

HOW (NOT) TO REGULATE MEDIATION THE EFFECTS OF THE STRICT HUNGARIAN PROVISIONS ON ONLINE MEDIATION

by

GERGELY L. SZÓKE*

Since the mediation is a more or less informal procedure, the first question is whether (legal) regulation of mediation is needed at all, or the framework of the civil law is suitable for mediation. The second issue is the subject matter of the regulation: which elements (principles, the process of the mediation, the legal effect of the settlement agreement, etc.) of the mediation procedure should be regulated. The third question is the flexibility of regulation. Should the law allow the parties to depart from the provisions by using special contract terms or the law should prescribe detailed and strict rules for the parties? Finally, I'm going to analyse the provisions of the Hungarian Mediation Act, and compare it with some other mediation acts and recommendations concerning mediation. Finally, I'm going to show the (negative) effect of the strict and detailed regulation on online mediation.

KEYWORDS

Online dispute resolution, regulation of mediation, Hungarian Mediation Act

INTRODUCTION [1]

In the past few years we studied the Hungarian Mediation Act¹ from a special viewpoint: whether it is possible or not to conduct online mediation under the HMA. We made a conclusion, that “utilisation of a mixture of online

* szoke@ajk.pte.hu

¹ Act LV of 2002 on Mediation, (hereafter HMA). The English translation of the Act is widely accessible, but is not official text. In this essay, if I write about the HMA I shall use the terminology of the Act, which may, in some cases, seems strange.

and offline technologies may be possible, but a solely online procedure is excluded. The parties must meet together in person on at least two occasions” and some steps “may be undertaken by using advanced electronic signatures or by using normal signatures and paper based documents”.²

On the ground of these conclusions some studies were started to answer to more general question: How mediation should be regulated to avoid that the regulation rather prevents the development of different types of mediation, than promotes it?

After a brief presentation of the basic definitions and features concerning (online) mediation, we’re going to study whether (legal) regulation of mediation is needed at all, or not, and, if the answer is yes, which elements (principles, the process of the mediation, the legal effect of the settlement agreement, etc.) of the mediation procedure should be regulated. The next important issue is the flexibility of regulation: Should the law allow the parties to depart from the provisions by using special contract terms or the law should prescribe detailed and strict rules for the parties? Finally, I’m going to analyse the relevant provisions of the Hungarian Mediation Act and compare it with some other acts and documents on mediation to show the negative effect of inflexible regulation.

MEDIATION AND ONLINE MEDIATION [2]

DEFINITION AND TYPES OF MEDIATION [2.1]

Mediation is a procedure, where two (or more) parties request a third party (or parties), to assist them to reach a voluntary agreement on the settlement of their dispute.³ Mediation is regarded as an alternative dispute resolution; it may offer an alternative way to resolve a dispute, instead of starting litigation. The settlement agreement is a contract, so it doesn’t have, of course, res judicata effect. The participation in a mediation process doesn’t hinder the parties to turn to court, even if the mediation was successful.

There are many different types of mediation all around the world. First, the procedures can be differentiated according to the role of the third party.

² Szőke, G. L. 2006, ‘The Possibility of Online Mediation under the Hungarian Mediation Act – in comparison with a number of international, including European documents on mediation’, *Information and Communications Technology Law*, vol. 15, no. 2, p. 140.

³ Szőke, G. L. 2007, ‘The Possibility of Online Mediation under the Hungarian Mediation Act’, *Masaryk University Journal of Law and Technology*, vol. 1, no. 1, p. 130.

The role of the mediator can be very different, just from facilitating communication and negotiation (facilitative mediation) to making proposals (evaluative mediation). The mediator himself never decides the case, and so never imposes a solution.⁴

Second, a distinction can be done by the different types of disputes, so there is business mediation, neighbor-to-neighbor mediation, consumer mediation, landlord-tenant mediation, employee-employer mediation, victim-offender mediation, mediation in family issues, etc. The essay concentrates only on mediation in civil and commercial cases.

Finally, according to the role of ICT during the mediation process, there are offline procedures, online procedures, and „mixed“ procedures.⁵

THE DEFINITION OF ONLINE MEDIATION [2.2]

Firstly we should explain the meaning of “online dispute resolution”. According to Julia Hörnle, online dispute resolution is a dispute resolution process, which “applies information technology and distance communication to the traditional ADR processes such as conciliation, mediation and arbitration (including the various mutants thereof). Thus ODR is essentially an offspring of ADR”.⁶

Online dispute resolution in practice means more than merely transferring the means of communication to an online environment. ODR schemes may use artificial intelligence applications,⁷ search engines and other software in order to be more effective, and one example may be automated negotiation,⁸ which is also usable as one element in online mediation. It is, in

⁴ Schultz, T., Kaufmann-Kohler, G., Langer, D. & Bonnet, V. 2001, *Online Dispute Resolution: The State of the Art and Issues*, University of Geneva, Geneva, p. 7, retrieved October 8, 2004, from <http://www.online-adr.org/reports/TheBlueBook-2001.pdf>, and Solovay, N. & Reed, C.K. 2004, *The Internet and Dispute Resolution, Untangling the Web*, Law Journal Press, New York, pp. 1-8-1-9

⁵ Szóke, G. L. 2005, ‘Online vitarendezés (1)’, *Infokommunikáció és Jog*, vol. 2, no. 2, pp. 41-42.

⁶ Hörnle, J. 2003, *Online Dispute Resolution – More Than The Emperor's New Clothes*, retrieved November 25, 2004 from <http://www.odr.info/unece2003/pdf/Hornle.pdf>

⁷ About the role of artificial intelligence in ODR see more: Lodder, A. R. & Thiessen, E. M. 2003, *The Role of Artificial Intelligence in Online Dispute Resolution*, retrieved November 25, 2005, from http://www.odr.info/unece2003/pdf/lodder_thiessen.pdf

⁸ As Melissa Conley Tyler and Di Bretherton summarises the procedure: “automated negotiation includes processes such as “blind bidding” where parties submit confidential settlement offers for a number of rounds. A computer program automatically notifies them of a settlement at the arithmetic mean once the amounts are sufficiently close” Conley Tyler, M. & Bretherton, D. 2003, *Seventy-six and Counting: An Analysis of ODR Sites*, retrieved December 10, 2004, from <http://www.odr.info/unece2003/pdf/Tyler.pdf>

fact, quite common that online and offline technologies are used jointly within one procedure. Using this particular definition of ODR, online mediation can be defined as “the mediation process, which applies partly or wholly, information technology and distance communication”. So, on the one hand online mediation can be regarded as a special type of mediation, and on the other hand it is a form of online dispute resolution.⁹

Online mediation is conducted mostly over the Internet using electronic communication. It globally mirrors the offline world concerning the strategies, styles and services, but there is an important difference: the conduct of online proceedings differs from traditional mediation, as communication is mostly textual and asynchronous.¹⁰

FEATURES OF ONLINE MEDIATION (ADVANTAGES AND DISADVANTAGES)¹¹ [2.3]

Online mediation has got more or less the same advantages and disadvantages, than traditional mediation.

Mediation is generally a fast and cheap procedure, but due to online communication it may be even faster and therefore cheaper. It may be much cheaper than traditional procedures, in cases where the parties are geographically far apart. The parties do not need to travel to meet each other, and don't need accommodation.¹²

Confidentiality is also an important feature of (online) mediation, which motivates the companies to participate in out-of-court procedures. Another advantage, that (online) mediation doesn't enhance the conflict, like usually court-based procedures do, but conciles the parties. This is very important both in family and in business issues, because the parties may remain partners after the successful settlement of their dispute. Last but not least online mediation is very comfortable way of resolving disputes.

⁹ Szőke, G. L. 2006, 'The Possibility of Online Mediation under the Hungarian Mediation Act – in comparison with a number of international, including European documents on mediation', *Information and Communications Technology Law*, vol. 15. no. 2. p. 133.

¹⁰ Kaufmann-Kohler, G. & Schultz, T. 2004, *Online Dispute Resolution: Challenges for Contemporary Justice*, Kluwer Law International, The Hague

¹¹ This chapter is based on Szőke, G. L. 2005, 'Online vitarendezés (1)', *Infokommunikáció és Jog*, vol. 2, no. 2, pp. 42-44.

¹² About the features of different types of online dispute resolution see more: Hörnle, J. 2002, 'Online Dispute Resolution in Business to Consumer E-Commerce Transactions', *Journal of Information, Law & Technology* vol. 7, no. 2. retrieved January 21, 2008, from http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2002_2/hornle

The participation in a mediation procedure is basically voluntary. On one hand this may be an advantage: once the parties decided to participate, they are probably willing to resolve the dispute. On the other hand it may cause difficulties on behalf of one disputant: if the other party doesn't want to participate in mediation, he has to turn to court.

A disadvantage of online procedures, that the signs of non-verbal communication, which is very important in traditional mediation procedures, are lost. Another problem may be – in cross-border disputes – the different language spoken by the parties,¹³ but this is not an (online) mediation specific problem, but it arises in all cross-border dispute-resolution process, including litigation.

REGULATION ISSUES OF (ONLINE) MEDIATION [3] DOES MEDIATION NEED ANY SPECIAL REGULATION AT ALL? [3.1]

Since the mediation is a more or less informal procedure, the participation is voluntary, and the result of the procedure is an agreement of the participants, the first question to be asked is whether special (legal) regulation of mediation is needed at all, or the framework of the civil law and civil procedure law is suitable for mediation. If we consider the definition of “mediation”, it is clear, that there is no legal prohibition against disputing parties turning to a third party requesting assistance in resolving their dispute. If the parties reach an agreement, they may draw up a contract as a settlement of the dispute. Such procedures generally fall within the scope of civil law. Furthermore, a self-regulatory mechanism could elaborate (as a code of conduct) exact and detailed provisions for mediation, which should then be observed by the mediator(s).

There is a wide range of views among mediators and lawyers about the necessity of legal regulation of mediation.

The most important argument against the necessity of regulation can be summarized in three points. First, because of the informality and voluntary participation there is no necessity to regulate mediation, and regulation would “jeopardize the flexibility of the instrument and might even slow

¹³ Most of the ODR service providers offer only English language.

down its development.”¹⁴ Second, some practical experience and analysis is needed before regulation. Third, the market forces will dictate the parties to only refer their cases to reputable and skilled mediators.¹⁵

There are many arguments which emphasize the importance of regulation. The most important function of the law should be to ensure the effectiveness of the fundamental principles, like impartiality of mediator, confidentiality and fairness. We can agree with the argument, which can be found in the comments of the Uniform Mediation Act¹⁶ of the USA, that “law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of the mediation process are met”.

The quality of mediation (requirements concerning the conditions and skills of a mediator) also need to be covered by law. The expertise of the mediator, of course, helps to fulfil the criteria of fair and effective procedures, and an incompetent mediator may lead to a general mistrust in mediation procedures.¹⁷ The market forces won't ensure quality: the parties may make their choice on the basis of the mediator fees instead of skills and reputation.¹⁸

One further function of legal regulation may be the protection of the weaker party, which may arise in consumer disputes or in employment disputes.¹⁹

Another important issue is the enforcement of the settlement agreement. Although the enforcement of the settlement agreement is ensured under

¹⁴ This opinion of Michael J.J. van de Honert, Ministry of Justice, Netherlands was expressed in a speech on mediation, van de Honert, M. 2006, Start Expert Meeting Mediation, retrieved February 10, 2008, from <http://english.justitie.nl/currenttopics/speeches/archives2006/Start-expert-Meeting-Mediation.aspx?cp=35&cs=1586>

¹⁵ Clark, B. & Mays, R. 1996, Regulating ADR - The Scottish Experience, School of Public Administration and Law, The Robert Gordon University, Aberdeen, retrieved February 10, 2008, from <http://webjcli.ncl.ac.uk/1996/issue5/rtf/clark5.rtf>

¹⁶ See more about this: Uniform Mediation Act of the United States, 2001. (Uniform Mediation Act), retrieved December 10, 2006, from <http://www.law.upenn.edu/bll/ulc/mediat/uma2001.pdf>

¹⁷ Szőke, G. L. 2006, The Possibility of Online Mediation under the Hungarian Mediation Act - in comparison with a number of international, including European documents on mediation, Information and Communications Technology Law, vol. 15. no. 2. p. 131.

¹⁸ Clark, B. & Mays, R. 1996, Regulating ADR - The Scottish Experience, School of Public Administration and Law, The Robert Gordon University, Aberdeen, retrieved February 10, 2008, from <http://webjcli.ncl.ac.uk/1996/issue5/rtf/clark5.rtf>

¹⁹ ASA (The Advice Services Alliance) comments on the proposed EU directive on certain aspects of mediation in civil and commercial matters published in Brussels 22nd October 2004, retrieved February 10, 2008 from <http://www.asauk.org.uk/fileLibrary/pdf/euadrdirective.pdf>

civil law, but mediation law may attach special legal effects to the settlement agreement.

Finally, legal regulation may play role in fostering and “legitimising” the mediation procedure, and so regulation may be one of the means of promoting mediation. This was the most important purpose of the adoption of the Hungarian Mediation Act. As can be read in the Commentary to the Hungarian Mediation Act, “one of the most important purposes of enacting the mediation act was to make the mediation process better known”.²⁰

Consequently, in my opinion the regulation of mediation is important, mostly in countries, where mediation doesn’t have much tradition. But the regulation should adopt two principles from civil law: the autonomy of the parties (the parties should be allowed to exclude or vary the provisions) and the informality of agreements. In this case the flexibility of mediation may be maintained, and law may function rather as a guideline, than as a legal obligation.

If the flexibility is not ensured, than the parties may leave mediation regulation out of consideration, and conduct under civil law. This may cause confusion in countries, where mediation doesn’t have too much tradition. In my view, it’s desirable to conduct mediation under mediation legal framework.

Mediation under civil law	Mediation under „mediation law”
I. The effectiveness of fundamental principles may be ensured by a contract or code of conducts II. No (legally binding) special conditions for the mediator III. The settlement agreement is a „traditional contract” ⇒ Informal procedure, based on the autonomy of the parties	I. The effectiveness of fundamental principles may be ensured by law II. Special conditions for mediator can be prescribed III. Special legal effects may be attached to the settlement agreement ⇒ Informal procedure with some compulsory element

Mediation under civil law and under “mediation law”

²⁰ My own translation

WHICH ELEMENTS OF THE MEDIATION PROCESS SHOULD BE REGULATED? [3.2]

Thinking about the arguments to regulate mediation and studying some different acts and recommendations on mediation,²¹ it can be summarized, that the main regulation issues are the principles of mediation, the conditions to be a mediator, the mediation procedure itself, and the legal effects of the settlement agreement.

One of the principles of mediation is impartiality, which practically means, that the mediator shall conduct in an unbiased manner, and he shouldn't have a perceived or actual conflict of interest with one party. The principle of confidentiality is an important motivation factor to choose ADR systems. The purport of this principle, that the mediator has to handle all data and information obtained in a mediation process in strict confidentiality during and after the process, and it is restricted to give testimony or evidence regarding the documents and views expressed during mediation. The principle of transparency practically means the obligation to provide information to the parties about the procedure. Finally, we have to mention fairness, which has to guarantee the equal possibilities for the parties in a course of mediation, and ensure, that the parties can freely and easily submit any arguments, information or evidence relevant to their case.²²

Laws concerning mediation usually lay down the conditions to act as a mediator to ensure the quality of the procedure. These rules may be only

²¹ To draw the conclusion and make a summary on the regulation issues I studied the following documents and laws: Uniform Mediation Act of the United States, 2001, retrieved December 10, 2006, from <http://www.law.upenn.edu/bll/ulc/mediat/uma2001.pdf>; General Assembly Resolution 57/18 of 19 November 2002 UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002. (UNCITRAL Model Law), 2001/310/EC Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, (OJ L 109, 19/4/2001 P. 0056 – 0061); Proposal for a directive on certain aspects of mediation in civil and commercial matters (COM(2004) 718 final), the Bulgarian Mediation Act (hereinafter: BMA), published in State Gazette, issue 110/ 17.12.2004 г., retrieved February 5, 2008, from <http://www.cmi-consulting.com/resources/download.php?id=11>; the Romanian Mediation Act (hereinafter: RMA), No.192/2006, published in Official Journal No. 441 / May 22, 2006, retrieved February 5, 2008 from http://www.mediationworld.net/download.php?path=200729112714.doc&name=romania_mediationact_eng.doc&mime=application/msword; and the Hungarian Mediation Act.

²² This is a very short summary of the principles without the aim to present the issue in details. About the principles see more: Szóke, G. L. 2006, The Possibility of Online Mediation under the Hungarian Mediation Act – in comparison with a number of international, including European documents on mediation, Information and Communications Technology Law, vol. 15. no. 2. pp. 134-138.

some “minimum conditions”, like not to be incapable or not to have a criminal record; some conditions in connection with higher education and some years of experience, and conditions concerning a compulsory training for mediators. The control of mediators may be ensured by a mediator-registration.

The procedure itself is also usually regulated by a mediation act. The main issues are the appointment of the mediator, the place, language, and other circumstances of the sessions, the possibility of representation, the closing of the process, and the form and legal effect of the settlement agreement.

The legal effect of the settlement agreement may be very different. The agreement may be binding just as a contract. The legislator may attach some special legal effects to it; in Hungary, for instance, if one of the parties should go to court after a successful mediation procedure and so challenge the settlement agreement, he may be obliged to bear all the costs of the court proceedings, regardless of the outcome of the litigation.²³ The settlement agreement may be binding similarly to a judgement, which means, that the same enforcement mechanisms is attached to the agreement than to a court judgement.

HUNGARIAN EXAMPLE:

THE HUNGARIAN MEDIATION ACT [4]

The Hungarian Mediation Act was adopted in 2002 in order to promote the usage of mediation. The Act concerns more or less all the issues, which was mentioned in chapter [3.2], although the structure of the Act is much different. After some definitions, the HMA regulates the register of mediators and the conditions to be a mediator (unfortunately no compulsory mediator training is prescribed). The next part contains detailed rules concerning the mediation procedure. The principles and the legal effect of the settlement agreement are involved also in this part.

Under the HMA, the opportunity to exclude or vary the terms of the Act is restricted. Although there are many provisions from which the parties are free to depart, there are also too much provisions which cannot be varied or omitted by the parties. If the provisions concern a fundamental principle,

²³ Act III. of 1952. (Act on Civil Procedure) section 80. (3)

than any prohibition or restriction on opting out is justified, but some of them concern the procedure itself. I'm going to show the most crucial points and compare the provisions with other laws on mediation.

THE REQUIREMENTS RELATING TO WRITTEN DOCUMENTATION [4.1]

According to sections 23 and 24 of the Act, the agreement in respect of mediation and the appointment of the mediator should be put in writing. The mediator should then communicate his acceptance or rejection in writing, too.²⁴ Therefore, both the agreement of the parties to invite the mediator, and the response of the mediator, whether accepting or rejecting, should be in writing. Finally, and as a logical consequence of these rules, the settlement agreement should also be recorded in writing.

The interpretation of the notion "in writing" in the online environment is clear under Hungarian law. The Act on Electronic Signatures²⁵ provides that, if a written form of documentation is prescribed by statute for any legal relationships, then electronic documents executed with (advanced) electronic signatures shall also be sufficient to satisfy this criterion.²⁶ Therefore, a legal requirement for a written form automatically means a requirement for advanced electronic signatures in the online environment, and these provisions of the HMA are inflexible, the parties not being free to ignore them, even by agreement.

In ODR, the above-mentioned provisions have the effect that the most important documents of the mediation process are only valid in electronic form, if advanced electronic signatures are used, and so participation in an online mediation process under the Hungarian Mediation Act is only possible if the parties either use advanced electronic signatures or meet personally in order to sign the paper based documentation.

If I compare the HMA with some other acts on mediation from Middle-East Europe, it can be stated, that there are similar restrictions concerning the agreements in a course of mediation.

²⁴ HMA section 23 and 24

²⁵ Act XXXV of 2001 on Electronic Signatures

²⁶ Act on Electronic Signature, section 4 (1)

According to the Bulgarian Mediation Act the mediator shall have the parties' written or verbal consent of participation.²⁷ The content and the format of the settlement agreement shall be determined by the parties, and the format can be verbal, written and written with a notarial attestation. The written agreement shall bear the date and place of agreement, the parties' names and addresses, the agreement subject, the mediator's name and the signature of the parties.²⁸

The Romanian Mediation Act prescribes written forms for the agreements. The Act prescribes, that the mediation contract shall be done in a written form, otherwise it shall be considered null and void. It shall be signed by both parties having a conflict and by the mediator as well, and one original sample shall be given to each of them. There are the same requirements concerning the settlement agreement.²⁹

It is clear, that the legislator of the analysed acts doesn't give attention to the possibility of online mediation. If I analyse some American, European, and international recommendations and documents, than I shall conclude the opposite.

The Uniform Mediation Act of the USA use the notion of 'record' and 'sign', which is widely enough to cover both paper based and electronic communication. Record means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. Sign means: a) to execute or adopt a tangible symbol with the present intent to authenticate a record; or b) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.³⁰ The second element of the definition is very similar to the electronic signature's definition of the Uniform Electronic Transactions Act,³¹ and it is very similar to the European notion of electronic signature, as defined in the E-signature Directive,³² too.

²⁷ BMA Art. 13. (1)

²⁸ BMA Art. 16. (1)

²⁹ RMA Art. 47. (1), Art 57-60.

³⁰ UMA Section 2. (8), (9)

³¹ Uniform Electronic Transactions Act, Section 2. (8), retrieved December 10, 2006 from <http://www.esignrecords.org/resources/ueta.pdf>. Both Uniform Electronic Transactions Act and Uniform Mediation Act is a proposed state law, and they only become laws if they are enacted into law by the state legislatures.

³² 1999/93/EC Directive, Art. 2. 1.

This is, of course, a much wider notion, than the definition of the advanced electronic signature. The Uniform Mediation Act prescribes a signed record in relation to mediation, but electronic communication also fulfills this requirement.

The UNCITRAL Model Law doesn't contain any reference to a compulsory written form concerning the documentation of mediation. The Guide to the enactment clearly states, that "it was agreed to define the term 'conciliation' broadly to reflect the concept that it is a flexible process that, in practice, takes many forms, some of which may be quite informal, and that it can be conducted without a written agreement to conciliate.

The 2001/310/EC Commission Recommendation lays down the requirement that any agreed solution for resolving a dispute by the parties concerned should be recorded in "any durable medium".³³ The Recommendation clearly refers to online possibilities: the Recommendation lays emphasis on the easy accessibility of the procedure, for instance by electronic means.³⁴ Also in the preamble it is stated, that "new technology can contribute to the development of electronic dispute settlement systems, providing a mechanism to effectively settle disputes across different jurisdictions without the need for face-to-face contact".

The EU Proposal for a directive on certain aspects of mediation in civil and commercial matters doesn't contain any requirement concerning the formality of the settlement agreement or any other document in connection with mediation.

THE PERSONAL PRESENCE REQUIREMENT [4.2]

The Hungarian Mediation Act prescribes that the parties (or, if the party is a legal person, the authorized representative) must appear together in person at the first mediation hearing and for the conclusion of the agreement. Where either of the parties fails to appear in person at the first mediation session, the mediator shall not start the mediation process.³⁵ These rules are binding on the parties and they are not entitled to determine otherwise. According to ministerial comments on the Act, the role of this provision is to

³³ 2001/310/EC Commission Recommendation B. Transparency, section 4. The Recommendation concerns the resolution of consumer disputes.

³⁴ 2001/310/EC Commission Recommendation C. Effectiveness, section 2.

³⁵ HMA section 28 and 29

exclude the possibility of a situation arising in which only the legal representatives of the parties negotiate during the procedure. In this way, the personal character of the mediation process is strongly emphasised.³⁶ Referring to other meetings in the mediation procedure, the Act also requires personal presence, but the clause “unless otherwise stipulated” is used. In this way the parties are free to decide whether to follow the provision of the Act or to agree otherwise, and so not to be present in person at the meeting.

These rules result, that only the utilisation of a mixture of online and off-line technologies may be possible under the HMA, but a solely online procedure is excluded. The parties must meet together in person on at least two occasions – once at the first meeting and once when the parties sign the settlement agreement.

Besides the Bulgarian Mediation Act, which prescribes, that the disputing parties shall participate in the procedure either in person or through a representative,³⁷ none of the analysed documents contains any reference to personal presence requirement.

MEDIATION ACTS AND ONLINE DISPUTE RESOLUTION [4.3]

The examination and comparison clearly shows that the Hungarian Act, just as the Bulgarian and Romanian Mediation Act, does not pay attention to online mediation; these laws were clearly designed for traditional procedure. The possibility of the emergence of this new form of mediation was totally ignored in the course of the adoption of HMA, and the inflexible provisions result, that it is not really suited to online mediation. The restrictions referred to are virtually incompatible with online mediation, in that the substance of the procedure, and the advantages of online mediation are lost.

CONCLUDING REMARKS [5]

The main point of this essay is to answer the question: how mediation should be regulated. As we analyzed in the section 3.1, according to some views no regulation of mediation is needed at all. Although we agree with the opposite arguments, which lead to the viewpoint, that mediation needs

³⁶ Eörsi, M. & Ábrahám, Z. (ed.) 2003, *Pereskedni rossz! Mediáció: A szelíd konfliktuskezelés*, Minerva, Budapest, p. 63.

³⁷ BMA Art. 12. (2)

legal regulation, we have to admit, that the danger of inflexibility is a real one. We showed up the Hungarian example, and so the consequence is clear: legal regulation may have a negative effect on different types of mediation, such as online mediation, if the autonomy of the parties is not ensured as widely as possible. I can exactly agree with the arguments of the Uniform Mediation Act, which states, that “it is important to avoid laws that diminish the creative and diverse use of mediation. The [Uniform Mediation] Act promotes the autonomy of the parties by leaving to them those matters that can be set by agreement and need not be set inflexibly by statute. In addition, some provisions in the Act may be varied by party agreement.”³⁸

If the regulatory framework doesn't suitable for the parties, they may have another choice: conduct mediation procedure under the framework of civil law. In this case, the specific features accorded to mediation by a mediation act will be lost, including, of course, both the advantages and disadvantages. The court would, of course, deal with the settlement agreement as a “normal” contract, but not as a mediation settlement agreement. Confusion may arise, if some of the procedure is regulated by a mediation act and some of them are outside the scope of it. In countries, where mediation procedure itself is not very well known, this confusion would produce a harmful effect in terms of public trust in the procedure, and may impede the efforts to establish professional mediation services.

As a consequence, since different types of mediation are developing, the regulation of such procedure has to function as a guideline for the parties and has to be as flexible as possible. Besides some basic principles, such as impartiality, fairness and quality of mediation, the law has to allow the parties to opt out from the provisions by an agreement. In this case the law won't hinder the parties to participate in different types of mediation (e.g. online mediation), but it will promote it.

³⁸ UMA, Prefatory Note, p.6.

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