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Mediation procedures in Germany – Effects produced by the German Mediation Act (*Mediationsgesetz*) on the development of mediation –

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I. The German Mediation Act from 26 July 2012

The so-called Mediation Act went into effect in Germany on 26 July 2012. German lawmakers were obligated to transpose the Mediation Directive in Civil and Commercial Matters from 21 May 2008, which had been issued by the European Parliament and the Council.

The scope of the Media Act is scanty. Only very few arrangements are set out regarding definitions of mediation and mediators, the tasks of mediators and limits on their activities, non-disclosure obligations and the training and continued education of mediators. Moreover, the German federal government is obligated to evaluate the impact and effects of mediation in Germany and the situation of training and continuing education of mediators.

The point in time for evaluation of the Mediation Act - by 26 July 2017 - will soon be reached; the Federal Ministry for Justice (BMJV) has commissioned the German Research Institute for Public Administration in Speyer with this evaluation task to perform an analysis of legal aspects.

II. Mediation training

Demand for training to become a mediator has been booming at many *training institutes* at the latest since issue of the Mediation Act. Not only lawyers, who are naturally involved with matters involving disputes, undergo this training. Many persons who interact with a large number of people in their professional environment, cooperation between whom is prone to conflict, have also been taking part in this training.

III. Mediation associations

In addition, there is an impressive number of newly founded *mediation associations*, which have taken on the task of informing people about mediation and its dissemination in all areas of life.

IV. Judicial mediation

As a result of the Mediation Act, § 278, section 5 of the Civil Procedure Code has been revised. Under this provision, in legal disputes so-called appointed mediation judges, who are for their part not authorized to decide the outcome of the legal dispute, can act as go-betweens. Mediation judges may at the same time use mediation methods. The number of judicial mediation procedures carried out internally at courts has risen (p. 22 PWC Study 2015 in: www. pwc.de/Konfliktmanagement, referred to in the following as: PWC). A study conducted upon the commission of North Rhine Westphalia comparing litigious procedures with internal judicial mediation procedures at Essen and Paderborn Regional Court and at Minden Administrative Court indicates that parties involved in procedures conducted using mediational methods expressed greater satisfaction with the result and procedure itself as well as overall satisfaction than parties in litigious procedures (Court Chamber Memorandum RAK Düsseldorf 3 / 2016 pp. 161, 162). The reason for this was that the parties were actively involved in the result produced. Although the number of conflicts resolved before appointed mediation judges has been mounting steadily in comparison to the overall number of procedures resolved, it is nevertheless still low (for example: German Federal Statistics Office 2015: 6,142 procedures resolved before mediation judges at local courts as a proportion of a total of 1,119,504 procedures resolved before local courts).

V. Mediation at business enterprises

A Round-Table (RTMKM) was established by reputed *business enterprises in the German economy* as far back as in 2008, before the Mediation Act went into force, to address the launch of conflict-management systems at companies as well as the promotion of the mediation procedure. The mission of the Round-Table has in the meantime been carried out by numerous companies being sensitized about the benefits of conflict management and resolving internal company conflicts by means of mediation through creation of an internal company pool of mediators. The perception of mediation procedures as a method of conflict resolution with external business partners is frequently also viewed as an opportunity to solve conflicts in a manner that saves on time and costs.

The business consultancy PWC has produced a *Study on the Status of Conflict Management at German Enterprises* in collaboration with the European University Viadrina Frankfurt (Oder), analyzing trends and developments over the years 2005 to 2015. The frequency in which alternative dispute-resolution procedures, in particular mediation and conciliation, are used has risen significantly. Use of mediation as an "upstream" procedure prior to court procedures has doubled (PWC 2015, p. 38). Out-of-court procedures are primarily opted for based on company philosophy and on reasons relating to costs and confidentiality (PWC 2015, p. 40). A professionionalisation of conflict management can be perceived at almost 80% of all companies surveyed in the study (PWC 2015, p. 57). A change in paradigm has taken place. A change in conflict behaviour among management can be identified at two-thirds of the companies surveyed (PWC 2015, p. 72).

A memorandum issued by *Unternehmerschaft Düsseldorf und Umgebung e. V.* on the *true value of mediation* from 2012 demonstrates that it is accepted as certain that mediation indeed makes a valuable contribution to strengthening the corporate culture, massive reducing internal conflict costs and fostering cooperation and efficiency at an enterprise or an affiliation of companies (Dr. Jürgen Klowait, Best Practice Konflikt (Kosten)-Management 2012, page 36).

Mediation procedures as conflict-resolution procedures within enterprises therefore not only hold out *advantages for parties affected by the conflict* - they also offer *concrete advantages for the entire enterprise in addition.* In addition to decreasing internal conflict costs, the negative effects of unaddressed conflicts are also mitigated. The execution of mediation procedures at companies has a sustained impact countering losses in motivation and productivity, absence from work as a result of illness all the way to employees "mentally resigning", costs of hiring and familiarizing new staff, etc.

The establishment of *conflict management programs* at business enterprises hence goes far beyond mere conflict management, also taking on *an ethical dimension* (PWC 2015, p. 29). Conflict management must be categorized as an instrument for value-oriented management of companies (see also: PWC Study and Viadrina 2013). Additional incentives are to be created for this in the future such as, for example, a voluntary commitment to sign a Conflict Management Code (PWC 2015, p. 84). By means of a publically announced voluntary commitment, an enterprise is to send out a signal that it "recognizes in principle that out-of-court conflict-resolution procedures make good sense and that it is willing to support the use of such if it is of the conviction that it better serves its interest than the use of "conventional procedures" (PWC 2015, p. 84).

VI. Mediation from an attorney's perspective

Specific specialized associations have been established *made up of attorneys* in which members report to each other on mediations that have taken place and analyze such. At the same time, this ensures that mediators' skills are maintained and improved through regular continuing education.

Exchange between attorneys has indicated that the number of mediations is rising slowly. An analysis of the causes of this cannot be characterized as representative. The causes can thus only be speculated.

The limited demand for mediation might be due to the fact that the attempt at mediation before filing a complaint is generally laid down in law merely *as a recommendational provision* (§ 253, section 3, no. 1 of the German Civil Procedure Code), i.e. it is not mandatory for such a procedure to be carried out. It is possible that attorneys who are not trained in mediation prefer litigation procedures, as they do not feel like they are in competition with mediators. People seeking legal advice often have difficulties assessing whether the mediation procedure would be better for them.

But even in those cases in which both persons seeking legal device as well as their legal counsel discuss the possibility of a mediation procedure, mediation often does not take place when the client wants to demonstrate *power and strength* by means of a court ruling, or when *emotions caused by a conflict* prevent clients from moving to the same level of communication as the other party to the conflict in a mediation procedure. Above and beyond this, it must not be ignored that *both parties* involved in the dispute *must be willing to engage in mediation*. Frequently, the advantages of mediation are perceived by one of the parties to the conflict, but the other part to the conflict is reluctant to seek to resolve the conflict out of court as a result of *injury experienced* during the dispute, preventing them from assuming individual responsibility for resolution of the conflict and actively contributing to a solution to the dispute. Psychological aspects influencing the *mediation willingness of individuals* relate to individual personalities and in many cases prevent mediation from even being contemplated in the first place. *Access by the mediator to the second party in the conflict*, which mediators precisely do not petition in the first step, frequently remains closed off as an option because mediators are not provided the possibility in the first place to inform the other part about the steps in the mediation procedure, to describe the advantages of such and thus overcome reluctance to accept the procedure.

As a successful effect of the mediation act should be emphasized, that attorneys trained in mediation frequently make use of mediation methods in trying cases, whether this involve clarifying the interests of the client, supporting them in self-critical reflection or in the structuring of negotiations. As a result of their mediation training, attorneys at law can supplement or replace the contradictory trying of a case by a cooperative approach to the case. A comparison of notes with attorney mediators confirms that mediation training facilitates and eases the trying of a case and leads to more satisfactory results for clients.

VII. Mediation in legal training

It should also be mentioned that *mediation* is now offered as a key qualification at universities *within the framework of law studies*. To the extent that this opportunity is taken advantage of, it leads to rethinking on the part of students, who discover that there is another procedure in which to solve conflicts other than litigious procedures.

VIII. Summary:

A lot has been done in Germany since the Mediation Act went into effect to foster and encourage mediation, be it through training of mediators, the founding of associations, to raise awareness of the possibility to resolve disputes out of court, by involving mediation in law studies, offering litigious procedures to be resolved by the appointment of a mediation judge and the attempt to provide for upstream mediation procedures prior to litigation procedures by means of a recommendational provision. The use of mediation at business enterprises as an instrument of conflict management and value-oriented company management has been especially successful.

It should nevertheless be kept in mind that so-called attorney mediators are not able to register a clear trend for people seeking legal counsel and the parties with whom they are in conflict to have a common desire for mediation. The common desire for mediation presupposes a minimum of communication between the parties - a common desire which is often lacking precisely because of the conflict situation. There continue to be few cases in which a mediation procedure comes about. For this reason, the task in the future will remain to establish a broad awareness that conflicts do not have to be resolved litigiously, and that instead the parties to the conflict can recognize themselves that they can determine themselves how a dispute can be solved in a manner that is mutually satisfactory to both parties. Factors that can convince the parties that a win-win solution is possible for both sides include aspects of the mediation procedure itself, namely its voluntary nature, individual responsibility and confidentiality as well as the wide-ranging benefits of mediation such as, for example, savings on costs and time, the all-embracing inclusion not only of the legal positions, but also the interests of the parties to the conflict as well as the forward-looking reestablishment of communications.

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