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## Within the civil law tradition

*Nadja Alexander*

A review of the international literature on ADR reveals a wide spectrum of dispute resolution processes practised throughout the world. It also demonstrates significant differences among different countries' application of ADR procedures; for example, mediation.

Among Western industrialised countries, it is the common law countries such as Australia and the US that have led the mediation movement. In contrast, the European mainland has tended to display a preference for legalistic and court-focused conflict resolution models. Accordingly, countries such as Germany, Austria, Belgium, Iceland, Luxemburg, the Netherlands, Portugal and Spain, while familiar with evaluative, rights-based forms of ADR such as arbitration, have been far more sceptical of interest-based processes such as mediation. Nevertheless, mediation is now beginning to make its mark on mainland Europe.

In this short essay I will consider recent developments in mediation practice in one European country of the civil law tradition: the Federal Republic of Germany.

In the past three years there has been a plethora of German literature about mediation. In addition, the past three years have witnessed the creation of a number of mediation interest groups and organisations. These activities reflect the repositioning of the mediation movement from the academic arena into the cut and thrust of mainstream political debate.

In 1999 German mediation services are offered in an increasing number of industry sectors. While some mediation initiatives are based on well-established practices such as the conciliation procedures of the *Industrie und Handwerk Kammer*, other initiatives, particularly those which take an interest-based approach to dispute management, have just begun to emerge.

In Germany the primary developments

in mediation practice fall into three categories: publicly funded mediation projects, court annexed mediation and other legislated mediation initiatives, and mediation initiatives in the private sector.

### Publicly funded mediation projects

A number of mediation projects in Germany are supported by public funds. One of these projects is *Mediationsstelle Brückenschlag*, which was established in 1996. As Germany's first community mediation centre, *Brückenschlag* is an attempt to transfer the American and Australian concepts behind community justice programs into the German context. Financing for the project is a combination of both public and private sponsorship, donation of individual time and effort, and generation of funds through training and mediation services.

Other government sponsored projects include *Die Waage* in Hanover, which specialises in victim-offender mediation, the *Förderverein Umweltmediation eV* in Bonn (environmental mediation) and the school mediation projects in Berlin, Bielefeld, Frankfurt and Offenbach.

### Court annexed mediation and other legislated mediation initiatives

Despite considerable public discussion and policy development, court annexed mediation has not yet been implemented in any of the German *Länder* (provinces). There is, however, a bill currently before the German Parliament which, if passed, will enable each of the German states to introduce mandatory mediation for civil disputes where the plaintiff's claim does not exceed DM 1000.<sup>1</sup>

An existing form of court annexed mediation (more accurately described as conciliation) can be found in four ➤

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➤ Bavarian *Amtsgerichte* (Magistrates' Courts) in Würzburg, München, Regensburg and Traunstein. The conciliators are retired magistrates and the court annexed model is voluntary in nature. In other words, the courts are not able to coerce parties to go through the conciliation process, with the result that the process is not widely used.<sup>2</sup>

There is not a great deal of legislation which specifically refers to mediation. Nevertheless, a small and growing number of laws make provision for the mediation process. For example, the German Insolvency Code was amended in 1999 to provide debtors and creditors with the opportunity to choose to take part in a mediation process to settle their dispute (§ 305 I 1 InsO). In family law matters, an application may be made to the court to mediate between the parties regarding parenting arrangements (§ 52a I 1 FGG). Finally, in criminal law matters victim-offender mediation has been available for youth offenders since 1990 (§ 10 Nr. 7 JGG) and for adult offenders since 1994 (§ 46a StGB).

### Mediation initiatives in the private sector

Private sector initiatives to date have been industry specific. In the family law context, for example, mediation is thriving. A national organisation for family mediation, the *Bundesarbeitsgemeinschaft für Familienmediation* (BAFM) was formed as early as 1992 with an interdisciplinary membership base. In 1993 the BAFM developed national practice guidelines for mediation of family conflicts, followed by a national training curriculum.

Interest in environmental mediation has continued to grow in the 1990s, with mediation being successfully used in several high profile environmental disputes. In 1998 a national organisation for environmental mediation, *Förderverein Umweltmediation eV*, was established with the specific goal of integrating the practice of mediation into the management of environmental disputes.

Mediation in employment and commercial disputes has been the latest area to be embraced by dispute

resolution professionals. Again, a national organisation for mediation in commercial and workplace disputes, *Bundesverband Mediation in Wirtschaft und Arbeitswelt* (BMWA) has been formed to promote the use of mediation in these areas. BMWA offers a mediation service, provides mediator training and distributes literature and information on commercial and workplace mediation. In addition, a group of high profile commercial lawyers joined together in 1998 to form the Society for Commercial Mediation and Conflict Management (*Gesellschaft für Wirtschaftsmediation und Konfliktmanagement*).

The national organisation representing the interests of German lawyers (*Deutscher Anwaltverein*) has established an ADR committee and, within the parameters of its limited funding, it is very active in promoting ADR, in particular mediation. The ADR committee has, for example, hosted a number of conferences on mediation and drafted model procedures for mediation and other ADR procedures.

In summary, mediation is moving forward in Germany at an exciting pace. Conferences and seminars are constantly on offer; ideas and initiatives abound; mediation is even starting to find its way into university curricula, albeit very slowly. The nature and stage of development of mediation initiatives varies considerably depending on the industry sector. While victim-offender mediation and family mediation projects have been running since the early 1990s, many others have emerged in the past two to three years. Overall, there is still considerably more rhetoric than practice — however, this was also true of the early days of the Australian mediation movement. ●

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### Endnotes

1. *Trends und News*, 1 *Konsens* 1998, 52.

2. Leeb, 40 *Mediation und Recht*, 1998, 4.