DEBATE GERMANY 1 – HUNGARY

Observations by Italian Team

(5 october 2011)

The debate has underlined that EU seeks to promote and encourage the effective use of mediation in certain civil and commercial matters in the internal market to ensure a balanced relationship between mediation on one hand and proceedings before the Member States Courts on the other.

The fact that the provision of mediation is contained in a Directive leaves Member States free to provide for mandatory conciliation or exclude forms both before and after initiation of legal proceedings. Therefore, as it emerged in the debate, and presentations of individual teams, there are some aspects need to be addressed and that can lead to different choices in the individual Member States.

Specifically, the following topics are emerged:

1) qualification of mediator: German team has underlined the importance of the legal qualification of mediator through studies and training in Courts. At this regard the directive does not fully address or enumerate basic uniform level of training and qualification of mediator. By regulating mediator training and implementing minimum qualification levels, the long-term success and impact of the directive will be much more likely. We think that the maybe the lack of provisions concerning the level of training of the mediator is due to the fact the mediator is a "judge of interest" and not a "judge of law" and under this aspect the legal training is not necessary or useful because there is a certain risk that a trained mediator could apply the law too strictly. This can create a result that is in contrast with the *ratio* of the directive in question. Instead, The italian legislation allows the access to mediator role even to the people which don't have any specific competence or knowledge in legal matters. This aspect of the Italian statute that has implemented the directive has been criticised by the national legal doctrine because the mediator is asked to apply a lot of civil procedure rules that is unlikely that mediator, without legal experience, knows.

2) The cost of mediation procedure: the German team has underlined that the mediation can reduce the costs of the proceeding. This thesis can be accepted only in the cases of a successful conclusion of the procedure of mediation. In the opposite case we must consider that mediation could become just the first step of the proceeding that will keep going on in front of the judge. In this case there will be an increase of the costs for the litigants. In order to avoid this negative consequence we could suggest a public service of mediation without additional costs for the citizens.

3) Right to access to justice: art. 5 of the directive leave the member State to provide or exclude mandatory form of mediation either before or after the beginning of the proceeding, as long as the national legislations don't denied the access to justice. In some member state, like Italy, the mediation has become an admissibility condition to seize the Court. Some italian courts has asked to the Constitutional Court to verify the consistency of this national rule with the constitutional principles (in particular the right to access to justice granted by art. 24).

4) notion of public order: the problem of the recognition of the mediation agreements is related with the concept of public order as both the teams have underlined. The teams didn't specified practical cases to explain how this limit works in their national systems. In Italy, concerning civil matters, a national Court denied the exequatur to united stet sentence concerning the punitive damages. Same solutions would occur if the parties have reached an agreement about punitive damages. So even if there is an agreement between the parties the limit of public order denied the enforcement of the mediation's results.

5) mediation privilege. The protection of confidentiality in mediation is well established privilege but it does not stop the debate on just how far this privilege should extent. We think that mediation privilege in not necessary as confidentiality in protected by contract and evidenciary rules and will frustrate other important legal policies;

6) Other topics. The debate did not address issues that create some query in Italy. First, the possibility to submit a joint application by the parties for mediation, which would be typical manifestation of private autonomy. Secondly, the possibility that the parties before the mediator (before the start of the civil trial) declare their will to begin the negotiation process
without really intending to reach a settlement or participate in the negotiations (simulation).