AFRICA MEDIATION ASSOCIATION

BRIEFING PAPER 2:

# MEDIATING DISPUTES: THE GERMAN EXPERIENCE AND LESSONS FOR AFRICA

This briefing paper is the result of a webinar held in June 2023 that aimed at discussing the history and practice of mediation in Germany and lessons for Africa. This webinar was presented by Lawyer and Mediator Ingrid Hönlinger and organized jointly by the Africa Mediation Association (AMA) and the German Foundation for International Legal Cooperation e.V. (IRZ).

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## THE HISTORY OF MEDIATION IN GERMANY

Mediation in Germany **began in the 1970s**, and it was not until **May 21, 2008**, that the European Union issued directives on its legislation due to cross-border civil and commercial disputes, known as the Directive 2008/52/EC. On July 26th, the **German Mediation Act** was enacted for all forms of mediation in Germany, regardless of the type of dispute or the residence of the parties involved.

In **2012**, Germany adopted its **Mediation Act** (Mediationsqesetz) which concerns **all forms of mediation in Germany**, irrespective of the form of dispute or the place of residence of the parties concerned.

The German Mediation Act only establishes **general guidelines**, as mediators and parties concerned **need significant scope for manoeuvre** during the mediation process.

SPEAKER:

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Ingrid Hönlinger has been a self-employed lawyer and since 1992 at her law firm Anwaltskanzlei Hönlinger. She has been a mediator since 2014 (certified since 2017). Between 2009 and 2013, she was a member of the Bundestag 2009-2013. There, her work focused on law, mediation, democracy, Latin America, and human rights.

The Act initially defines the terms “mediation” and “mediator”, and it deliberately **avoids establishing a precise code of conduct** for the mediation process. However, it does set out a number of **disclosure obligations and restrictions** on mediation activities, to protect the independence and the impartiality of the mediator profession. Moreover, legislation formally obliges mediators to maintain **strict client confidentiality**.

The German Federal Government was legally required to **report back** to the lower house of Parliament (the *Bundestag*) on the impact of the German Mediation Act five years after its implementation, which was achieved in **2017**.

## THE PRACTICE AND THE STAGES OF MEDIATION

The practice of mediation is interested in both the **visible part of the conflict** – the facts – and the **background to the conflict**. The background comprises the parties’ interests and needs, their emotions, the problems within their relationship, their interpersonal problems, their values, whether there have been misunderstandings, what kind of information they have had access to, their perspective, and the structural conditions that could have impacted the conflict.

**Stage 1: Opening**
The mediator introduces the process, ensures confidentiality, shares the goals and rules of the mediation process, and explains his/her role as a mediator

**Stage 2: from the parties’ positions to the topics**
The mediator controls communication between parties by explaining the techniques of mediations and collecting the topics that will concern the next stage of the mediation process.

**Stage 3: from the topic to the interests of the parties**
Direct communication is implemented step by step between the parties so they can shed light on the conflict, clear up their emotions, recognize their own needs through the formulation of wishes and thus dissolve their positions.

**Stage 4: Solutions**
During a brainstorming phase, the collect of ideas for solutions are commonly evaluated before searching for common grounds.

**Stage 5: Signature of an agreement**
Parties formulate concrete solutions with or without the mediator. These solutions need to be SMART (Specific, Measurable, Acceptable, Realistic and Timed) and lead to the production of an agreement that both parties read and sign.

After this 5-stage process, **the goal is for the agreement to work even after the mediation process has ended**. The period or date for the realization of the agreed solution is thus clearly defined, and every party should receive a signed copy of the agreement. The mediator can propose another meeting in order to examine whether the agreement has been respected and implemented. If needed, themes or changes can be discussed in the new meeting.

In some cases, **mediators decide to call the parties several months after the agreement was signed to find out whether the agreement still holds**, or whether there are points the parties would like to discuss. Most of the time, everything is okay but it happens that sometimes parties appreciate phone calls as they need to touch upon some of the points included in the agreement.

## TECHNICALITIES: REMUNERATION AND REQUIRED TRAINING FOR A MEDIATOR

**Costs** are **usually negotiated** between the mediator and the parties involved. There is no legislation governing mediation fees, and hourly fees are estimated to range from EUR 80 to EUR 250. Legal aid mediation is not currently envisaged, unlike in The Netherlands for example, except for a pilot project in the federal state of Berlin, "Bigfam."

No legislation defines the professional profile of a mediator in Germany. However, the Federal Ministry of Justice introduced **regulations for additional training** and **further development criteria** that offer the opportunity to rely upon a certified definition of mediation. A certified mediator requires 130 hours of mediation training, 5 practice cases under supervision, and continuous training. Mediation training in Germany is currently offered by various associations, organizations, universities, companies, and institutions.

## COURTS

The German Mediation Act **promotes mutual dispute settlement** by including a number of **different incentives** in the official procedural codes (e.g. the Code of Civil Procedure).

For instance, when parties bring an action in a civil court, they must declare whether they have attempted out-of-court measures, such as mediation, and whether there are specific reasons for not considering this course of action. The court may also suggest settling the conflict via mediation or another form of out-of-court settlement.

The Federal Ministry of Justice **aimed for mediators to work very closely with courts**. Furthermore, it has even been proposed that mediation processes be undertaken by judges in courts. However, the German Parliament discussed the issue and concluded that it would not work well with the idea of mediation in its essence. Rather, the profession of mediation should be a profession out of the jurisdictions systems of Germany. There should be free and private mediators in order for the parties in conflict to meet in a place that promotes reconciliation: the mediation process might unfold differently, whether the parties meet in court or a private office for instance. However, without engaging in mediation processes, judges can be encouraged to use *methods of mediation* for the parties that come to court to reach conciliation.

In principle, a mediation agreement can be enforced with the assistance of a Lawyer and Mediator or a notary.

## COURT/MEDIATION: FUNDAMENTAL CHANGE OF THE PARADIGM OF CONFLICT RESOLUTION

| COURT: | MEDIATION: |
|---|---|
| Public | Private |
| Legal solution | Own solution |
| Judge | Mediator |
| Rules of the court | Own decision |
| Judgment | Agreement |
| Forced | Voluntary |
| Formal | Informal |

When comparing the processes of going to court or going through mediation to resolve a conflict, there is a **higher level of satisfaction** with the latter, as it brings **quick resolution**, and **saves money and time**. Moreover, the conflict resolution seems **more sustainable** as the parties feel committed to it after having found the resolution by themselves. Another advantage of mediation can be found in its **international applicability** as a method of dispute resolution.

## INTERACTIONS DURING THE SEMINAR: DISCUSSION WITH THE AUDIENCE

A participant pointed out **an important advantage of mediation** regarding the backlog of judicial cases that have never been resolved. The participant mentioned that on the African continent, some cases have been in a judicial system for decades. In that context, the participant regarded mediation as firefighting equipment **capable of reducing the backlog** and **providing justice for all citizens.**

Another participant asked Ingrid Hönlinger about the **promotion of mediation in Germany** since the advantages of mediation seem yet to be widely known. Ingrid Hönlinger explained that there were a lot of challenges, like the absence of funding by courts. Mediation processes thus resulted only from **private initiatives without support**. However, the mediation organisations fund themselves by offering training and fees for their members. They can also rely on fees for conflict parties to pay.

Apart from these challenges, there exists also a **reluctance from lawyers** to promote mediation as an alternative conflict resolution method. According to Ingrid Hönlinger, the reason behind this reluctance is that lawyers **do not want to see their cases taken away** if they promote mediation. However, lawyers **might benefit from being able to offer alternative resolution methods**, and could also be trained to conduct mediation processes. The five stages of mediation presented are a very good tool and communication method.

Some participants raised some **differences** in the practice of mediation in African countries. According to a participant, a lot of African countries have observed **requests for establishing laws that guide mediation besides general guidelines.** In some European countries, however, guidance for mediation practice is left in the hands of private mediators. Ingrid Hönlinger gave some precisions about the practice of mediation in Germany and how it was developed without any laws at first. The practice of mediation came before any legislation in Germany, with organisations that already offered training and practice. Some participants argued that it was **very important to have a formal document** under the form of terms of reference to guide mediators in their practice.

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