be.

It appears most meaningful to enable judges by law not only to informally point out to the possibility of mediation, but to actually involve mediation in the proceedings by giving instructions on mediation – if only by furnishing competent professional advice on the opportunities which exist. This may have a model effect beyond the scope of custody and family matters.
6. WHO DOES NOT HAVE (SUFFICIENT) INTEREST IN A WELL–FUNCTIONING ‘MEDIATION SCENE’?

6.1. Notaries

The significant role played by notaries in the non–contentious, cartulary and dispute–
averting administration of justice has already been outlined. And yet, many notaries
apparently have little interest in mediation. Quite a few consider themselves to be ‘born
mediators’, based on their many years of professional practice, whilst not being aware
what mediation actually is. However, the opportunities and advantages which mediation
holds for the work of notaries are clearly evident.

To reiterate: notaries should be required to undergo basic mediation training on a
mandatory basis.

6.2. Lawyers

The attitude of lawyers' vis–à–vis mediation is somewhat ambiguous, often rejecting
mediation. In spite of the advantages which mediation holds, as outlined, mediation
insiders occasionally refer to mediators as the ‘natural enemies’ of lawyers. This may be
fuelled by lawyers’ concerns that the mediator could substitute the lawyer in dispute
resolution. Efforts to present mediators as not being rivals who compete against lawyers
apparently have not been successful to date (Colombo, 14). The Vienna Bar, for instance,
refused to take part in the pilot project at the Vienna Commercial Court mentioned
earlier. I fully understand that the interests of many lawyers are not congruent with
those of a sizeable number member of this profession who are (prominently) active in
the field of mediation.

It is not for me to bestow advice on the profession of lawyers or their professional
representation. I am, however, convinced that talks between mediator associations and
the bar could bring about something mediation is striving for: a win–win situation.
7. SETTING UP A (PROTECTED) PROFESSION IN ITS OWN RIGHT

7.1. Mediator – A profession in its own right?

Colleagues have frequently demanded that mediation should speak in one voice and discussed the possibility of setting up a separate profession endowed with self-governance and a professional representation of its own. This seems to be a problematic and delicate endeavour. More often than not we note that mediation is at the interface of conflicting interests of different professions and that communication simply fails even between mediators. We must wait and see what the further developments will be. Presenting oneself as a homogenous group to the outside world has obvious advantages (‘lobbying’ being the catchword here). For many, however, mediation stands for diversity, a diversity of methods, a diversity of original professions, and diversity of views. This diversity must not be lost. If mediators want to gain the ear of the public at large and of the legislative bodies, they must act in keeping with their professional self-understanding and apply their major work tool: a mediating attitude.

7.2. A licence for exercising the profession?

In Austria, the profession of a mediator is not protected by law. Any person may work as and call himself a mediator, irrespective of the criteria set out in Austrian law for admission to the list of qualified mediators kept with the Austrian Federal Ministry of Justice.

In the interest of assuring quality (minimum training), safeguarding confidentiality and secrecy (privilege of refusing testimony in court), and protecting the parties in mediation in the event of errors or mistakes committed by a mediator by imposing mandatory liability insurance on mediators, the introduction of a licensing system to practice mediation is an idea that seems to merit further consideration.
8. THE SOCIAL DIMENSION OF MEDIATION: A VISION

It is undisputed that mediation has a social dimension (*perspektive mediation 3/12*). If the parties to a conflict do not accept mediation in a dispute as anticipated, the reasons outlined in this paper will weigh more or less strongly.

The success of mediation always depends on the competences people have in general, which need to be called upon and enhanced. This is an important task to be dealt with at the political level. Currently, uncertainty prevails: voluntariness (based on free will), self-accountability and self-determination are the prerequisites which the parties must contribute to mediation.

I leave it to your judgement whether these qualities can be found with the majority of European citizens. The ideal-type situation illustrated at the outset by Ovid may be a utopian vision. And yet, a unified Europe also used to be a vision which has now become a reality that is worth fighting for.

My paper is directed mainly at law practitioners and experts, and this is why I would like to end with a quote by the eminent Roman jurist Celsus which has accompanied me since my early studies to this very day and has impacted my work until now:

"*Scire leges non hoc est, verba earum tenere,*

*sed vim ac potestatem*"

(Knowing the laws does not mean knowing their words, but their intent and purpose)
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Austrian laws (as amended)


Literature


Friedrich, Otto; Helmberger, Doris: “Kein Kulturkampf mit den Religionen“, in: Die Furche 31/10/2012, 4 et seq.


Mitlöchner, Rudolf: "Entweltlichung, falsch verstanden", in: Die Furche 31/10/2012, 5.


perspektive mediation 3/2012, Verlag Österreich 2012


Why is mediation not used more often as a means of alternative dispute resolution?


**Links**

[www.justiz.gv.at](http://www.justiz.gv.at) (Austrian Federal Ministry of Justice)

[www.netzwerk-mediation.at](http://www.netzwerk-mediation.at) (Austrian Mediation Network)

[www.oebm.at](http://www.oebm.at) (Austrian Federation for Mediation)

[www.vmg.co.at](http://www.vmg.co.at) (Association for Mediation of Pending Court Cases)