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## The New German Mediation Act – Paving the Way for Mediation As Established Standard in Dispute Resolution?

Implementing the EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters, the German Mediation Act is the first codification of mediation and related provisions in German law. Mediation may therefore be regarded as a more established standard in dispute resolution and gain relevance for business decisions. The new act also introduced two types of mediation related to court proceedings.

### The New German Mediation Act

In July 2012, the German legislator implemented EU-Directive 2008/52/EWG (“EU Directive”) into national law and adopted the so-called ‘Act to Promote Mediation and Other Methods of Out-of-court Dispute Resolution’ (*Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung*, BGBl. 2012 I, 1577; hereinafter the “Act”). The core elements of the Act are the enactment of the Mediation Act (*Mediationsgesetz*, MediationsG) and amendments to the procedural codes, in particular the German Code of Civil Procedure (*Zivilprozessordnung*, ZPO). The MediationsG is the first codification of mediation and related provisions in German law prescribing, *inter alia*, basic principles, procedural rules, and minimum duties of the mediator. The primary aim of the EU Directive is to ensure the enforceability of an agreement reached via mediation, the confidentiality of the mediation, and the suspension of the statute of limitations for the duration of the mediation proceedings.

While the EU Directive is applicable to cross-border disputes only, the MediationsG does not distinguish between cross-border and domestic mediation. The Act focuses on mediation as a method of alternative dispute resolution. However, the amended provisions in the procedural codes are also open to other methods, such as ombudsmen, adjudication, minitrial or early neutral evaluation, to name but a few mentioned in the legislative materials.

The question on whether or not to include a separate concept of in-trial mediation in the MediationsG, along with out-of-court mediation, was a major controversial issue which resulted in a delay of the enactment by several months. Whereas the draft bill originally proposed by the German Government provided for such a concept, the Legal Committee of the German Parliament (*Rechtsausschuss des Bundestags*) proposed to delete the concept from the bill, which was passed by the Bundestag. However, as a result of the initiative of the German Federal Council (*Bundesrat*), the idea of in-trial mediation was revived, albeit restated in a modified manner. Instead of being an independent concept in the MediationsG, it is now mentioned as one potential method for judicial conciliatory proceedings.

## Mediation in the EU Directive and the MediationsG

Mediation is defined by the EU Directive and the MediationsG as a confidential and structured proceeding in which the parties, voluntarily and on their own responsibility, seek an amicable settlement of their dispute with the assistance of a mediator (sec. 1 par. 1 MediationsG). The mediator is chosen by the parties as a neutral person for such proceedings (sec. 2 par. 1 MediationsG). Unlike an arbitrator in arbitration – as another method of alternative dispute resolution – the mediator has no authority to impose a decision or other measures upon the parties. The parties are at no time obliged to continue the process (sec. 2 par. 5 sentence 1 MediationsG). The goal of mediation is generally to seek a future-oriented solution to the dispute, thus allowing the parties to move forward and continue their cooperation. Such forward-oriented perspective is perceived to enable value-added cooperative approaches. The agreement reached by mediation can be made enforceable via notarization by a German notary public or a German court pursuant to sec. 794 par. 1 no. 5 ZPO or by means of a lawyers' settlement (sec. 796a ZPO).

The MediationsG stipulates basic duties of the mediator to adequately inform the parties and ensure that they are aware of the principles and the course of the mediation (sec. 2 par. 2 MediationsG). The mediator is equally committed to all parties. His major tasks are to promote communication between the parties and ensure the adequate and fair participation of each party (sec. 2 par. 3 MediationsG). If the parties intend to enter into a settlement agreement, the MediationsG requires that the mediator also ensure that such agreement is reached based on the parties' full understanding of the circumstances and content of the agreement (sec. 2 par. 6 MediationsG). The actual role of a mediator may vary depending on the case and the parties: Whilst his role may be limited to moderating and enhancing communication between the parties, he is not prohibited from making proposals to the parties as long as the parties so request. The MediationsG imposes strict confidentiality obligations on the mediator and on those involved in the administration of the case, who also have the right of refusal to testify in civil court proceedings. In any case, the title 'certified mediator' (*zertifizierter Mediator*) may be used only by persons who have completed specific training pursuant to the rules set forth by the German Department of Justice; continuing education is mandatory (sec. 5 par 2, sec. 6 MediationsG).

Finally, by applying sec. 203 par. 1 of the German Code of Civil Law (*Bürgerliches Gesetzbuch*, BGB) to mediation proceedings, a suspension of the statute of limitations during the mediation proceedings can be obtained: As already stipulated by the prior law, the statute of limitations is tolled as long as serious negotiations pertaining to the dispute continue. However, as there is no explicit rule for mediation procedures, significant uncertainty may arise regarding the exact time frame of the suspension of the statute of limitations, or when one party denies that mediation was still being employed as a serious attempt to settle the dispute. In order to avoid any such uncertainties, the parties are free to make additional arrangements. They are encouraged to explicitly agree on a suspension of the statute of limitations. Also, the DIS Mediation Rules contain provisions to which the parties can agree, specifying the commencement and termination of suspension similar to the rules for arbitration proceedings.

## Types of Mediation

The Act refers to three types of mediation or related proceedings: the standard out-of-court mediation, the out-of-court mediation upon proposal by the court, and mediation in judicial conciliatory proceedings. These three types differ in terms of how they are commenced and in terms of the person acting as mediator.

The MediationsG establishes the rules and standards for *out-of-court mediation* as an independent proceeding which is based solely on the decision of the parties to find an amicable agreement in a structured process, as described above. It is primarily governed by the MediationsG and not related to court proceedings. When a dispute arises, parties may enter into

mediation proceedings based on either an ad-hoc agreement to this particular dispute resolution method or on a mediation clause in a contract underlying the dispute. Mediation may also be agreed upon by the parties as a first step within a multi-tier dispute resolution mechanism, whereby arbitration or court proceedings become permissible only after mediation has failed or, exceptionally, become moot.

Mediation may also be initiated when civil court proceedings have already commenced, upon the *court's proposal*. The newly introduced sec. 278a ZPO empowers the court to propose mediation or any other proceeding for out-of-court settlement, without thereby subjecting the court to any challenge by lack of neutrality on that basis. If the parties agree to enter into such a proceeding, the court is entitled to stay the court proceedings, which will be continued only if an agreement cannot be reached; if mediation is successful, the court proceeding will be terminated. The parties may agree on the initiation of such mediation also without the prior recommendation by the court. A judge previously involved in a mediation is excluded from serving as judge on the case (sec. 41 no. 8 ZPO).

The third type – *mediation within judicial conciliation* – is based on the new sec. 278 par. 5 ZPO. It provides for the possibility to enter or re-enter conciliatory proceedings before the court upon the referral of the court at any time during the court proceedings. The conciliatory proceedings are conducted by a judge acting as judicial conciliator (*Güterichter*) who is not authorized to render binding decisions. The judge need not be different from the judge conducting the court proceeding. Such conciliation is meant to reach a mutual agreement, thus concluding the case other than by verdict. New sec. 278 par. 5 ZPO allows the judge in a conciliatory role to make use of the methods of mediation, which is thus a compromise between applying and not applying the concept of in-court mediation. It has occasionally been argued that the role of the judge conducting the mediation is in contradiction to his statutory authority and mandate in court proceedings, or that a judge could tend to impose his legal view on the parties, in violation of the principle of self-restraint on behalf of a mediator. Others regard in-court mediation as a time-efficient manner of handling court cases. The amendments to the Act provide a legal basis for the judge in a conciliatory role when applying mediation, without however establishing particular rules regarding confidentiality or generally applying the duties of a mediator. The procedural rules foster confidentiality by prohibiting the creation of a transcript in conciliation proceedings unless both parties consent (sec. 159 par. 2 ZPO).

## Mediation As an Established Method for Dispute Resolution?

Even before the enactment of the MediationsG, mediation had developed as a professional method for dispute settlement in the area of commercial disputes, along with litigation and arbitration. Similar to arbitration procedures, mediation has become more professional and institutionalized: for example the arbitration institutions ICC and DIS provide case administration pursuant to the ADR rules or the DIS Mediation Rules, respectively. A recent ICC report provides statistics on mediation procedures with amounts in dispute of up to USD 550 million and an average amount of USD 17 million. The EU Directive seeks to promote mediation as a method that can provide a cost-effective and quick extra-judicial resolution of disputes through processes tailored to the needs of the parties. According to the ICC statistics to date, ADR proceedings – which are mainly mediation proceedings (80 %) – have an average duration of less than four months after transfer of the file to the mediator and an average cost of around USD 20,000. With the recent codification, mediation has been acknowledged by the German legislator as an established method for the resolution of disputes.

## Mediation under the Business Judgment Rule

When confronted with a commercial dispute, corporate management must decide on the appropriate response. Selecting the appropriate method for dispute resolution among various legal options is generally part of such an entrepreneurial decision within the corporate management's discretion pursuant to the business judgment rule implemented in sec. 93 par. 1

sentence 2 of the German Stock Corporations Act (*Aktiengesetz*, AktG). The factors to be taken into account regarding a preferable method of dispute resolution may, from a management perspective, include the expected outcome, certainty and predictability, time and cost efficiency, and collateral effects such as publicity. Whether or not to opt for mediation must be determined based on the circumstances of the specific case requiring a broad view on the dispute and on the relationship between the involved parties. Such analyses will likely involve several corporate departments, such as legal, finance and commercial or operative units. It may also be useful for representatives of the departments to participate in the mediation, in order to develop a value-added solution.

## **Out-of-court-Mediation and Settlement Negotiations**

The out-of-court mediation moderated by a neutral third person may be chosen as a reasonable method when unstructured settlement negotiations are no longer advancing, and the parties remain reluctant to initiate arbitration or court proceedings as they may negatively affect amicable negotiations and ongoing business relations. However, as the mediation proceeding is non-binding and based on cooperation, a satisfactory outcome is more likely if each party has a vested interest in an agreement which both settles past conflicts and provides added-value for future cooperation. The tolling of the statute of limitations during mediation – in particular when conducted under established rules such as by the DIS Mediation Rules – can contribute to making mediation an attractive method for dispute resolution. The parties may be inclined to initiate out-of-court mediation within ongoing court proceedings under sec. 278a ZPO if a court decision can no longer be expected to be issued within a reasonable timeframe due to increased complexity of the case.

## **Mediation in Connection with Court Proceedings**

Once court proceedings have been commenced, mediation upon recommendation of the court can be a route towards amicable resolution of the dispute if there are promising signs that such resolution can be achieved. The mediation-type judicial conciliation can constitute a compromise for when one party is reluctant to leave the court room and is doubtful of the other party's willingness to reach an agreement. When it appears that mediation is not advancing a settlement of the dispute, the judge in a conciliatory role can terminate the conciliation proceedings and relegate the matter to court proceedings. Even though the judge in a conciliatory role has no authority to render binding decisions or issue a legal indication, a proposal submitted to the parties could in fact give guidance to the parties and provide valuable support to management seeking to determine whether under the business judgment rule a settlement is appropriate and in the company's best interest. The judge in a conciliatory role may also access the court files to the case. However, any legal consideration is not binding for the lawsuit itself inasmuch as the judge in a conciliatory role is not functioning as a court room judge and can therefore not be heavily relied upon.

## **Potential Downsides of Mediation**

The flexibility of mediation may also be regarded as a potential disadvantage. When settlement negotiations between the parties have failed, it may be in a company's interest to have the dispute resolved in a structured proceeding and obtain a final solution providing clear guidance for comparable future situations. As the parties are not required to reach a consensus, mediation proceedings do not necessarily result in a practicable compromise and can lead to adversarial legal proceedings instead. Especially if there are few areas of future cooperation, the commencement of mediation (e.g. selecting a suitable person as mediator, agreeing on the procedure) may further delay a definite resolution without the expectation of adding considerable value. The search for value-added solutions in the context of a dispute may also increase its complexity rather

than open new routes to the parties. Even where an internal decision-making within the organization of each party can be handled efficiently and without considerable delay, a complex mediation agreement may lead to new legal disputes under such agreement, which may also revive the original dispute. The scope for value-added commercial solutions can be limited by applicable law and regulation undermining the potential advantages of mediation.

In an international context, it is worth noting that mediation is by far not as established as arbitration. While the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) may be seen as facilitating cross-border respect of arbitral awards, there is no comparable cross-border instrument governing mediation proceedings or their outcomes. The New York Convention – with its more than 145 signatory countries – imposes an international obligation on state courts of signatory countries to refer parties to arbitration in lieu of state court proceedings and to grant recognition of awards arising out of such agreements, absent narrowly stipulated and defined grounds for refusal. It does not apply to mediation agreements or their outcomes.

## Summary and Outlook

With the enactment of the EU Directive and MediationsG, the European and German legislators have acknowledged that mediation is an established method for dispute resolution. The MediationsG sets forth minimum legal standards and requirements without limiting the flexibility of mediation. Along with out-of-court mediation, amendments to the ZPO have also paved the way for mediation within ongoing court proceedings and allow for a judge in a conciliatory role to apply methods of mediation.

When confronted with the question of how best to resolve a dispute, merchants should take serious consideration of mediation as a potential method of dispute resolution. Mediation may be preferable as a structured proceeding if the parties are reluctant to commence court or arbitration proceedings and have a strong common interest in value-added, future-oriented solutions. Flexibility may be regarded as an advantage, for example when multiple parties are involved; but it can also increase complexity and duration. Despite a degree of codification in Germany and indeed certain other countries, there remain considerable disadvantages of mediation, in particular in an international context when it comes to enforcement of agreements resulting from mediation. In many cases, the more reliable dispute resolution mechanism for commercial disputes may be arbitration, which also allows the recording of a settlement in the form of an arbitral award on agreed terms (sec. 1053 ZPO, sec. 30 UNCITRAL Model Law on International Commercial Arbitration). This may provide for significant flexibility in determining solutions for each particular case while at the same time providing an accepted framework for enforcing arbitral awards through the New York Convention.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

**Rainer Wilke**  
Düsseldorf  
+49.211.17888.717  
[rainer.wilke@shearman.com](mailto:rainer.wilke@shearman.com)

**Prof. Dr. Richard Kreindler**  
Frankfurt  
+49.69.9711.1000  
[rkreindler@shearman.com](mailto:rkreindler@shearman.com)

**Markus Rieder**  
München  
+49.89.2388.2615  
[rkreindler@shearman.com](mailto:rkreindler@shearman.com)