

Mediation: Austria's Third Man

While Vienna's position as an arbitral seat among the international community continues to blossom, *Edward Machin* finds commercial mediation's role in the Austrian litigation community has much less favour among counsel and clients.

The efficacy of a country's court system – roundly praised by parties and practitioners – would, one may have thought, be cause for celebration. With litigation, arbitration and mediation working in conjunction to offer a comprehensive conflict resolution service, clients enjoy distinct, viable means by which to settle their disputes.

Not so in Austria, however, where it seems the appetite for mediation – an increasingly popular facet of dispute resolution in jurisdictions as diverse as Russia, Ireland and Qatar, among others – is virtually non-existent. Yet Austria, an EU member state, is committed to implementing the Mediation Directive.

Lawyers point to two distinct reasons for this lacuna. First, bringing court proceedings in Austria is a model of cost-efficiency: current fees are 1.2% of the figure in dispute, with no pre-trial discovery or verbatim minutes to balloon legal costs.

Perhaps more fatally, mediation is seen by commercial entities and their advisers as being a compromise to the adversarial spirit which colours so much of modern conflict resolution.

Regarding the former, Freshfields Bruckhaus Deringer's Austrian dispute resolution head Gunther Horvath says: "We don't have the US experience of compulsive mediation, where the time to bring a case to trial is so long and remote that it is completely unsatisfactory to the parties."

He adds: "Here, you simply start litigation in the morning and can expect to have the first hearing in a month or so. It's not Italy where the judge says 'see

you in 2013!'"

With a first instance decision normally reached within 18 months, appeals taking an additional six months and cases brought before the Supreme Court of Justice – Austria's court of last resort – within two years, parties have thus come to expect a swift, cost-effective and transparent resolution of their disputes.

Mediation: support, not decide

Mediation, it seems, rarely features as a required entity in the process, simply because the appetite among clients is arguably negligible.

This is because the Austrian court system encourages, Horvath says, "an investigatory type of judge – one who plays a very active role in explaining what is going on, asking questions of the litigants and witnesses, and very much driving the proceedings."

Commercial parties of all sizes, he believes, have faith in such an approach over one which involves, as he puts it, "someone who listens and simply tries to strike a balance."

It is perhaps unsurprising that the majority of clients have, according to Horvath, "a certain distrust in the mediation process as a result."

Benedikt Spiegelfeld, senior partner at CHSH in Vienna, describes how this line of thinking applies in practice. "When I was a young lawyer my senior partner came before the judge in a particular matter. 'Can you settle?' he was asked from the bench."

The answer was succinct. "We would not be before the court if we could settle."

Accordingly, the view among both

counsel and parties in Austria is that if a settlement is not possible between the lawyers, mediation can't – and won't – help. "It might be wrong, but that's the general opinion," says Spiegelfeld.

Indeed, the fact that the country's jurisprudence encourages settlement both prior to and during court proceedings further pushes mediation to the hinterland.

"If you can't settle then you need a third party to decide the matter," he notes. "The third party does not decide something in mediation, however; he supports the parties to find an agreement."

Counsel appear equally reticent to engage with a decision-making process based largely on reconciliation, 'feeling' and an absence of hard law.

Gerold Zeiler, an international arbitration partner at Schoenherr Rechtsanwälte in Vienna, terms this "a personality thing. I see myself as a lawyer who deals with a case, and then as an arbitrator who decides that matter on a legal basis."

Splitting the difference

The Austrian Civil Law Mediation Act entered into force on 1 May 2004, and plays an increasingly important role in the country's jurisprudence: family, trade union and other civil disputes all regularly utilise a conciliatory approach to conflict resolution.

Commercial matters, though, are seldom, if ever, characterised by a mediation-centric approach – a fact that Viennese practitioners further attribute to a financial climate having sharpened litigants' desire to engage in adversarial means of settlement.

"My view is that mediation is a feature which may work during economic booms," notes Michael Kutschera of Binder Grosswang. "Parties say: 'look, it's a waste to have three years of litigation about an issue. Why don't we get rid of the problem in a way where everyone can save face?'"

Conversely, during times of fiscal malaise he believes that there exists "little appetite to be seen to give in lightly."

For this reason, Kutschera says, decision makers would rather opt for arbitration – despite its time and costs ramifications – simply to be able demonstrate that they "went all the way to protect the interests of their companies."

"The economy is now beginning to pick up, so there may be a time ahead for mediation to get going, but it's not there yet," says Kutschera – who, by his own admission, "looks to bring people together rather than quarrel."

Spiegelfeld, while accepting that the sidelining of mediation is "a weakness in Austria's litigation culture," remains less certain.

"Companies will continue to look at the opportunities to collect – and defend themselves against – claims for which, in the good times, they'd look to split the difference," he says. "Now they want one hundred per cent, and that certainly bodes badly for mediation in the future."

Counsel, arbitrator, litigator

Mediation's cost benefit, hitherto seen as an unimpeachable advantage over both litigation and dispute resolution, also comes under fire from the Austrian legal community.

"Its relative inexpensiveness is, for me, a quality issue," says Gerold Zeiler.

A typical mediation, he explains, is conducted as follows: the mediator will receive the file, study it for two or three days, after which he – or she – will sit with the parties for a similar period of time.

"Is it even possible for the mediator to understand, for example, a particularly complex energy transportation contract in less than forty eight hours? I very much doubt it," Zeiler says.

Rudolf Fiebinger, senior partner at Fiebinger Polak Leon & Partners in Vienna, believes he has a solution. "To

mediate you have to be able to litigate," he states, "so the ideal mediator should have served as both counsel and arbitrator."

According to Fiebinger, parties come to a settlement guided or proposed in a mediation because, having been comprehensively shown the alternatives, it becomes clear that they would be better off in a mediated agreement.

Simple as it sounds, "This can only be done by a mediator who is able to give the parties a detailed evaluation as to their claims, defences, legal considerations and settlement proposals, among others," he notes.

One inference flowing from the adverse perception of mediation as a form of dispute resolution is that, consequentially, it appears that Austria is sorely lacking in candidates able to undertake such roles.

Indeed, the majority of practitioners interviewed for this feature, in spite of their seniority in the Viennese dispute resolution community, had yet to undertake a mediation.

Accordingly, and following Fiebinger's logic, where these multi-specialist dispute lawyers are to come from is perhaps the great challenge facing mediation in the country.

Nonetheless, and unlike many in Austria, Fiebinger – who is currently working in conjunction with an Austria university on a framework for commercial mediation offered by seasoned arbitrators – still believes there is a market for mediation.

Softly softly

Bettina Knoetzl, a Vienna-based litigation partner at Wolf Theiss, is of a similar view. She cites a recently-launched initiative by the courts to integrate mediation into the country's litigation culture as being evidence of changing times.

"The Commercial Court in Vienna, together with the District Court, is running a pilot project which points parties towards mediation during the early stages of a dispute," she explains.

Indeed, Knoetzl notes that Austria's procedural law – by way of the preparatory hearing – imposes a duty on judges to attempt to begin settlement negotiations. "Once the judge understands that he is getting nowhere then, in my opinion, a case should be sent for

mediation."

She accepts that this view is not widely shared. As such, mediation faces an almost insurmountable challenge in convincing Austria's legal and business communities of its benefits.

This despite the EU Commission's advocacy of ADR. For, as Freshfields' Horvath says: "Mediation may be pushed on the market by outside forces, but it certainly won't evolve from an internal desire."

And while regular commercial litigants – banks, insurers, and the like – may see it as a viable tool in certain, narrow situations, "The feeling, ultimately, is that mediation remains too soft, not strong enough for big-ticket disputes," Knoetzl says ruefully.

"The thinking among litigants is that if I am building up a case I want to show strength," she continues. "It takes me a great deal of time to convince my clients that knocking at the other door and saying 'why don't we mediate?' does not, in itself, indicate weakness or a poor case."

Although hardly unique to Austria, Knoetzl believes that "Parties feel they will get what they deserve if they go to court, rather than sitting down and talking about settlement, which is a 'compromise.' They don't want to be the first one to flinch."

"My hope and trust lies with the courts," she says, convinced that if the right people push it then mediation will increasingly gain a foothold in the litigation process.

According to Knoetzl, "Some of the older judges seem to be less open-minded towards mediation than the younger generation, who have grown up with the concept in place. Once this spirit takes over, and judges gain experience of just how easily cases can be resolved with the help of mediation, I trust the culture will change – judges will 'automatically' consider mediation as an appropriate tool to resolve the dispute."

After all, she says, "this has a very practical aspect: a successful mediation substantially reduces work for the court."

The majority are less positive – and, frankly, less interested. "Ten years ago my senior partner told me that mediation was going to be the next big thing," says Zeiler. "Well, I'm still waiting, and so is he."