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International developments in ADR

Alternative dispute resolution in Germany

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While judicially hosted settlement conferences and arbitration have traditionally been quite common, until a few years ago mediation and other forms of ADR were not well known in the German business world. Most German business people were only familiar with non-binding third party assistance in the context of political bargaining or collective bargaining negotiations. Over the last five years, however, the landscape of dispute resolution has significantly changed and mediation has now become part of the dispute resolution process in business life.

German court system

For a long time, the German court system was considered quite acceptable by the business community. Nonetheless, lawmakers considered introducing a limited mandatory mediation program as an opportunity to reduce the volume of small cases. The legal community subsequently became the driving force in favour of ADR. Today, corporate counsel and management are likewise taking the lead in promoting ADR.

As opposed to some politicians, business people usually do not regard German courts as being overburdened.

Disputes may sometimes be brought to trial within a couple of months. Pre-trial information exchanges usually do not take up much time because they rarely take place. There is no document disclosure process in a technical sense under German law. And generally speaking, apart from some recent procedural innovations, there is no organised way of requiring disclosure of documents and information to the opposing party under German procedural law. Finally, there is less uncertainty in German civil litigation than in some other jurisdictions because of extensive statutory law and the absence of juries and jury verdicts.

Since these specific litigation risks do not exist in Germany — or not to the same extent as elsewhere (for example in the US) — there has been less pressure to explore alternatives to litigation.

Nonetheless, the political intention to reduce the volume of small cases led to a legislative amendment. This provided for an opening clause in the Introductory Law to the German Rules of Civil Procedure (*Einführungsgesetz zur Zivilprozeßordnung*, EGZPO). The new s 15a of the EGZPO authorised the 16 German states (Länder) to establish 'mandatory mediation' programs in civil cases. The legislation authorised the Länder to submit civil cases valued up to €750, and certain types of disputes beyond this amount, to be referred to mandatory mediation.

Awakening of the legal community

While this amendment was quite limited in scope, it turned out to be a major catalyst for change. As a result of this amendment, in 1997 the German Bar Association for the first time discussed mediation as a viable alternative to court initiated settlements in a public forum. Discussion about the benefits of dispute resolution in a wider framework intensified significantly.

Today the German Bar Association has a committee on ADR that is advising the board of the organisation, as well as a section for mediation with several hundred members. The Bar Association has established various training programs. Among members of the Bar, mediation and other forms of ADR have become broadly known and are increasingly practised.

First successes from the business world

Concerned that mediation was just a new marketing idea, the business world first appeared somewhat sceptical. More recently, however, business leaders have recognised the benefits of an informal process that addresses their interests and offers the potential for (re)establishing relationships, or that assists in terminating them with as little damage as possible.

In 2000 two German corporations successfully settled a €200 million dispute regarding the renegotiation of prices with the assistance of a mediator. In the same year, a Dutch and German construction company settled their €100 million dispute regarding a claim in the wake of a merger and acquisition transaction. Because of information provided to shareholders, this case has probably become the largest publicly disclosed mediation settlement in Germany.

In 2001 several companies settled their differences regarding, for example, the early termination of long term delivery contracts, the expulsion of a partner from a partnership, as well as claims regarding production facilities, with the assistance of a mediator. Conflicts within family owned businesses and controversies in the context of construction projects or distributorships turned out to be particularly well suited for mediation.

Other dispute resolution options

Business people who are familiar with evaluative mediation or early neutral evaluation from their own jurisdictions can select similar methods of dispute resolution in Germany. The notion of *Schlichtung*, for example, is usually used for negotiations where the parties have a third party assisting them by conducting the negotiations and presenting a proposal at the end.

For parties who are interested in conducting an early neutral evaluation, it may be useful to note that under German law it is possible to obtain a private expert evaluation of a controversial set of facts or regarding a question of law (*Schiedsgutachten*). Usually, this evaluation is binding unless it is clearly erroneous (because it is inequitable or incorrect). Parties tend to select this process if they agree that the dispute to be resolved requires legal, technical or other expertise, but does not require fully fledged arbitration proceedings.

The private expert evaluation procedure may be (and in practice is) combined with mediation. A binding private expert evaluation assists parties in mediation when an impasse on specific questions of law or science cannot be overcome. In other cases, parties have taken a non-binding expert opinion as a starting point for their final settlement negotiations. Frequently, parties also provide for a multi-step dispute resolution procedure by using mediation and, failing that, arbitration.

If settlement efforts in mediation fail, the parties may still arbitrate their dispute. Since Germany adopted a new *Arbitration Act*, that came into force on 1 January 1998, business people and lawyers have a modern legal framework for arbitrations in Germany. The content and structure of the new Act are largely based on the UNCITRAL Model Law.

To improve the internal handling of disputes, some companies have started inhouse negotiation and dispute resolution training programs, since ADR appears to be a particularly promising concept for resolving disputes within large company groups. However, few German companies, if any, have started to systematically design a dispute system to reduce the cost of litigation.

Institutional framework

There are various indications that businesses will become increasingly interested in ADR. First, the number of dispute resolution service providers has significantly increased. In Germany, the Munich-based

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Association for Business Mediation and Conflict Management (*Gesellschaft für Wirtschaftsmediation und Konfliktmanagement*, GWMK) has emerged as the leading association for business mediation. The organisation assists companies in the selection of qualified mediators, provides information about applicable rules and regulations, and administers mediation proceedings if requested by the parties. In addition to the GWMK, a significant number of local chambers of industry and commerce offer ADR services to the corporate world. ●

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