

G. L. Szóke: *The Possibility of Online Mediation under the Hungarian...*

THE POSSIBILITY OF ONLINE MEDIATION UNDER THE HUNGARIAN MEDIATION ACT*

by

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The first question which has to be discussed is the definition of online dispute resolution and, the definition of online mediation, and we would like to show the features (advantages and disadvantages) of online mediation.

The presentation focuses on the Hungarian legal background. We're going to analyse whether online mediation can be conducted in the frame of the existing Hungarian law on mediation, or not, how should the existing principles be interpreted in online environment, and – finally – what are the crucial points of the existing rules, which should be amended to ensure, that online mediation can be conducted under the law of mediation in Hungary. We shall examine the relevant provisions of the Hungarian Mediation Act from two angles. First of all, we shall examine the provisions referring to the possibility of online mediation, and, secondly, (where possible) we shall compare the provisions with a number of European documents on mediation.

Introduction [1]

In Hungary mediation has little legal tradition and online mediation simply does not exist.¹ The Hungarian Mediation Act² (hereinafter: the HMA) was adopted in 2002 in order to promote the usage of mediation. The Act has been analysed by Hungarian authors from several points of view over the past three years, but no-one has yet considered the possibility of

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¹ An online procedure to resolve domain name disputes exists, but this is not mediation.

² 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, seem strange.

online mediation. I am, therefore, proposing to survey the Hungarian Mediation Act with specific reference to the possibility of online mediation.

The main question of this essay, therefore, is whether or not it is possible to conduct online mediation within the framework of the Hungarian Mediation Act. To answer that question, we shall examine the relevant provisions of the Hungarian Mediation Act from two angles. First of all, we shall examine the provisions referring to the possibility of online mediation, and, secondly, (where possible) we shall compare the provisions with – or refer to – a number of European documents on mediation, which may have an impact in the future, on the relevant Hungarian legislation. These are the 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,³ and the Proposal for a directive on certain aspects of mediation in civil and commercial matters.⁴

Online Mediation under the Hungarian Mediation Act [2]

The Definitions of Mediation and Online Mediation [2.1]

Definition of Mediation [2.1.1]

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.⁵ The role of the third party, the mediator can be different, from facilitating communication and negotiation to making proposals, but the mediator never imposes solution.⁶ The participation in a

³ OJ L 109, 19/4/2001 P. 0056 – 0061

⁴ COM(2004) 718 final

⁵ This definition is based on comparison of the following documents:

1) 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),

2) Uniform Mediation Act of the United States, 2001., retrieved February 2, 2004, from <http://www.law.upenn.edu/bll/ulc/mediat/uma2001.pdf> and

3) Preliminary draft proposal for a directive on certain aspects of mediation in civil and commercial matters (Mediation Directive Draft Proposal) retrieved March 22, 2005, from http://64.233.161.104/search?q=cache:KkRBRd9XJO4J:europa.eu.int/comm/justice_home/ejn/news/news_adr_draft_proposal_en.pdf+%22Preliminary+draft+proposal+for+a+directive+on+certain+aspects+of+mediation+in+civil+and+commercial+matters%22&hl=hu

⁶ T. Schultz, G. Kaufmann-Kohler, D. Langer, V. Bonnet: Online Dispute Resolution: The State of the Art and Issues, Geneva, 2001, retrieved Oktober 8, 2004, from <http://www.online-adr.org/reports/TheBlueBook-2001.pdf>

mediation process doesn't hinder the parties to turn to court.

In the HMA mediation is defined as "a special non-litigious procedure conducted according to this Act to provide an alternative to court proceedings in order to resolve conflicts and disputes where the parties involved voluntarily submit the case to a neutral third party in order to reach a settlement in the process and lay the ensuing agreement down in writing." (HMA, section 2)

The Definition of Online Mediation [2.1.2]

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" (Hörnle 2003). Consequently, the expression of eADR is more exact and clearly refers to online ADR. Other authors, such as Thomas Schultz, say that ODR involves both online alternative dispute resolution methods and online court-based processes (Schultz 2003). This debate is irrelevant from the point of view of online mediation.

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 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. On the other hand it is a special form of online dispute resolution.

⁷ About the role of artificial intelligence in ODR see more: Lodder, Arno R. – Thiessen, Ernest M.: 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.: Seventy-six and Counting: An Analysis of ODR Sites, retrieved December 10, 2004, from <http://www.odr.info/unece2003/pdf/Tyler.pdf>

Features of Online Mediation (Advantages and Disadvantages)⁹ [2.2]

The 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.¹⁰

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 don't enhance the conflict, like usually court-based procedures do, but conciliates 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, it is possible to participate in the procedure from an armchair.

A disadvantage of online procedures, that the signs of non-verbal communication, which is very important in traditional mediation procedures, cannot be used in online environment. Another problem may be – in cross-border disputes – the different language spoken by the parties. Most of the ODR service providers offers only English language.

The Principles of (Online) Mediation [2.3]

Impartiality [2.3.1]

The principle of impartiality is regulated by the HMA and is also laid down in the Recommendation 2001/310/EC of the European Commission. Numerous detailed provisions are needed to realise this, such as rules for appointing the third party (the mediator) and the exclusion of the mediator should he have a perceived or actual conflict of interest with one party.

⁹ This chapter is based on: Szőke, Gergely: Online vitarendezés (1), Infokommunikáció és Jog, 2005 április

¹⁰ About the features of different types of online dispute resolution see more: Hörnle, Julia: Online Dispute Resolution in Business to Consumer E-Commerce Transactions, retrieved Oktober 21, 2003, from <http://elj.warwick.ac.uk/jilt/02-2/hornle.html>

The problem which may challenge the requirement of impartiality is the method of funding some ODR services (Hörnle 2003). One example may be SquareTrade and eBay: “eBay partnered with SquareTrade in order to provide a neutral and globally accessible dispute resolution service for disputes between buyers and sellers.” Since the dispute is between buyers and sellers, and not between users and eBay (Abernethy 2003), this partnership, in our view, doesn’t infringe the principle of impartiality. But other types of cooperation, in which the financier is interested in the dispute resolution, impartiality may be violated. So, in our view, the legislation has to face this problem and resolve the potential conflict.

The general requirement for impartiality in section 3 of the HMA prescribes that “Mediators shall be responsible for mediating negotiations between the parties to the best of their abilities in an unbiased and conscientious manner.” Section 25 of HMA contains rules relating to conflict of interest: a mediator may not handle a case in which he represents one of the parties, is a relative of either party, is employed by a legal person who is affiliated with either of the parties, or is employed by either of the parties, whether by contract of employment, by subcontract agreement or by way of membership, if he is involved in the case in any other way or if he is biased. These provisions require nothing major in respect of online mediation.

Under the HMA the funding of an online mediator service provider by a company would not¹¹ automatically infringe section 25 unless the mediator were employed by the company. The general requirement of fairness may be fulfilled if the mediator complies with section 3 of the HMA.

Transparency [2.3.2]

On the one hand the principle of transparency in practice means the obligation to provide information to all parties concerning the procedure. The information provision could be easily fulfilled in ODR mechanism. It has to be ensured, that the parties can easily find the relevant information.

According to the Hungarian Mediation Act, the mediator shall inform the parties in the first mediation session about the most important features of the mediation process.¹² This usually is done orally. In the online

¹¹ I have to say “would not”, since there are no real cases to date

¹² The information which should be provided is listed in the Mediation Act, section 30.

environment, the information may appear on-screen.

On the other hand the principle of transparency may have another meaning: providing information to the public about the procedures. This, however, may find itself in conflict with the principle of confidentiality. In such cases, one solution might be the publication of statistic data concerning the most important features of the cases.

Confidentiality [2.3.3]

Confidentiality is one of the main principles of mediation, although the parties involved are free to depart from it. The issue of confidentiality has three elements. The first is that it should be ensured that one party is able to submit arguments, information or evidence to the mediator on a confidential basis, this is laid down both in Recommendation 2001/310/EC of the European Commission and in the HMA (HMA section 32). The second element is that of the obligation of the mediator to handle all data and information obtained in a mediation process in strict confidentiality both during and after the process. (HMA section 26) The third element is that neither the mediator, nor any persons involved in the administration of mediation (including the parties) shall give testimony or evidence regarding – in particular – the views expressed and the statements or admissions made by the parties, or documents prepared solely for the purposes of the mediation (Proposal for a directive article 6.). The provisions of HMA¹³ are almost the same.

First of all, the issue of confidentiality may be ensured by privacy and security policies, which prescribe the proper way of data handling¹⁴ and security measures. Second, the requirement of confidentiality has to be supported by technical means in online mediation, and so the relevant issues is the security of the web pages. (Dósa – Polyák 2003)

Effectiveness [2.3.4]

The third principle in the Recommendation is effectiveness. This involves the requirement of accessibility, expeditious procedure, cost effectiveness

¹³ HMA section 10

¹⁴ So privacy policies may have two function: ensure both the privacy of the users and confidentiality.

and the lack of obligation to use legal representative.¹⁵ These requirements can be easily adopted to online mediation without any special provisions.

Under the HMA there are no provisions relating to effectiveness and so examination of this factor is not possible.

Fairness [2.3.5]

The first element of the principle of fairness is the obligation to provide information concerning the procedure. Under the HMA the information which the mediator must provide for the parties is regulated in details.¹⁶ As it was mentioned above the fulfillment of information provision doesn't cause any difficulty in online environment.

The second element of fairness in the Recommendation constitutes a guarantee for the parties, that they can "freely and easily submit any arguments, information or evidence relevant to their case on a confidential basis".¹⁷ The provisions of the HMA are very similar: "the mediator shall hear the opinion of both parties in the mediation process and ensure equal treatment for all parties. In this stage, the parties shall present their case supported by any documentary evidence they may have." (HMA section 32)

The submission of evidence may cause problems in the online environment. For instance, the lack of technology for advanced digital signatures may prevent one of the parties from sending evidence by secure electronic means. The party who does not possess a digital camera may not participate in video-conferencing, or, if the party does not have a scanner, he/she cannot send a paper-based document to the mediator, if the procedure is conducted only by electronic means. Although evidence and facts do not play such a significant role in mediation proceedings as in arbitration,¹⁸ it is necessary to ensure that the opportunities for traditional methods of communication, such as mail, fax and telephone, are left open in order to ensure that evidence for both parties can be presented on an equal basis.

¹⁵ 2001/310/EC Commission Recommendation, C. Effectiveness, section 1-6.

¹⁶ HMA section 30

¹⁷ 2001/310/EC Commission Recommendation, D. Fairness, section 1. (b)

¹⁸ About the issue: "unequal access to technology" in arbitration see more: Hörnle, J: Online Dispute Resolution – More Than The Emperor's New Clothes, retrieved November 25, 2004, from <http://www.odr.info/unece2003/pdf/Hornle.pdf> and Fekete, E. (2004) Az elektronikus választott bírósági eljárás jogi aspektusai, Romániai Magyar Jogtudományi Közlöny, 1/2004. pp. 54-56.

Quality of Mediation [2.3.6]

The Draft proposal impose an obligation for the Member States to ensure the quality of mediation. In the field of ODR the issue of the quality of mediation raises up only minor questions. The attitude of the mediator shall be more or less the same, as in a traditional mediation process: “online mediation is more similar to traditional face-to-face mediation than it is dissimilar”(Raines 2004).

But the mediator has to keep it in his/her mind, that the communication has got some special features: The parties don't meet personally, so the signs of non verbal communication cannot be used. These circumstances has to affect the attitude of the mediator.

According to the Hungarian Mediation Act, no special training is needed for mediators. The conditions for acting as a mediator is to have a degree in higher education and at least five years experience in the respective field, not to have a criminal record and not to be incapacitated for any reason (HMA section 5). These conditions also apply – unchanged – to the online environment.

The Mediation Process [2.4]

The Requirements Relating to Written Documentation [2.4.1]

The HMA contains detailed provisions in respect of the procedure itself, and at this point we shall attempt to analyse the sections which touch upon the possibility of online mediation.

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 within eight days from his receipt of the invitation (HMA section 23 and 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. This rule is also incorporated in the definition of mediation, as stated above.

The interpretation of the notion “in writing” in the online environment is

clear under Hungarian law. The Act on Electronic Signatures¹⁹ 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.²⁰ 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 Mediation Law is only possible if the parties either use advanced electronic signatures or meet personally in order to sign the paper based documentation.

The 2001/310/EC Commission Recommendation laid down the requirement that any agreed solution for resolving a dispute by the parties concerned should be recorded in “any durable medium”.²¹ Hungarian legal terminology does not generally use the term “any durable medium”, although the concept is recognised and occasionally used. The Commission’s Proposal, on the other hand, does not require any special form for any document during the mediation process.

In our opinion, the term “any durable medium” should be used to define only the form of the actual settlement agreement. For other documentation, no special rules are necessary, although, if the Act does prescribe a written form, than there should be provided at least the possibility of variation – by means of, for example, the clause “unless otherwise stipulated by the parties”.

The Personal Presence Requirement [2.4.2]

One further, very important problem referring to online mediation relates to the provisions of the Mediation Act, which prescribe 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

¹⁹ Act XXXV of 2001 on Electronic Signatures

²⁰ Act on Electronic Signature, section 4 (1)

²¹ 2001/310/EC Commission Recommendation B. Transparency, section 4.

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 (HMA section 28 and 29). 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 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 (Eörsi – Ábrahám, 2003).

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. It should be noted, that none of the documents examined in this article contains any recommendation in respect of personal meetings.

This examination of the provisions of the Hungarian Mediation Act clearly shows that the Hungarian Act does not pay attention to online mediation. The possibility of the emergence of this new form of mediation was totally ignored in the course of the adoption of Mediation Act, with the result that the HMA is not really suited to online mediation. At least the obligations to meet personally need to be reviewed, and it would be desirable that the Act should offer the further option that, by mutual agreement, the parties may communicate by electronic means.

Concluding Remarks [3]

The basic question addressed was whether or not online mediation is possible within the framework of the Hungarian Mediation Act.

Despite our earlier comments to the effect that the Act is not really appropriate to online mediation, the answer should be “Yes”. The utilisation of a mixture of online 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 - once at the first meeting and once when the parties sign the settlement agreement. Other steps may be undertaken by using advanced electronic signatures or by using normal signatures and paper

based documents, but there are other areas of mediation, in which – with the agreement of the parties concerned – online technologies are applicable.

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, it is, therefore, unlikely that any service provider would offer online mediation complying with the Hungarian Mediation Act.

There is, however, one other way in which to participate in an online mediation process – outside the framework of the HMA but under the general terms and conditions of Hungarian Civil Law.²² In this case, the specific features accorded to mediation by the Mediation Act will be lost, including, of course, both the advantages²³ and disadvantages. For example, if the settlement agreement is challenged, the court will not regard the mediation procedure as a mediation procedure within the meaning of the Act. The court would, of course, deal with the settlement agreement as a “normal” contract, but not as a settlement agreement regulated under the Mediation Act.

Online mediation activity outside the framework of the HMA would generate confusion in Hungary for the simple reason that, since even the mediation procedure itself is not very well known. Several different forms of (online) mediation would, in fact, produce a harmful effect in terms of public trust in the procedure.

To summarise the theme of this article, we would say that the enactment of the Hungarian Mediation Act was an important step in the promotion of mediation, but that the inflexible provisions (which sometimes seem to be unnecessary even in traditional, face-to-face mediation) in practice hinder the possibility of conducting online mediation under the Mediation Act, due to which, the revision and amendment of the Mediation Act is necessary.

²² The objective of the Mediation Act is only „to offer an alternative for natural and other persons to settle their disputes arising in connection with personal and property rights”. The Act does not wish to cover all type of mediation procedure, but to regulate one type and attach rights and duties to the procedure, as defined in the Act.

²³ One important advantages is regulated in the Act on Civil Procedure. 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. This is not, of course, the case where a party turns to the court due to non-performance by the other party in the matter of the settlement agreement. Act III. of 1952. (Act on Civil Procedure) section 80 (3)

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