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**THEMIS FINAL 2011**  
**DEBATES**  
**Germany 1 vs. Hungary 2**

**GERMANY**

Germany had to argue that the provisions of the 2008/52 of 21 May 2008 should be strengthened in order to make the mediation process more binding on the parties and suggest amendments to the Directive through which this could be achieved.

**I- Presentation**

- **Germany chose to organize within its team a debate: one member of the team was the moderator, one was a Eurosceptic, one was pro-mediation and pro-Europe.**

=> appreciation: we think that this choice was quite original and made the presentation more attractive. Moreover the debate was convincing because the Euro-sceptic person eventually became convinced.

- **Germany wrote the issues they asked themselves and their answers on a board**

=> it was a good way to summarize their arguments. Still, what they wrote was not clear enough to summarize their arguments.

-As for the hearing and pronunciation: they spoke slow enough but sometimes hard to hear.

## **II- Contempt**

### **A- Germany debated on 3 main issues:**

- **Provisions of the directive referring to procedure**

The issue raised by the Eurosceptic was that the procedure may vary between the different member States. That led them to the conclusion that provisions upon procedure had to be strengthened to achieve more previsibility.

- **Problem of qualification of the mediator.**

The Pro-mediation highlighted that mediation was interesting in many ways : faster than going to Courts, cost limited compared to a long trial, good way to reconcile parties having a disagreement (eg: family disputes).

The Euro-sceptic stressed a problem: parties cannot be sure of the qualification of the mediator as well as a judge. This creates a risk of enforcement if the agreement is illegal and the mediator did not check.

=> conclusion: there should be a new provision of the directive or a new directive in order to be assured of the mediator's qualification : legal qualification as well as psychology

- **Considerations of public policy and confidentiality**

The Euro-sceptic person: referred to problems of confidentiality vs public policies. The current directive does not precise what public policies are that are referred to.

The pro-mediation person explained that there were other situations where confidentiality was required (eg best interests of the children). Anyway charter of human rights and principle shared by different MS in their Constitution to control mediation.

=> conclusion: there are some virtues that are important but have to be open to discussion and make a new directive that would foresee mediation under European circumstances. It has to define the legal instruments of the European principles that have to be referred to.

### **B- Aside these 3 issues, the team concluded that other provisions should be added:**

- adding a provision ensuring legal aid
- adding more references to civil process

### **C- General appreciation about their contempt:**

- Good presentation: They have chosen to stress altogether the lacks of the directive and to suggest amendments. We believe that it seems the best way to deal with these matters.
- Little lack of precision in the amendments: still they might have lacked precision on the amendments suggested, giving only broad directions (eg: instead of saying the directive should make sure that mediators are qualified, German team should have given the concrete measures to allow this : an amendment should suggest that mediators have a 3-year law qualification or have worked in a job related to law...).
- Introduction : they started with their argumentation right away. They could have given more precisions about the subject to make it easier to understand: defining the terms like mediation, giving details about the contempt of the Directive (eg: how is the mediator appointed, how is the agreement taken, enforceability of the agreements, how to solve conflicts before Courts once the agreement is taken...)

### **D- Amendments they should have added to their presentation or talked about:**

- the directive seems arbitrary by limiting its application to cross-borders disputes between two member states. Why not amending the directive to disputes inside a Member State or between one member state and a third State?
- The enforceability of the agreement when the two parties disagree should be more precise : eg: in which situations can parties brought the agreement after the mediation before a judge? How to solve a situation when the enforceability is brought before another Member State which considers the agreement illegal? Extra amendments could give answers to these situations.

## **HUNGARY**

Hungary 2 had to argue that more certainty was required in the wording of the articles referred to in the paragraph 2 of the 2008/52 EC Directive of 21 May 2008, in order to make this legal instrument able to achieve the intentions that underpin it as set out in the Preamble causes.

### **I- Presentation**

Hungary chose a very clear approach of the situation.

In a first part it gave an introduction to the Directive.

=> this introduction helped us understand the overall background of the directive. Still it might have been a bit too long compared to the two other key issues.

In the second and third parts, the Hungarian team eventually dealt with the subject, stressing the words in articles 6 and 7 that would deserve more certainty.

=> at the end of their presentation we had a really accurate view of the certainty which could be brought to the wording of the directive. Their presentation was to that extend very helpful and clear.

As for the materials they used, we enjoyed the power-points in two ways. On the one hand, the first power-point was quite funny and entertaining (fun is always good to take!!). On the other hand the three power points were helpful to follow their presentation: if one ever misses a word or an argument, everything is precised on the power-point. Those materials were therefore a sure stand to their presentation. Still at once, a Hungarian member got lost in her power-point and lose us as well...

### **II- Contempt**

#### **A- Hungary divided its presentation in 3 parts:**

- **Introduction and background of the Directive:**

-Explanations of the different ways to deal with dispute resolutions: 2 ways: judicial or extra-judicial.

In the extra-judicial we've got alternative dispute resolution with mediation (which specificities are voluntary, party themselves, agreement, mediator...). This introduction gives a clear idea of the meaning of mediation.

-Broad line of the legislative procedure: Tamperei 1999, Green Paper 2002, draft directive 2004, directive 2008

-Focus on the draft 2004: domestic matters, explanatory memorandum (risk of discriminatory effect, legal uncertainty, applicability in the hands of the parties...)

-Other legal instruments that refer to mediation on which can be based the directive (eg: treaty on the functioning of the European Union).

- **Uncertainties in article 6**

-The objectives of the Directive: agreements should be as effective as a judicial proceedings + enforcement should not depend on the good will of the parties

-Uncertainties in article 6:

*1-content of such an agreement shall be made enforceable*

Mechanisms to render settlements enforceable: already possible in most member states

=> consequences: only enforce settlement agreements if there are none.

Isn't there a need for harmonization in that matter?

*2-Which member renders agreement enforceable?*

The directive is silent, agreement shouldn't be made enforceable only in the Member State that concluded it? Formal validity, language, later court application... all these elements are linked to the State where the agreement is concluded

*3- Grounds for refusal: art 6 foresees possibilities to refuse the agreement:*

--if content is contrary to the law of the MS. What if legal in MS where enforceable and illegal the MS where concluded?

--mismatch between translations

--isn't there an instrument omitted in the instruments mentioned? Regulation 805/2004?

*4- Direct enforceability: paradox that you have to go before the judge to make the agreement enforceable. Parliament proposed that ADR settlements should be enforceable in the same ways as authentic instruments but refused.*

- **Uncertainties in article 7**

Confidentiality performs several functions (eg: protects any type of information...)

Limits:

- no arguments about its relevance
- damage in the confidentiality
- differences in the translations of the considerations for confidentiality (eg: English version public policy, Polish version= public order)

### **B- Overall appreciation**

-The different lacks in the wording were very well stressed in the Hungarian presentation.

=> excellent presentation

-A bit short in time, a jury member cut them before the end.

### **C- Unclear wordings they have not stressed**

We do not see any wording they forgot to refer to: they chose to focus on the wordings in articles 6 and 7 and it seemed to us that the wordings of article 2 are clear enough and do not deserve any more precision.

Still they stressed the uncertainty in the wording but did not always give a better wording.