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One Continent: Many Methods

Mediation in Germany

Structure, Status quo and Special Issues

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During the last decade, there has been a widespread trend away from litigation towards Alternative Dispute Resolution (ADR) procedures. Although, both German attorneys and German businesses are quite satisfied with the judiciary,[1] in recent years, the interest has focused more and more on mediation as a means of dispute resolution.[2]

I. Introduction: From Past to Present

In Germany, one first initiative regarding mediation was made in the field of legal sociology, at a conference held in 1977, and later published in the *Jahrbuch für Rechtssoziologie und Rechtstheorie (Yearbook for Legal Sociology and Legal Theory)*.[3] Already in 1979, the President of the Federal Constitutional Court *(Bundesverfassungsgericht)* pointed out the

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1 Germany shows relatively low legal costs and short term for enforcement of contracts compared to other jurisdictions. See: The Cost of Non ADR – EU Survey showing the Actual Costs of Intra-Community Commercial Litigation at www.toolkitcomapny.com; World Bank Doing Business Monitor 2011 – www.doingbusiness.org/rankings.

2 Handelsblatt, 24.11.2010; Süddeutsche Zeitung, 12.01.2011; FAZ 04.10.2010 – regarding „Stuttgart 21“, a public conflict related to the Stuttgart railway station.

3 *Blankenburg et al*, Jahrbuch für Rechtssoziologie und Rechtstheorie, Volume 6, Köln 1980.

limited resources of the legal system.[4] The President of the Federal Court of Justice *(Bundesgerichtshof)* also concluded that there was a need for more efficiency in the judicial system that especially mediation could fill.[5] In the meantime, the Federal Constitutional Court decided that it is no violation of due process if courts consider mediation clauses as binding contract provisions which must be followed-up before the court proceeding can be started.[6]

Nevertheless, until the late 1990s, the general interest in non-adversarial ADR methods has been relatively modest in Germany.[7] Mediation was quite rare, and its use mostly confined to the fields of divorce and environmental disputes.[8]

Effective as of January 1, 2000, the federal legislator introduced a new **Sec. 15a EGZPO** (Einführungsgesetz zur Zivilprozessordnung = *Introductory Law to the German Rules of Civil Procedure)* that authorized the German Federal States (Bundesländer) to establish **"*Schlichtung"* (conciliation) for civil cases** valued at or up to EUR 750.00 and certain types of disputes, e.g. disputes between neighbors.[9] In addition, the federal legislator has amended a provision in the German Code of Civil Procedure (*Zivilprozessordnung*, or ZPO) by providing for court referrals to ADR with the consent of the parties (Sec. 278 para. 6 ZPO).

Furthermore, the Ministry of Justice in Lower Saxony initiated a **pilot program to promote voluntary mediation** based on this provision in several courts.[10] In the context of this program, judges referred cases mainly to judge-mediators who are not assigned to the particular case. The project started in January 2003 and was extremely successful as well as evaluated. The success rate of this kind of court-related mediation was 79 %.[11]

The **German Bar Association** established a committee on ADR which is advising the board, as well as a section for mediation with several hundred members in the meantime. In September 2008, the biannual national conference of lawyers (*Deutscher Juristentag*) which is an important lobby for all legislative initiatives dealt with mediation as one special topic.

Today, there is a significant body of **German literature on mediation**[12] and the subject can frequently be found on the **agenda of conferences and congresses** in all business

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4 *Benda,* Deutsche Richterzeitung 1979, p. 357.
5 *Pfeiffer*, Zeitschrift für Rechtspolitik 1981, p. 121.
6 BVerfG, judgment dated 14.02.2007, 1 BvR 1351/01.
7 *Alexander*, Wirtschaftsmediation in Theorie und Praxis, Frankfurt 1999, p. 8-11.
8 *Duve/Ponschab,* Zeitschrift für Mediation 1999, p. 263, 265; *Spörer*, Zeitschrift für Mediation 1998, p. 27.
9 A number of German states, including North Rhine-Westphalia, Bavaria, Baden-Wurttemberg, Hesse and Brandenburg, introduced legislative schemes under this law.
10 Other federal states, like Bavaria, Saxony, Baden-Wurttemberg, Berlin or Hesse introduced similar court-annexed mediation programs in the meantime.
11 See: www.mediation-in-niedersachsen.de.
12 For example: *Dietz, Hannelore,* Werkstattbuch Mediation, Köln 2004; *Ponschab, Reiner/Schweizer, Adrian,* Die Streitzeit ist vorbei, Paderborn 2004; *Risse, Jörg,* Wirtschaftsmediation, München 2003; *Haft, Fritjof/Schlieffen, Katharina Gräfin von,* Handbuch Mediation, 2. Auflage, München 2009; *Walz (Hrsg.),* Formularbuch Außergerichtliche Streitbeilegung, Köln 2006.

areas and branches. Meanwhile, thousands of lawyers and other professionals have been trained in mediation and offer their services as mediators. The **draft for a Mediation Code** has been discussed intensively and the German businesses discovered mediation as part of an effective management and consider this method with respect to social responsibility and ethics.

II. Structure of Mediation in Germany

For the avoidance of confusion: The following description refers solely to the experience of the author and does not claim general applicability. In addition, all information is based on commercial settings, not on mediation strategies for family, environmental or public disputes.

1. Definition and Understanding

According to the common understanding – now described in Sec. 1 of the German Mediation Code – mediation is understood in Germany as a **confidential, voluntary and non-formal proceeding with two or more parties with the goal of an amicable dispute resolution by negotiations.** The proceeding is supported by a neutral, the mediator, who has no decision power. The decision power remains with the parties.

The goal of the mediation process is an **interest-based agreement** acceptable to all of the parties (Win-Win). The mediator has to assist the parties to understand each other, to see where the conflict comes from and to pave the way of resolving the conflict.

The **areas** where mediation in Germany is applied are mainly family disputes, e.g. divorce, child custody, alimony etc., commercial disputes, e.g. between companies, license and/or trademark disputes, M & A and joint venture disputes etc.; labor disputes, e. g. between employer and employees, works council, shareholders, trade union and employers associations etc.; public disputes, e.g. environmental and/or construction disputes or school mediation.

2. How to select the Mediator

As basic principle the **mediator's selection** must be done by the parties without the direct involvement of the mediator(s) in discussion. There are several ways to find a mediator: Recommendation by other persons, (seldom) advertisement, or by contacting organizations. Either Chambers of Commerce (e.g. Industrie- und Handelskammer Munich or Frankfurt) or mediation organizations[13] and the German Arbitration Institution (DIS)[14] provide lists with experienced mediators. Such organizations also administer mediation proceedings.

[13] EUCON – www.eucon-institute.com; Bundesverband Mediation e.V. – www.bmev.de; Bundesarbeitsgemeinschaft für Familienmediation e.V. – www.bafm-mediation.de; Bundesverband für Mediation in Wirtschaft und Arbeitswelt e.V. – www.bmwa.de; Centrale für Mediation – www.centrale-fuer-mediation.de.

Once selected, the **mediator regularly contacts the parties** before the meditation session in order to agree on the conditions of the mediation. It is also usual that the parties and the mediator agree in writing on important points, e. g. confidentiality of the mediation proceeding, neutrality of the mediator, costs of the mediation,[15] place, time etc.

3. Mediation Setting and Mediation Process

It is the task of the mediator to **prepare the mediation** with respect to place, time schedule and prior information, e.g. by exchange of material. It is regularly preferred by German mediators to conduct the mediation on a **neutral place**. In average, mediations in the commercial field are scheduled for **one to two days**.

At the beginning of the mediation session, the parties are introduced to the proceeding by an **opening statement**, including the acknowledgment of the parties, the explanation of the mediation characteristics and the confidentiality, the mediator's tasks and duties, the explanation of the proceeding, the framework conditions and the agreement on the rules for the discussion.

The **mediation proceeding** as such follows logical steps: (1) Introduction, (2) statement of facts and legal issues and working on topics, (3) working on the interests of the parties, (4) discussing and selecting options and alternatives for a solution, and (5) final agreement.

There are different views with respect to **joint sessions and/or caucus**. The preferred strategy of German mediators is to keep the parties together on the table for interaction, listening, discussion of facts and interests, venting of emotions and finding solutions. However, the use of the caucus is increasing in the area of commercial mediation, especially in case of risk analysis or BATNA-testing.

4. Role and Style of the Mediator

According to the German understanding, mediation should be **more facilitative** than directive on the process and more facilitative than evaluative on the content.

As a guideline, but not legally binding, German **mediation trainings** take between 120 up to 200 hours,[16] including the following **key techniques**:

- Communication skills, like active listening, open questions
- Counselling and calming skills

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[14] Effective from 1 May 2010, the DIS provides separate mediation rules, so-called *Mediationsordnung (DIS-MedO)*. The mediation rules can be used for domestic as well as in international disputes. Persons of any nationality can be appointed as mediator by the parties.

[15] The costs for the mediation are regularly shared between the parties, besides mediation in labor disputes including employees or the works council. Mediators in commercial cases charge regularly on an hourly rate between EUR 150,00 up to EUR 450,00/hour. Most of the Legal Expenses Insurance Companies, e.g. DAS, ARAG or HDI Gerling cover the costs of mediation proceedings. However, there is no legal aid by the state for mediations proceedings.

[16] For lawyers, most local Bar Associations acknowledge trainings of 120 hours.

- Interest-probing and exploring needs
- Structured process
- Subjective fairness principles
- Caucus vs. joint sessions
- Legal aspects of mediation
- Dealing with impasse, apology and emotions
- Expanding resources, creative techniques, like brainstorming or mind mapping
- Principled negotiation
- Risk analysis, decision trees, BATNA-/WATNA-testing, reality testing
- Application of accepted standards
- Cognitive barriers, like selective perception, overoptimistic estimation, fear of loss, sunk costs, reactive devaluation.[17]

The professional **title "Mediator"** is not protected by German law. Therefore, everybody more or less trained in mediation skills can provide this service to parties in dispute.

5. Role of Lawyers in Commercial Mediation

Increasingly, ADR and mediation are **expected by the clients as services** provided by law firms. Especially the court-annexed mediation changes the mind of parties and lawyers continuously. In the meantime, it is considered as **"best practice"** to reflect and explain to the clients all means of dispute resolution.

In commercial cases, often **lawyers are chosen as mediators** because commercial disputes regularly involve legal issues. The mediator's neutrality but also ethical rules exclude the lawyer-mediator form advising the parties on legal matters of the mediation, either before or during or after the mediation process.[18]

Lawyers are considered as **necessary guidance for the parties** in commercial mediation proceedings in order to avoid legal detriment. In addition, the participation of the parties' counsels helps to avoid power imbalance and protect against unfair "tricks". The parties feel emotionally supported, more secure and more decisive.

6. Settlement Formalities

Considering the status quo the **final settlement** in mediation is a contract, in general not bound to formalities, unless legal rules require the inclusion of a notary public, e.g. in cases of share transfer or purchase of land.

As a pure contract, the final settlement as such is not an **enforceable instrument**. There are some ways to effectuate the enforceability of the settlement agreement: Including a nota-

[17] *Duve/Eidenmüller/Hacke*, Mediation in der Wirtschaft 2003, p. 28.
[18] See now Sec. 3 of the draft German Mediation Code.

ry public, including the court for a settlement protocol or transferring the mediation settlement into an arbitral award on agreed terms.[19]

III. Draft of German Mediation Law

In order to transfer the *Directive 2008/52/EG of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters dated 21 May 2008* the German Government (Bundesregierung) published a d**raft of the German Mediation Code dated 12 January 2011** after about two years of hearings and legislative procedure.

The **goals of the legislator** can be summarized as follows:

- Strengthening of mediation in all areas of law
- Protection of confidentiality of mediation proceedings
- Protection of mediator's obligation of secrecy
- Easement of enforcement of mediation results (final agreements)
- Support of court-annexed mediation
- Evaluation of savings by mediation in family matters
- Extension of court's power to transfer disputes to mediation.

Sec. 1 (1) provides a **legal definition of mediation**: *Mediation is a confidential and structured proceeding with voluntary participation of the parties supported by a mediator and with the goal of the parties to achieve an amicable and self-dependent solution of the dispute.*

It differentiate between

- **Mediation outside the court proceeding** (*aussergerichtliche Mediation*)
- **Mediation during a court proceeding** however **outside the court** (*gerichtsnahe Mediation*)
- **Mediation during a court proceeding** however **conducted in court by a "Mediator-Judge"** who has no power for decision (*gerichtsinterne Mediation*)

Sec. 1 (2) **defines the mediator** as an independent and neutral person without decision power guiding the parties through the mediation process.

Sec. 2 describes the **proceeding** and the **duties of the mediator**:

- The parties choose the mediator.
- The mediator has the duty to assure that the parties understood the principles and the process of mediation and that the parties participate voluntarily.
- The Mediator has to be neutral. S/he has to promote the communication and has to provide for an appropriate and fair integration of the parties into the mediation proceeding. S/he is allowed for caucus if the parties agree.

[19] See now amended Sec. 796d Civil Procedure Code according to the draft German Mediation Code

- Third parties can only participate in the mediation proceeding if the parties agree.
- The parties are free to end the mediation at any time. The mediator can end the proceeding if s/he is of the opinion that a self-dependent communication or a settlement cannot be expected from the parties anymore.
- In the case of an agreement, the mediator has to ensure and informed decision by the parties understanding the content of the agreement. S/he should advise the parties without being guided by advisors that they have the possibility for a check of the agreement by external advisors. S/he can fix the amicable solution in a final contract if the parties agree.

Sec. 3 regulates the **duties of disclosure** and **limitation of the mediator's function**:

- The mediator has to reveal to the parties all circumstances being relevant for his/her independence and neutrality. In such situation, s/he can only function as mediator if the parties agree.
- Any person related to the parties in the same dispute before is not allowed to act as a mediator. The mediator must not act during and after the mediation for any party in the same dispute.
- A person must not act as mediator if one of his/her partners linked through an office community was active for one party in the same dispute. Such another person must not be active during and after the mediation proceeding in the same dispute. This limitation is not relevant if the party agrees after comprehensive information and if other legal reasons must not be considered.
- The mediator has the duty to inform the parties on their demand about his/her professional background, his/her training and his/her experience in the area of mediation.

Sec. 4 deals with **confidentiality**:

- The mediator and all persons included in the mediation proceeding have the duty of confidentiality provided no other legal provisions in contrary exist.
- This duty includes all information gathered in the course of the mediation proceeding.
- The duty of confidentiality does not apply if
  1. a disclosure of the content of the mediation result is necessary for the realization and enforcement of the final agreement;
  2. a disclosure is demanded by the *ordre public* in order to avoid danger for a child or significant adverse effect of the physical or mental integrity of a person, or
  3. the facts are in public domain or are not relevant enough for confidentiality.
- The mediator has to inform the parties to the extent of his/her duty of confidentiality.

Sec. 5 refers to **training and continuing education**:

The mediator has the duty in his/her own responsibility to ensure by a sufficient training and continuing education that s/he disposes of theoretical knowledge as well as practical experience in order to guide the parties in a professional way through the mediation proceeding.

Sec. 6 deals with **academic research projects** and **financial state support** related to mediation:

- The government and the states can agree on academic research projects in order to find out the impact of financial support of external and court-annexed mediation in family matters.
- Details on the requirements for academic research projects.
- The government has to inform the parliament on the collected experiences from the existing academic research projects.

In addition **several provisions of existing codes** shall be amended:

- Sec. 253 (3) Civil Procedure Code: The statement of claims in every law suit has to inform the court on the parties' efforts to resolve the dispute in mediation before bringing the action in court and whether there are reasons contrary to the execution of mediation.
- Sec. 278 (5) Civil Procedure Code: The court can transfer the parties to a "Mediator-Judge" for a conciliation hearing.
- Sec. 278a Civil Procedure Code: The court can propose a court-annexed mediation or another proceeding of alternative dispute resolution. The court proceeding shall be suspended for the time of the mediation proceeding.
- Sec. 796d Civil Procedure Code: Each settlement agreed at the end of a mediation proceeding can be declared as enforceable on demand of one party by district court as agreed in the settlement or located at the place of the mediation proceeding. The other party shall have the right to be heard before the declaration of enforceability. The same procedure can be conducted vis-à-vis a notary public.
- Already existing – Sec. 203 Civil Code: Suspension of Time Limits during negotiations = mediation.

IV. SPECIAL ISSUES

Finally, two special issues should be mentioned, **exceeding the scope of mediation**.

1. Med/Arb or Arb/Med

There is **no special focus on Med/Arb or Arb/Med proceedings** in Germany. However, increasingly the arbitrators consider the possibilities of a "*mediation window*" and of settlement negotiations in arbitration.

Settlement in court and in arbitration has a long tradition in Germany. Accordingly, Sec. 1053 of the German Code of Civil Procedure allows the recording of a settlement in arbitration in the form of an *arbitral award on agreed terms*. In addition, parts of the DIS-rules encourages the arbitral tribunal to seek for settlement opportunities during the arbitration proceeding.

2. New Trend: Conflict Management Systems

Beyond the pure application of mediation in the commercial setting, several large companies (DAX companies) founded in 2008 the ***Round Table Mediation and Conflict Management of German Major Enterprises.***[20] This initiative focuses on the implementation of mediation and conflict management in the business field. There are quarterly meetings organized, as well as working teams for certain topics and conferences on mediation and conflict management. The Round Table is academically evaluated by the Europa-Universität Viadrina, Frankfurt/Oder and based on – in the meantime – three surveys conducted by PwC related to commercial dispute resolution and conflict management.[21]

In 2010, the **DIS *Konfliktmanagementordnung (DIS-KOM)*** became effective. The focus of DIS-KOM is the support of the parties to decide on the best available proceeding for the concrete dispute. The goal is to find the most effective proceeding for each dispute in order to meet the parties' economic, legal and further interests. The parties are supported by a conflict manager who has no power for decision but provides proposals regarding the best choice for a proceeding.

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[20] See: www.rtmkm.de.

[21] Survey Commercial Dispute Resolution 2005; Survey Commercial Dispute Resolution 2007 and Survey Conflict Management – From Elements to System 2011.

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