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Mediation in Germany: The long and winding road

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Résumé

Le développement de la médiation moderne en Allemagne a été un processus long et difficile. Cet article retrace le chemin des pionniers de la médiation ayant persévéré dans leur démarche solitaire à travers les années 80 et le début des années 90, moment à partir duquel la médiation est devenue une préoccupation aussi bien politique qu'universitaire. Le paysage actuel de la médiation en Allemagne y est décrit en terme de fondement théorique, de formation et de pratique en révélant les raisons du particularisme allemand. En dépit de l'émergence récente de la médiation en Allemagne, de très intéressantes recherches ont été menées de manière empiriques dans des domaines tels que les relations victime agresseur ou en matière de médiation familiale. Ces recherches sont ici analysées dans le but de leur applicabilité à des formes émergentes de médiation. Cet article aborde plus particulièrement le problème des structures légales, politiques, et socio économiques ayant une influence sur le système de médiation et sur la manière dont cette médiation est pratiquée en Allemagne. Ces structures jouent un rôle significatif sur le débat national relatif à des thèmes tels que l'exigence de la qualité d'avocat pour remplir les fonctions de médiateur, le choix entre la médiation obligatoire ou facultative. Pour conclure, le lecteur est invité à considérer le chemin restant à parcourir en Allemagne afin: de développer la professionnalisation et la spécialisation, d'endiguer la spirale de réglementation législative et le piège de l'encadrement judiciaire, de donner à la médiation une chance réelle de futur.

1. A Modest Beginning ...

Whereas in the US legal anthropologists and above all practitioners from the community sector were the catalysts for the modern mediation movement,[1] in Germany, legal sociologists, pioneer judges, lawyers, criminologists and social workers provided the initial impetus.[2] Notably for Germany the

1 R. Danzig, "Toward the Creation of a Complementary Decentralized System of Justice" (1973) 26 *Stanford Law Review* 1.

2 E. Blankenburg, E. Klausa & H. Rottleuthner, *Alternative Rechtsformen und Alternativen zum Recht*, (Opladen, 1980); W. Gottwald, *Streitbeilegung ohne Urteil*, (Tübingen: Mohr, 1981); H. Janssen & H-J Kerner, (eds.), *Verbrechensopfer, Sozialarbeit und Justiz*, (Bonn: DBH-Schriftenreihe, 1985); D. Rössner, "Konfliktregulierung und Opferperspektive in der jugendstrafrechtlichen Sozialkontrolle", in DVJJ (ed.), *Jugendgerichtsverfahren und Kriminalprävention*, (München: DVJJ-Schriftenreihe 13, 1984), at 375–386; H. Ostendorf, *Alternativen zur strafverurteilenden Konflikterledigung*, ZRP 16, 1983, at 302–309; T. Trenczek, "Täter-Opfer-Ausgleich – Grundgedanken und Mindeststandards" *Zeitschrift für Rechtspolitik* 25, 1992, at 130–132.

criminological, legal and sociological discussions developed parallel to each other. Nevertheless, it took many years before the German pioneers of mediation attracted any significant attention from mainstream legal practitioners and the wider community. It was only in the latter half of the 1990's that the mediation movement began to enjoy more than academic attention in Germany. Since this time a plethora of mediation books and articles have been published, not to mention the many mediation conferences and training seminars that have taken place. These developments indicate that the German mediation movement is gradually repositioning itself from the academic to the practitioner focused political arena.[3] Despite a growing field of trained mediation professionals in a diverse range of practice areas, the practical relevance of mediation in Germany cannot be compared to that of common law jurisdictions such as Australia and the US. Apart from developments in the fields of victim offender mediation and family mediation, mediation in Germany is still in its infancy.

2. The Mediation Landscape in Germany: A Patchwork Quilt

a) Mediation in practice

An overview of the rapidly growing number of organisations offering mediation services in the German private sector reveals a tendency to form organisations according to the dispute area, for example, community mediation, family mediation, mediation in succession law, workplace mediation, construction mediation, commercial mediation, environmental mediation, insolvency mediation, insurance mediation, administrative law mediation, social law mediation, health dispute mediation, intellectual property mediation, school mediation, victim offender mediation and online mediation.[4] In most of these practice areas there is, in fact, very little practice. Rather seminars, discussion groups, literature and pilot projects comprise the primary focus. Exceptions have emerged in the fields of victim offender me-

3 S. Breidenbach, *Mediation: Struktur, Chancen und Risiken von Vermittlung im Konflikt* (Köln: Otto Schmidt, 1995); S. Breidenbach & M. Henssler (eds.), *Mediation für Juristen*, (Köln: Otto Schmidt, 1997); on the development of mediation *see* D. Strempel, "Rechtspolitische Aspekte der Mediation", in F. Haft & K. v. Schlieffen (eds.), *Handbuch der Mediation*, (München: Beck, 2002) at 104.

4 *See* the contributions on mediation practice areas in F. Haft and K. v. Schlieffen (eds.), above Note 3 at 1417.

diation, family mediation and to a significantly lesser extent community, school mediation, environmental mediation, commercial and workplace mediation.

i) Victim offender mediation

Victim offender mediation (VOM; in German Täter Opfer Ausgleich TOA) was the first form of mediation to develop and find recognition in both theory and practice in Germany.[5] The first pilot programs began in 1985 in the juvenile sector. Today there are about 400 VOM programs across the country; about 1/3 of the schemes work with juvenile as well as adult offenders. Most institutions supporting victim offender mediation are small, many of them employing only one (part time) mediator dealing with fewer than 50 cases a year. The largest VOM program is the Waage in Hanover.[6] Waage employs four mediators who handle about 600 cases a year involving approximately 600 adult offenders and even more victims. Statistics from the national VOM service bureau in Cologne with which most VOM programs are registered indicate that approximately 25 000 cases are handled annually.

VOM was integrated into the German criminal justice system as early as 1991 through a series of legislative reforms. With respect to juveniles the office of public prosecutions can refrain from a formal procedure if the juvenile makes a serious attempt at victim offender reconciliation.[7] With respect to adult offenders, German criminal law does not prima facie allow extensive use of discretion not to prosecute by referring to alternative procedures.[8] In the past decade, however, VOM has been established as a significant exception to this general rule. § 153a (1) No. 5 *Code of Criminal Procedure* (Strafprozessordnung StPO) allows a prosecutor to defer and/or refrain from formally charging an accused person in a misdemeanour case if VOM is undertaken. In addition, § 46a of the *German Criminal Code* (Strafgesetzbuch StGB) was introduced in 1994 to permit a judge to mitigate or refrain from imposing a sentence in cases involving a maximum of one year imprisonment where VOM has been undertaken. Further, in such cases the prosecutor can even drop the charge prior to sentencing (§ 153b *Code of Criminal Procedure*, Strafprozessordnung StPO). Finally, several regulations relating to VOM were introduced into the *Code of Criminal Procedure* in 1999, the result of which is that prosecutors and judges must assess and continue to reassess the suitability of VOM at each stage of the criminal procedure and trial (§ 155a *Code of Criminal Procedure*, Strafprozessordnung StPO). Where appropriate, cases may be referred to an approved VOM program (§ 155b *Code of Criminal Procedure*, Strafprozessordnung StPO).

Despite significant legislative reform and the growth in VOM programs throughout Germany, VOM today is utilised in less than 5% of criminal matters.[9] According to existing legislation, VOM could potentially be used in 95% of criminal matters. The gap between actual use and potential use reflects the difference between legislative intentions and expectations and the limited understanding of many stakeholders in the criminal justice system of the role VOM can play.[10] On the other hand, VOM programs are becoming increasingly successful in directly attracting disputants involved in criminal matters before the legal system becomes involved. In this context the boundaries between VOM and community mediation begin to blur – a reflection of the universal application of the mediation process.

ii) Family mediation

Family mediation refers to separation and divorce matters, parenting and custody arrangements, property settlements and family disputes about wills. In Germany, the number of private sector mediation services on offer has risen dramatically since the mid 1990's.

The *Reform on Law relating to Children* (Kindschaftsrechtsreform 1998), despite some critique that it did not go far enough in promoting cooperative decision making in disputes involving children,[11] has nevertheless contributed to an increase in the instances of joint custody and other joint solutions by parents. Further, in the context of parenting arrangements, the German Youth Welfare Department (Jugendamt) may adopt a mediative role according to § 17 *Juvenile Welfare Law* (Sozialgesetzbuch SGB VIII).

5 *See* D. Dölling et al, *Täter-Opfer-Ausgleich in Deutschland*, (Bonn: Forum Verlag, 1998) and above Note 2.

6 *Waage* is translated into English as "scales" and refers to the balancing aspect of VOM.

7 § 45 (2) 2 *Juvenile Criminal Code* (Jugendgerichtsgesetz JGG).

8 The so called legality principle: § 152 *Code of Criminal Procedure* (Strafprozessordnung: StPO).

9 *See* D. Dölling et al, above Note 5; and M. Kilchling, "Aktuelle Perspektiven für Täter-Opfer-Ausgleich und Wiedergutmachung im Erwachsenenstrafrecht. Eine kritische Würdigung der bisherigen höchstrichterlichen Rechtsprechung zu § 46a StGB aus viktimologischer Sicht." 16 *Neue Zeitschrift für Strafrecht* 309 at 311.

10 T. Trenczek, "Victim-Offender-Mediation in Germany: ADR under the Shadow of the Criminal Law" (2001) 13(2) *Bond Law Review: Special Issue: International Dispute Resolution* 364.

11 H. Mähler & G. Mähler, "Familienmediation", in F. Haft & K. von Schlieffen (eds.), above Note 3 at 914 et seq.

Anecdotal evidence suggests that family mediation is the most practised form of civil mediation, although it is estimated that only 10% of divorce cases (between 5000 and 10 000) go to mediation each year. The primary family mediation organisation in Germany is the interdisciplinary body, Federal Association for Family Mediation (Bundesarbeitsgemeinschaft für Familienmediation, BAFM).[12] In 1993 the BAFM established guidelines for mediation in family disputes. This initiative was followed by the development of a mediation accreditation program and the recognition of family mediation training programs, which adhere to the accreditation requirements.

iii) Community mediation

Community mediation refers to mediation that takes place at a community level: at community justice and legal centres, in schools and in other organisations that offer mediation services to the wider community.[13] One of the better known community mediation programs is Mediationsstelle Brückenschlag. Founded in 1996, Brückenschlag is financed partially by public funds and a mixture of private donations, profits from training courses and the voluntary work of mediators and other staff. Other community mediation projects include the project Stadtteilvermittlung of the City of Frankfurt/Main, the Mediation Centre in Frankfurt/Oder (Mediationstelle Frankfurt/Oder), the Mediation project in the Bürgerhaus in Bremen-Vegesack and the Waage Conflict Resolution Centre in Hannover, the last of which offers both victim offender and community mediation services. Despite the fact that there has never been a strong history of pro bono community legal advice giving in Germany, a number of community mediation programs are now training volunteer mediators and contracting them to a minimum number of mediations upon attaining their qualification.

In Germany a number government sponsored legal centres providing legal advice also offer conciliation services (Schlichtung).[14] Despite the fact that

12 *http://www.bafm-mediation.de/* (4 January 2003).

13 T. Metzger, "Mediation im Nachbar-, Miet- und Verbraucherrecht", in S. Breidenbach & M. Henssler (eds.), *Mediation für Juristen: Konfliktbehandlung ohne gerichtliche Entscheidung*, above Note 3 at 183; H. Pfeiffer & T. Trenczek, "Kommunale Schlichtungsstellen – Möglichkeiten bürgernaher Konfliktbearbeitung jenseits des justizbezogenen Täter-Opfer-Ausgleiches", in T. Trenczek & H. Pfeiffer (eds.), *Kommunale Kriminalprävention*, (Bonn: Forum-Verlag, 1996) at 397.

14 A prominent example of one of these conciliation centres is the ÖRA in Hamburg which also offers mediation services; *see http://www.hamburg.de/fhh/behoerden/behoerde_fuer_soziales_und_familie/oeffentliche_rechtsauskunft/index.htm* (4 January 2003); K.P. Hennings, "Die Arbeit der öffentlichen Rechtsauskunft- und Vergleichsstelle in Hamburg", in E. Blankenburg, W. Gottwald & D. Strempel (eds.), *Alternativen in der Ziviljustiz: Berichte, Analysen, Perspektiven* (Köln: Bundesanzeiger, 1982) at 51.

the bulk of their work consists of legal advice, these centres are officially recognised conciliation centres (anerkannte Gütestellen), which means that a number of legal consequences follow when parties enter into a conciliation process. First, the German equivalent of the statute of limitations (Verjährung) ceases to run for the duration of the conciliation process, and second, any agreement reached within the conciliation between the parties can be enforced in a court of law.[15] Generally, these services are inexpensive or free for those with limited financial resources. Traditionally, they have not been utilised widely by the disputing public.

In addition, there are a number of long existing conciliation centres in various branches of the German economy. Generally, these conciliation centres operate through chambers of commerce (such as the German Chamber of Industry and Trade), and industry associations (for example, in the textile, radio and television, technical and car industries). Like the government sponsored legal centres offering conciliation services, most of the dispute resolution processes associated with these conciliation centres do not follow an interest based mediation model. Rather, the processes offered tend to be directive, interventionist and rights based in nature.

The institution of the Schiedsmann has a very long tradition (up to 180 years) in various German states (Länder). Generally, the local government is responsible for appointing persons to the office of Schiedsmann.[16] Appointees are generally laypersons and respected members of the community, who fulfil the role on a voluntary basis. Bierbrauer has examined the role of the Schiedsmann.[17] He concludes that the nature of the dispute resolution process offered by the Schiedsmann varies considerably according to both the individual Schiedsmann and the jurisdiction. While a small number of Schiedsmänner offer processes similar to mediation, most demonstrate a much more inquisitorial and directive approach. There is not a great public demand for the services of the Schiedsmann, whereas interest in facilitative mediation schemes is growing.

15 § 209 I Nr. 1 and 2 Nr. 1a *German Civil Code* (Bürgerliches Gesetzburch – BGB) and § 794 Abs. 1 Nr. 1 *Code of Civil Procedure* (Zivilprozessordnung – ZPO).

16 O. Siegel, "Alternativen zur Justiz: Der Schiedsmann", in E. Blankenburg, W. Gottwald & D. Strempel (eds.), see above Note 14 at 55.

17 G. Bierbrauer, "Factors Affecting Success in the Mediation of Legal Disputes: Third Party Conciliation through the German 'Schiedsmann'", in S. Lloyd-Bostock (ed.), *Law and Psychology* (Oxford: SSRC Centre for Socio-Legal Studies, 1981) at 103.

iv) Peer mediation

Peer mediation programs (Konfliktlotsen) exist in several hundred German schools today.[18] The dramatic rise in such programs reflects a community and political response to reports of increased violence in schools, drugs and alcohol problems as well as disciplinary issues. While programs can be found at all school levels, most focus on students 12 years and older. It is particularly in this age group that the influence of peers increases and with it resistance to authority figures such as teachers and parents. It is often easier for students to accept another student as mediator rather than a teacher. Similarly, students as mediators are often in a better position to understand the context of the conflict and the language of the disputants. Early reports suggests that schools that have implemented peer mediation programs have just as many conflicts as before, but that overall, students and teachers enjoy a more cooperative atmosphere and constructive approach to conflict.

v) Environmental mediation

Environmental mediation or environmental dispute resolution refers to mediation in the public sphere involving planning, building and environmental issues. Environmental mediation differs from most other forms of mediation in the following ways: first, there are multiple parties involved such as government, institutional stakeholders, interest groups and individuals; second the mediations are typically a series of public and private meetings with the various stakeholder groups; and third, the issues at stake have a direct impact on the community. Environmental mediation first officially came on the German political scene in 1993 where it was discussed and adopted as an approach to be used with respect to town planning laws and then again in 1994 with respect to the processing of emissions licenses.[19] It represents a new form of political cooperation in issues that impact the relationship between people and nature. Environmental mediation is also envisaged as a form of dispute resolution in the draft of a *German Environmental Law Code*. It is, however, not envisaged that this draft law will be put before the

18 *See* K. Faller, *Mediation in der pädagogischen Arbeit. Ein Handbuch für Kindergarten, Schule und Jugendarbeit*, (Mülheim: Verlag an der Ruhr, 1998); O. Hagedorn, *Lehrer und Schüler lernen die Vermittlung im Konflikt*, (Stuttgart: Klett Verlag, 2000); C. Simsa, *Mediation in Schulen – Schulrechtliche und pädagogische Aspekte*, (Neuwied: Kriftel-Verlag, 2001).

19 Federal Parliamentary Document (Bundestag-Drucksache) 12/43 17, Federal Parliamentary Document (Bundestag-Drucksache) 12/69 23.

German parliament in the near future.[20] Two primary organisations promoting and fostering the use of environmental mediation are the Interest Society for Environmental Mediation (Interessensgemeinschaft für Umweltmediation e.V., IGUM)[21] and a national alliance between private and public groups, The Environmental Mediation Association (Förderverein Umweltmediation e.V.).[22]

vi) Commercial and workplace mediation

Despite the fact that mediations of medium to large scale commercial disputes in Germany are few in number, a small number of senior legal practitioners and academics are determined to promote the use of workplace and commercial mediation practice in Germany. To date members of this group have successfully held conferences, seminars and training events, formed a number of associations and conducted a series of mediations. However, compared with the practice in Australia and the US, mediation in German commercial affairs is still minor. There are three primary organisations representing this practice area of mediation. The National Association for Mediation in Business and the Workplace (Bundesverband Mediation in Wirtschaft und Arbeitswelt – BMWA) is an alliance of trained mediators offering services in this practice area.[23] The Society for Commercial Mediation and Conflict Management (Gesellschaft für Wirtschaftsmediation und Konfliktmanagement – gwmk) differs from BMWA in that it is a non-profit organisation, the membership of which consists largely of lawyers (not necessarily mediators) from major German commercial (law) firms. The aim of gwmk is to foster the growth and acceptance of mediation in commercial matters.[24] The German Society for Mediation in Commerce (Deutsche Gesellschaft für Mediation in der Wirtschaft e.V., DGMW) established itself as an independent umbrella organisation in the field of commercial mediation providing a central point for institutional and individual mediator members to network.[25] Each organisation offers mediation services through members, provides mediation and ADR training and has developed standards for the conduct of commercial and/or workplace mediators, model ADR clauses and other guidelines for the operation of workplace and commercial mediation in Germany.

20 H. Zillessen, "Umweltmediation", in F. Haft & K. v. Schlieffen (eds.), *Handbuch Mediation*, above Note 3 at 1171.

21 *http://www.umweltmediation.info/Pressemitteilung980708.htm* (4 January 2003).

22 *http://www.ag-recht.de/umweltmediation/frame01.htm* (4 January 2003).

23 BMWA (1998) 1 *Konsens* 75, *http://www.bmwa.de/* (4 January 2003).

24 *http://www.gwmk.org/* (4 January 2003).

25 *http://www.dgmw.de/* (4 January 2003).

vii) Online mediation

While a number of organisations and institutions are experimenting with online mediation, CyberCourt established by the Society for Computer Law (Gesellschaft für Computerrecht) in Munich has attracted most attention to date.[26] Although CyberCourt offered arbitration services when it first came on the market in 1999, concerns relating to natural justice and enforceability of awards led the project to adopt a mediation and conciliation model in 2000. CyberCourt directs its mediation and conciliation services, in particular, to cyberspace disputants, that is, parties whose conflict emerges from internet activity such as e-commerce disputes, domain name disputes and internet banking disputes. In addition, the German legal profession is looking to establish an online dispute resolution mechanism. Current research at the University of Applied Sciences in Lüneburg (Fachhochschule Nordostniedersachsen) is examining the risks and opportunities of online-dispute resolution.[27]

viii) Court related mediation

Court related mediation has not yet played a major role in German dispute resolution. In this regard, however, German practice is poised for a potentially significant change. The German parliament has recently passed a number of laws creating legal frameworks for the establishment of both voluntary and mandatory court related ADR schemes.

Effective as of 1 January 2000, the federal government of Germany introduced § 15a *Introductory Law of the Code of Civil Procedure* (Einführungsgesetz zur Zivilprozessordnung, EGZPO) permitting all German states (Länder) to introduce mandatory court related ADR (Aussergerichtliche Streitschlichtung) with respect to certain civil disputes. To qualify for mandatory ADR, the disputes must be either:

- Financial disputes before the magistrates' court up to a litigation value of 750 Euro,
- Neighbourhood disputes, or
- Defamation disputes where the alleged defamation has not occurred through the media.

Therefore German state parliaments have the option to legislate to require participation in an ADR process as a prerequisite to formally beginning court

26 *http://www.cybercourt.org/* (4 January 2003).

27 Further information can be obtained from *http://www.fhnon.de/forber/forschung/index.html* (4 January 2003).

proceedings, where, subject to a number of exceptions, the above criteria are fulfilled. The clause in § 15a EGZPO is known as the experimentation clause (Experimentierklausel) because it aims to encourage different models amongst the different German states with respect to the design of mediation models.

A number of German states, namely Nordrhein-Westfalen, Bayern, Baden-Württemberg, Hessen and Brandenburg have already introduced legislative schemes providing for mandatory ADR, while other states are at various stages of drafting or passing legislation within the terms of § 15a EGZPO. At the same time, there are a number of German states such as Lower Saxony that do not intend to introduce legislation within the framework of § 15a EGZPO. Their decision is based on the belief that mandatory mediation of such an indiscriminate nature will see many inappropriate cases referred to mediation, and exclude appropriate cases. According to the Lower Saxony perspective, such a policy will neither reduce court waiting lists nor increase the satisfaction level of disputants with respect to the settlement of their disputes. As indicated above § 15a EGZPO specifically leaves the model of ADR open in order to encourage a healthy competition of experimentation between the German states. While the state laws on mandatory ADR differ, for example, in terms of ADR service provider, much criticism has been directed at two elements common to all programs under the umbrella legislation, namely the mandatory nature of ADR and the case characteristic of low monetary value of the dispute as a selection criterion for ADR suitability.[28]

§ 15a EGZPO does not mention the term *mediation*. Rather it chooses to use broader terms for consensus based ADR, namely *Schlichtung* and *Streitbeilegung*. Nevertheless, all relevant background papers, commentaries, conference discussions and literature suggest that mediation was envisaged, if not as the primary process, at least as one of the ADR processes to be implemented under the legislation. The openness of § 15a EGZPO was intended to (and has) encourage(d) experimentation in mediation process design. At the same time, the lack of direction towards a particular philosophy, set of values and process translates to a lack of clarity in process quality and performance standards – a state of affairs that is particularly dangerous in the early days of the German mediation movement. Indications of the challenges that lay ahead include: (1) the use of summary debt recovery pro-

28 N. Alexander, "German Law Paves the Way for Mandatory Mediation" (2000) 2(9) *ADR Bulletin* 87; S. Breidenbach & U. Glaesser, "Befähigung zum Schlichteramt?" (2001) 1 *ZKM* 11–16.

cedure (Mahnverfahren), as one of the legislative exceptions to mandatory ADR, to avoid going to ADR,[29] (2) the temptation to push quick settlements in light of flat rate mediator payment schedules with a bonus for settling a dispute,[30] and (3) the ability for states to avoid implementing the mandatory nature of the system by choosing not to enforce penalty provisions for non-attendance at an ADR session.[31]

In the absence of a particular mediation philosophy or model, it appears that the nature of the dispute resolution process employed will depend on the qualifications and training of the mediator. As neither the federal legislation nor any of the state provisions specify mediator training or qualifications, the mediation on offer will depend largely on the existing qualifications and background of the mediators. In terms of who can qualify as mediator, the mandatory mediation schemes fall into three categories:

1. Mediators must be lawyers or notaries e.g. the Baden-Württemberg model,
2. Mediators are existing conciliators (Schiedsleute), e.g. the Nordrhein-Westfalen model, and
3. Mediators are sourced from recognised ADR organisations (Gütestellen), which include conciliators (Schiedsleute), and conciliation and mediation centres, e.g. the Brandenburg model.

Model 1 is likely to promote a settlement or evaluative mediation model. Model 2 is likely to perpetuate the work of the *Schiedsleute* tradition, which has enjoyed a strong tradition in a number of German states such as Nordrhein-Westfalen. While *Schiedsleute* is best translated as *conciliators*, as indicated earlier, empirical research on their practices reveals a strongly directive ADR model sometimes reflecting a conciliation model and other times reflecting wise advice giving or early neutral evaluation.[32] Model 3 is essentially a combination model. Organisations or institutions may apply for approval as an ADR organisation and thereby become eligible to mediate under the mandatory scheme. To date, approved organisations include lawyer-oriented mediation organisations and Schiedsleute, as well as community mediation centres. Accordingly, a wide spectrum of mediation styles is likely to be employed under this model. Where mediators or ADR organisations are recognised by legislation then the statute of limitations regulations will apply as outlined in Part 2 a)iii) above, with respect to conciliation centres.

29 F. Haft & J. Eisele, (Book review), "Außergerichtliche Streitschlichtung in Deutschland" von M. Wolfram-Korn and P. Schmarsli (Munich, 2001), (2002) 4 *NJW* 278–279.

30 *See*, for example, Article 13 BaySchlG. For a critique of the Bavarian Model, *see* N. Alexander, above Note 28.

31 S. Breidenbach & U. Glaesser, *see* above Note 28.

32 G. Bierbrauer, in S. Lloyd-Bostock (ed.), above Note 17 at 103.

More recently, and effective as of 1 January 2002, § 278 IV ZPO was amended to provide for court referral to ADR (Aussergerichtliche Streitschlichtung) with the consent of the parties. Within the framework of this amendment, the Ministry of Justice in Lower Saxony has initiated a statewide voluntary court related mediation pilot project.

At this point mention must be made of a small number of voluntary court related mediation projects dotted throughout Germany, which existed prior to the 2002 civil procedure reforms and met with varying amounts of success. They included the voluntary mediation service offered by retired judges at the Magistrates' Courts in Würzburg, München, Regensburg and Traunstein, the voluntary mediation project at the District Court (Landgericht) Stuttgart and the activities of the non-profit organisation fairmittelt e.V. at the Magistrates' Court Hannover.

The current Lower Saxony project, however, is unique in Germany in terms of its statewide and multi-jurisdictional dimensions and the fact that the mediations will be conducted by specially trained judges who have been granted a 50% caseload reduction to deal with the anticipated mediations. The project aims to improve the capability of both the judiciary and disputing parties to find more appropriate means of dispute management and resolution and to increase the range of dispute management services offered by the courts. Accordingly, courts in Lower Saxony will be able to refer matters pending trial to mediation and, in certain circumstances, to other ADR processes. The project will begin in four civil courts, namely two District Courts (Landgerichte), two Magistrates' Courts (Amtsgerichte), one Administrative Court (Verwaltungsgericht) and one Court for Social Security Issues (Sozialgericht). The project will begin in January 2003 and continue for three years. An independent research team will evaluate the project.[33]

In summary, current developments in Germany indicate two distinct trends in court related ADR and, specifically, mediation: first, the attempt to explore various mediation practice models through mandatory referrals envisaged by the broadly framed § 15a EGZPO; and second, the significant efforts in Lower Saxony and other jurisdictions to challenge and change the existing dispute management culture through the introduction of voluntary court related mediation schemes.

33 *http://www.niedersachsen.de* (search "Presse & Service") (4 January 2003).

b) The development of mediation law

One indicator of the prevalence of mediation in the dispute management practice of a country is the amount of legislation relating to mediation. Laws about mediation typically fall into the following categories.

- General legislation regulating mediation and mediators;
- Court specific legislation regulating the use of mediation in disputes pending trial, so called court related mediation/ADR;
- Legislation regulating the use of mediation in a particular industry, practice area or profession;
- Case law emerging from disputes involving agreements to mediate, mediation clauses, mediation settlements, mediation procedures, mediator qualifications and other mediation related documentation or events.

To date there are neither general laws about mediation nor mediators in Germany. Court specific legislation (§ 15a EGZPO and § 278 IV ZPO) has been described in Part 2 a)viii) above. Legislation regulating the use of mediation in specific practice areas exists in insolvency, family matters and criminal law. In terms of insolvency, § 305 I Nr. 1 of the *German Insolvency Law* (Insolvenzordnung InsO) was introduced in 1999. The law mandates creditors and debtors to try to mediate their dispute before they can begin the court procedure. With respect to family law disputes, the *German Law on Non-contentious Jurisdiction* (Freiwillige Gerichtsbarkeit FGG) encourages consensual solutions (§ 52 FGG). In the context of parenting arrangements, the Court can stay proceedings so that mediation can take place. Where one party objects to mediation, the Court itself may mediate between the parties (§ 52a FGG).

In 1997 the *Professional Code for Lawyers* (§ 18 Berufsordnung für Rechtsanwälte, BORA) explicitly recognised mediation as a legitimate part of a lawyer's role.[34] Accordingly, when acting as a mediator, the lawyer remains subject to BORA. Following a series of cases recognising the right of lawyers, who had completed an appropriate mediation training program, to describe and advertise themselves as mediators, the German Lawyers' Board (Bundesrechtsanwaltskammer BRAK) passed a resolution to the same effect in April 2002. In addition, lawyers who have completed appropriate training are entitled to advertise mediation as an interest area (Interessenschwerpunkt) or a service (Tätigkeitsschwerpunkt) they offer.[35]

34 § 18 *Professional Rules for Lawyers* (Berufsordnung für Rechtsanwälte BORA).

c) Standards for mediation practice

Mediators in Germany are not subject to national regulation and, as a consequence, standards and mediation styles vary greatly. Current trends in Germany indicate the likely development of mediation accreditation and practice standards according to industry. To date standards have been drafted by mediation organisations in specific practice areas. These standards are not legally binding; rather they provide a performance benchmark for mediators in the relevant area. For example, BAFM has established mediation standards and a training curriculum for mediators in family matters.[36] Nine German training institutes now offer mediator training and accreditation according to the BAFM's guidelines.[37] As such the BAFM guidelines have become the de facto national family mediation standards in Germany.[38] In terms of victim offender mediation, the National VOM Service Bureau (TOA Service Büro) funded by the Federal Ministry of Justice together with the Federal Association of VOM (Bundesarbeitsgemeinschaft für Täter Opfer Ausgleich) have developed a quality certificate and accreditation procedure.[39] Similarly, organisations representing the various practice areas of mediation have been busy drawing up standards for commercial mediation (gwmk, BMWA and DGMW), workplace mediation (BMWA) and environmental mediation (IGUM and Förderverein Umweltmediation e.V.), just to name a few. There are also moves to establish national minimum and mediation standards valid across all practice areas by a number of umbrella organisations such as the National Mediation Association (Bundesverband Mediation e.V.) and the German Society for Mediation (Deutsche Gesellschaft für Mediation e.V., DGM).

35 *See* the following cases from the Lawyer's Court (Anwaltsgerichtshof): AGH Baden-Württemburg 6/00; 1 AGH Rheinland-Pfalz 10/00; 2 AnwG Berlin 65/00 and the resolution of the Bar Association: BRAK Presseerklärung Nr. 18 vom 25. April 2002.

36 *http://www.bafm-mediation.de/* (4 January 2003).

37 H. Mähler & G. Mähler, "Ausbildung in Familienmediation", in F. Haft & K. von Schlieffen, (eds.), *Handbuch Mediation*, see above Note 3, at 1417.

38 H. Gerwens-Henke, "Zehn Jahre Familienmediation – ein persönlicher Rückblick" (1998) 1 *Konsens* 15.

39 TOA Service Büro, *TOA-Standards – Ein Handbuch für die Praxis des Täter-Opfer-Ausgleichs*, Köln/Hanover 1995, latest version: *http://www.toa-servicebuero.de* (4 January 2003).

Despite the fact that none of the existing standards are in the form of legislation or regulation (but rather guidelines), German courts are likely to have recourse to these standards to determine whether a mediator has fallen below the industry standards expected by consumers. In a young mediation world consisting already of overlapping standards, the question on everyone's lips will be: which standards will provide the benchmark?

d) Education, training and accreditation in mediation skills

In terms of education and training, the mediation experience in Germany has taken a considerably different route to that of common law countries like Australia and the United States.

i) Mediation as a postgraduate tertiary offering

At postgraduate level mediation accreditation programs are being designed and offered on an interdisciplinary basis (i.e. interdisciplinary instructors and participants). Typically the programs are a combination of face to face classes and distance learning models to accommodate students' professional commitments. The postgraduate programs require students to specialise in one mediation practice area such as family or commercial mediation. For example, the European Masters in Mediation is a European education initiative that offers both lawyers and non-lawyers a postgraduate degree in mediation. The University of Hagen is the German partner in this European initiative.[40] The Masters program consists of a one year foundation course in which mediation is taught in an interdisciplinary context drawing from legal, communication and psychological theories. The second year allows students to specialise in particular areas of mediation such as family mediation or commercial mediation and is very practice oriented including an exchange program with another European country.[41] Other postgraduate programs are offered by the University of Applied Sciences in Ludwigshafen in cooperation with the National VOM Service Bureau and the University of Oldenburg. The Europa University Viadrina is planning a Masters in Mediation for 2003.

ii) Mediation in law schools and universities

Despite interdisciplinary mediation certification programs being offered at postgraduate level by German universities, German law schools to date have been reluctant to include mediation theory and or skills in law curricula.

40 *http://www.fernuni-hagen.de/FeU/Studserv/studserv_f.html* (4 January 2003).

41 N. Spegel, "Mediation – European Style" (1998) 4 *ADR Bulletin* 8.

Specialised courses in mediation within the legal education curriculum are not yet offered on a regular basis.[42] In 2001 the first university mediation clinic linked to a law school was established at the Europa University Viadrina.[43] The clinic operates with the local community as a grass roots mediation centre using a transformative mediation approach. Mediation subjects are also offered in a small number of Schools of Social Work in Germany, for example in Jena, Erfurt, Berlin and Nürnberg and at the Business Law Faculty at the University of Applied Sciences in Lüneburg. Forthcoming changes in this area are discussed in the context of the impact of structural environment in Part 3 a) below.

iii) Mediation training in the private sector

Mediation training in the private sector in Germany is thriving. Although the format of the programs varies to a large extent, there appears to be a trend towards one to two year programs consisting of intensive training modules of about 200 contact hours in total and opportunities for clinical practice.[44] Organisations offering mediation training can be categorised as (1) general umbrella organisations for mediation or (2) practice area specific organisations. Typically these organisations offer mediation services, information, practice guidelines as well as training. Umbrella organisations include: National Mediation Association (Bundesverband Mediation e.V.), the German Society for Mediation (Deutsche Gesellschaft für Mediation e.V., DGM) and the Centre for Mediation (Centrale für Mediation, CfM). The CfM is a joint venture of two prominent German publishing houses and has become a national focal point for conferences, seminars, events, training, publications, press releases and information on legal developments related to mediation.[45] In addition, organisations for family mediation, environmental mediation, workplace mediation, commercial mediation, victim offender mediation, school mediation and community mediation are mushrooming throughout the German mediation landscape.[46] Professional bodies

42 Ad hoc seminars on negotiation and mediation are offered as part of the law curriculum at a very small number of law schools in Germany. *See*, for example, F. Haft, "Folgerungen für Ausbildung und Praxis", in W. Gottwald & F. Haft (eds.), *Verhandeln und Vergleichen als juristische Fertigkeiten*, (Tübingen, 1993) at 116, who report on the seminars at the University of Tübingen.

43 *http://www.viadrina.euv-frankfurt-o.de* (4 January 2003).

44 E. Ewig (ed.), *MediationsGuide 2002*, (Köln: Centrale für Mediation, 2002).

45 *http://www.centrale-fuer-mediation.de/* (4 January 2003).

46 For a list of organisations and contact details *see* M. Hehn & U. Rüssel, "Ausbildungsinstitutionen", in F. Haft & K. von Schlieffen, (eds.), *Handbuch Mediation*,

for lawyers (for example, the German Lawyers' Academy, Deutsche Anwaltsakademie) and for psychologists also offer mediation training.

e) The birth of empirical research on mediation

The past two decades of German mediation research has focussed primarily on conceptional and theoretical discussions and legal, juridical issues related to ADR. Empirical research about the use and effects of mediation is, with the exception of criminological research about VOM,[47] scarce due to the lack of mediation practice upon which to base it.[48] Research surveys, however, have shown that the general public is accepting of informal dispute resolution. The preference for restorative and informal dispute resolution is especially higher among victims of crime compared to persons who have not been victimised, and higher among non-lawyers compared to criminal justice officials.[49]

(München: Beck, 2002) at 1424 and the website of the Centrale für Mediation at *http://www.centrale-fuer-mediation.de/ausbildung.htm* (4 January 2003).

47 For example, B. Bannenberg, *Wiedergutmachung in der Strafrechtspraxis. Eine empirisch-kriminologische Untersuchung von Täter-Opfer-Ausgleichsprojekten in der Bundesrepublik Deutschland*, (Bonn: Forum Verlag, 1993); D. Dölling et al, (eds.), *Täter-Opfer-Ausgleich in Deutschland. Bestandsaufnahme und Perspektiven*, (Bonn: Forum Verlag, 1998) at 365; L. Netzig & F. Petzold, "Abschlussbericht der Aktionsforschung zum Modellprojekt Täter-Opfer-Ausgleich bei der Waage Hanover e.V." in C. Pfeiffer, (ed.), *Täter-Opfer-Ausgleich im Strafrecht*, (Baden-Baden: Nomos, 1997) at 9–128; A. Hartmann, *Schlichten oder Richten. Der Täter-Opfer-Ausleich und das (Jugend)Strafrecht*, (München: Wilhelm Fink Verlag, 1995); J. Schreckling, *Bestandsaufnahmen zur Praxis des Täter-Opfer-Ausgleichs in der Bundesrepublik Deutschland*, (Bonn: BMJ, 1991); T. Trenczek & L. Netzig, "Restorative Justice as Participation: Theory, Law, Experience and Research", in B. Galaway & J. Hudson, (eds.), *Restorative Justice: International Perspectives*, (Monsey, New York: Criminal Justice Press, 1996) at 255.

48 In the late 1980s Wasilewski conducted research, which indicated that most lawyers in Germany pursue informal dispute solutions (approximately 70% of their cases are resolved out-of-court); the rate of informal settlements drops down to 25% if lawyers act on both sides; *see* R. Wasilewski, *Streitverhütung durch Rechtsanwälte*, (Köln: Bundesanzeigerverlag, 1990) at 36. Regarding the use of mediation by lawyers, *see* F. Haft, "Das Verhalten des Anwalts bei der außergerichtlichen Lösung von Konflikten" *Anwaltsblatt* 1989, at 458; M. Henssler & W. Koch, (eds.), *Mediation in der Anwaltspraxis*, (Bonn: Deutscher Anwaltsverlag, 2000).

49 D. Dölling & S. Henninger, "Sonstige empirische Untersuchungen zum TOA", in D. Dölling et al, above Note 5 at 360; M. Kilchling, *Opferinteressen und Strafverfolgung*, (Freiburg: MPI, 1995); K. Sessar, *Wiedergutmachung oder strafen; Einstellung in der Bevölkerung und der Justiz*, (Pfaffenweiler: Centaurus, 1992).

German studies confirm that the willingness to participate in mediation schemes is extremely high on the part of victims (75%) as well as offenders (90%). These figures are even higher in matters involving monetary claims and in conflicts involving youth offenders. Neither the seriousness of the offence nor the injury caused is a relevant factor in predicting the willingness of victims to participate.[50] Where both parties enter mediation there is an 80–90% likelihood of a mutual agreement resulting from the mediation.[51] However, face to face meetings occur in about 75% of the cases only. The rate of personal meetings is considerable lower if the offender is an adult; here mediation is pursued quite often (in some programs in more than half of the mediations) indirectly through shuttle diplomacy. In these cases participants support the notion of mediation, but reject a personal meeting with the other party out of fear, frustration or other reasons. In cases where there is no ongoing relationship, where damage to property has been minor and the emotional problems caused negligible, participants often find proceedings involving face to face contact to time consuming and unnecessary for settling financial compensation.

Victims and offenders give a broad range of reasons for taking part in mediation.[52] During the course of the mediation a surprising turnaround frequently occurs: financial demands take a back seat and non-material aspects gain in importance. Often both victims and offenders say that as a result of VOM they came to terms with what happened after getting to know the other party personally. Victims of violent conflicts, in particular, express that even after initial scepticism, the mediation talks have helped them to overcome the excessive fears resulting from the incident, and that during mediation talks, they were able to overcome fear, anger, hate and thoughts of revenge.

Research indicates that the majority of participants in a VOM process experience a high level of satisfaction in the process and outcome, with satisfaction rates up to more than 80% also on the side of the victim.[53] Criticisms

50 In the meantime assault and other violent crime make up the majority of cases handled by German VOM programs. Three out of four cases of the annual caseload of about 600 cases of the Waage in Hanover (which works only with adult offenders) involve violent crime; approximately one half of this number involves family and domestic violence.

51 *See* also A. Hartmann & H. Stroezel, "Die bundesweite TOA-Statistik", in D. Dölling et al, (eds.), *see* above Note 5 at 184.

52 D. Dölling & S. Henninger, above Note 49 at 203; A. Hartmann, above Note 47 at 279; T. Trenczek & L. Netzig, above Note 47 at 255 et seq.

53 D. Dölling & S. Henninger, above Note 49 at 203; Hartmann, above Note 47 at 282; T. Trenczek & L. Netzig, above Note 47 at 256; J. Schreckling, above Note 47 at 42.

emerge when the mediator is perceived as not neutral and is focussed on the re-socialisation of the offender in the criminal justice system, rather than the restorative element of the process.

Overall criminological research about VOM in Germany shows that ADR and mediation is very well accepted by the parties to conflict as well as the general public and is successful in terms of the parties being able to agree to mutually acceptable outcomes. Despite positive research outcomes, however, the use of mediation is been held back especially by the reluctance of criminal justice officers to refer cases to VOM and funding problems related to VOM programs.[54]

With regard to civil mediation, Proksch has undertaken an extensive empirical study. The study compares mediation with traditional forms of dispute resolution in family disputes concerning divorce and parenting arrangements in the German cities of Jena, Nürnberg/Fürth and Erlangen.[55] In 75% of cases the offer of mediation was accepted by the divorcing parents; within these cases 75% of the participants found a mutual acceptable solution. The research results indicate that approximately 80% of those surveyed were very satisfied with the mediation process and would recommend it to their friends and colleagues. On the other hand, the majority of respondents who participated in the court process to resolve their dispute found the process unsatisfactory, too formal, impersonal and unhelpful in terms of clarifying the real issues in dispute. The positive evaluation and high satisfaction levels with the mediation process has been confirmed in other German studies.[56] Interestingly, the studies confirm that women, mothers, men and fathers respond similarly in terms of their view of mediation as a fair process that serves their interests.

As has been mentioned in Part 2 a)viii) the pilot projects on court related mediation throughout Germany are being accompanied by research evaluations.[57] No data was available at the time of writing.

54 *See* T. Trenczek, above Note 10 at 364.

55 R. Proksch, *Kooperative Vermittlung (Mediation) in streitigen Familiensachen*, (Stuttgart: Kohlhammer, 1998); R. Proksch, "Praxiserfahrungen mit Vermittlung (Mediation) in streitigen Sorge- und Umgangsrechtsverfahren", in J. Duss- von Werth, (ed.), *Mediation – Die andere Scheidung*, (Stuttgart: Klett-Cotta, 1995) at 144.

56 R. Bastine, G. Link & B. Lörch, "Bedeutung, Evaluation, Indikation und Rahmenbedingungen von Scheidungsmediation" in J. Duss- von Werth, above Note 55 at 144; B. Weinmann-Lutz, *Kooperation und Konfliktlösung bei Scheidungspaaren in Mediation. Eine theoretische und empirische Untersuchung von Geschlechterunterschieden und Effekten*, (Aachen: Shaker, 2001).

57 Above Note 33.

3. Impact of the Structural Environment on the Development of Mediation

Mediation does not exist in a vacuum. The environment surrounding mediation practice, in particular legal, political and cultural factors, impact upon the development of mediation in any given jurisdiction. This section explores a number of factors that have contributed to the differences in approach to mediation between Germany and Anglo American jurisdictions, while at the same time acknowledging the scarce amount of comparative empirical research on this topic.[58]

a) Mediation training and education

As indicated earlier, law faculties in Germany have resisted offering courses in mediation on a regular basis. In part, this state of affairs reflects the slow development of mediation practice in the German legal marketplace. Another part of the answer lies in the structure of German legal education. The structure of German legal education is embedded in its civil law traditions. *"The universities in civil law countries have been central to legal education for many centuries. Law (together with medicine and theology) was one of the first faculties established at the ancient European universities – for example at the University of Bologna in 1088."*[59] In Germany the nature of legal education, called the study of *legal science* (Rechtswissenschaft) reflects the highly theoretical and scientific approach to law integral to the civil tradition.

German legal education is organised around two sets of final exams, the first of which occurs at the end of between four and six years of study (Erstes Staatsexamen); the second of which occurs two and a half years later (Zweites Staatsexamen) and qualifies the graduate for admission to the legal profession. The German government, without input from the universities, conducts both sets of exams. In other words, from a student's perspective it is important to study the topics that the government exams are likely to include. Currently, mediation, and other skills topics are not examined by the

58 *See*, for example, E. Blankenburg, "Die Infrastruktur der Prozessvermeidung in den Niederlanden", in W. Gottwald & D. Strempel, (eds.), *Streitschlichtung: Rechtsvergleichende Beiträge zur außergerichtlichen Streitbeilegung*, (Köln: Bundesanzeiger, 1995) at 139; E. Blankenburg, "AKR: Deutschland im internationalen Vergleich", in W. Gottwald, D. Strempel, R. Beckedorff & U. Linke, (eds.), *Handbuch zur aussergerichtlichen Konfliktregelung, AKR-Handbuch*, (Neuwied: Luchterhand, 2000) at 2.2.2.

59 D. Weisbrot, *Australian Lawyers*, (Melbourne: Longman Cheshire, 1990) at 119.

state. Accordingly, despite real interest, many students make a calculated decision to focus on courses that are directly relevant for their exam. Moreover, professors offering mediation courses at law schools typically must do so in addition to their normal teaching load.

The current state of play is, however, on the brink of significant change. The Europeanisation and globalisation of law has given new impetus to legal education reform discussions in Germany. In 2001 the Conference of the Federal and State Justice Ministers (Justizministerkonferenz) recommended the introduction of ADR skills integration, especially mediation, in university law curricula. Furthermore, the recently passed *Law on Legal Education* (Gesetz zur Juristenausbildung), which will come into effect on 1 July 2003, proscribes in § 5a (3) a series of key qualifications such as legal interviewing, legal rhetoric, communication skills, conciliation and mediation that must be integrated into university law curricula. To this end university skills seminars in key qualifications are to comprise about 10% of the total law curricula. Accordingly, the issue of skills integration and mediation accreditation is one that must be addressed urgently by German law schools. While this is the first time that express reference has been made to mediation in the context of legal education guidelines and laws, it remains to be seen whether mediation will also enter the list of examinable topics for the state bar exams.

Mediation training available in the German private sector and in the interdisciplinary postgraduate programs is considerably more theory based, detailed and lengthy than the majority of training available in common law jurisdictions. In addition, the training tends to have a solid interdisciplinary foundation with most courses being offered by trainers from diverse disciplinary backgrounds. The strong theoretical and conceptual approach reflects not only a civil lawyer's thinking but also a culturally defined approach to education and training across all disciplines throughout Germany.

An additional difference is the very small number of volunteer mediation schemes, which reflects not only the newness of mediation in Germany but also the absence of a volunteer culture as is found in the new worlds of, for example, the US and Australia. Nevertheless a number of mediation pilots programs that use volunteers have emerged. For example, in Bremen, Lüneburg and Hanau volunteers (former trainees or employees) who want to stay involved have been used on an individual basis. Recently the Waage Hannover received a two year grant from the Ministry of Justice of Lower Saxony to train mediators (both volunteer and paid) in victim offender and neighbourhood dispute resolution. It is expected that the inclusion of volunteers of different ages and national heritage with diverse personal and

professional backgrounds will foster the idea of alternative dispute resolution in the wider community.

b) Making the market fit legal models

The German market place offers mediation service in a wide range of legally defined dispute areas such as commercial law, environmental law, family law, criminal law/victim offender mediation (VOM), succession, industrial relations, insolvency, insurance, administrative law, social law and intellectual property.[60] Accordingly, the structure of the German mediation market place poses a perplexing paradox. On the one hand, facilitative mediation as an alternative to litigation promised the delegalisation and depositioning of disputes to enable disputants to engage in a conversation on the level of their real needs and interests. On the other hand, the German mediation service and training providers appear to have embraced a market model that derives its essential structure from the very legal categories from which it is trying to distance itself. One of the consequences of such a structure is the definition of disputes and issues according to legal structures and accordingly a tendency towards a more legalistic model of mediation.

Interestingly, the practice area approach to mediation has been forced to give way to the blurring of the lines between civil community mediation and criminal VOM. With the success of VOM in Germany many disputants are going directly to mediation before going to the police or pressing charges (see Part 2 a)i) above).

c) Perception of the German judicial role: in the first place mediator, in second place adjudicator

A further factor that is having an impact upon the modern mediation movement in Germany is the perception of the German judicial role.[61] German judges are required by law to attempt to settle a matter before hearing the case. This requirement has a long tradition in Germany and other civil law countries. In Germany the relevant section of the *Code of Civil Procedure* (Zivilprozessordnung ZPO) is § 278. By comparison, no such legal requirement exists in common law jurisdictions, although judicial attempts to encourage parties to settle may occur in some common law jurisdictions as a matter of case management practice rather than law.

60 *See* the contributions on mediation practice areas in F. Haft & K. von Schlieffen, (eds.), *Handbuch Mediation*, above Note 3 at 1417.

61 C. Duve, *Mediation und Vergleich im Prozess – Eine Darstellung am Beispiel des Special Master in den USA*, (Köln: Otto Schmidt, 1999).

Strictly speaking the civil law judicial settlement function is not a form of court related mediation, as it takes place within the courtroom and is conducted by the judge, who will directly hear the matter. In practice, judges' attempts to encourage parties to settle are very legalistic and interventionist. In fact, the majority of judges do not engage in a process that could be paralleled with facilitative mediation.[62] Nevertheless this "mediative" function of the judicial role has led to one of two views amongst the members of the German judiciary: (1) Mediation already occurs in the courtroom and therefore court related mediation programs are unnecessary; or (2) As mediation is, as a matter of law, part of the judicial role, judges are the natural and rightful mediators of disputes that would or could otherwise be determined by a court of law.

In addition, the fact that if the parties do not settle, the same judge will hear the case forthwith places the judicial settlement function a world apart from court related mediation in common law jurisdictions. In fact, if a German judge were to conduct interest based mediation with private caucuses resulting in non-agreement, adjudicating the same matter would pose a significant ethical dilemma and role conflict.[63] After parties' disclosure of legal and non-legal interests, discussion of options for resolution and private caucus, the judge would be required to banish all that she has heard from her mind to focus only on the legally relevant points in order to make a decision correct in law. Even if this were humanly possible, the parties, knowing the immediate procedural effect of non-agreement, would be reluctant to engage in a full and frank discussion so integral to the success of the mediation process. In addition, the rules of natural justice would require that the mediator does not hold private caucus with each the parties separately.

Finally, the settlement function of the German judge must be consistent with the overall objective of the judicial role, namely to find a legal solution for the disputants. According to Article 20 III of the *German Constitution* (Grundgesetz GG) the judicial role is bound by law and justice. Therefore,

62 *See* D. Treuer, "Impressionen über den gerichtlichen Vergleich", in W. Gottwald & F. Haft, (eds.), *Verhandeln und Vergleichen als juristische Fertigkeiten*, (Tübingen: Attempto, 1993) at 116; H. Rottleuthner, "Alternativen im gerichtlichen Verfahren", in E. Blankenburg, W. Gottwald & D. Strempel, (eds.), above Note 14 at 145; R. Rogowski, "Die aktive Rolle des Richters im Prozessvergleich: Überblick über die rechtssoziologische Forschung zur vermittelnden Rolle des Zivilrichters in der Bundesrepublik Deutschland", in E. Blankenburg, W. Gottwald & D. Strempel, (eds.), above Note 14 at 171.

63 W. Gottwald & D. Treuer, *Vergleichspraxis: Tips für Richter und Anwälte*, (Stuttgart: Boorberg, 1991).

even while exercising their settlement function, German judges are required to lead parties towards a solution consistent with the relevant legal norms. This is not mediation.

Related to the role of the judiciary is the inability of German courts to create their own court rules and practice directions. By comparison, the power of common law courts to create and change their own court rules has been instrumental in progressing mediation in those jurisdictions. The *Code of Civil Procedure* (Zivilprozessordnung ZPO), a federal law, meticulously regulates what the courts can and cannot do. Accordingly, all changes in-court rules necessarily involve federal parliament amending the ZPO – something that does not occur as often as a particular court might change its rules. § 15a EGZPO (discussed in Part 2 a)viii) above) granted the state parliaments authority to experiment by setting court rules for Magistrates' Courts within their respective state with respect to court related mediation in very specific circumstances. From a German perspective the new § 15a EGZPO symbolises a significant step along the path of experimentation for the German states but still not for the courts themselves. The German legal culture of uniform codification and regulation will continue to make full experimentation in-court related mediation a challenge.

d) Implications of the German law on legal advising for non-lawyer mediators

The controversial and often heated lawyer versus non-lawyer debate has adopted particular importance in Germany due to the existence of the *Law on Legal Advising* (Rechtsberatungsgesetz RBerG) that provides lawyers with a monopoly in all matters involving legal advice giving.[64] In addition, immunity from being subpoenaed as a witness in the context of settlement discussions only applies to lawyer mediators in Germany. Non-lawyer mediators enjoy no such privilege.

In recent years a number of court decisions impacting on the ability of non-lawyer mediators to practice mediation has sent shivers of uncertainty down the spines of mediators, in particular, those who are not legally qualified. The line of decisions indicate that where non-lawyer mediators are mediating a matter that directly impact the legal rights of unrepresented parties, in other words, a legal dispute, they may breach Article 1 § 1 (1) of the *Ger-*

64 On the German debate concerning the Rechtsberatungsgesetz, *see* R. Strack, "Mediation und Rechtsberatung" (2001) 4 *ZKM* 184, and B. Eckhardt, "Nichtanwaltliche Mediation als verbotene Rechtsberatung?" (2001) 5 *ZKM* 230.

man Law on Legal Advising (Rechtsberatungsgesetz RBG), which grants lawyers the monopoly on legal advice giving.[65] These court decisions have endorsed the view that as mediation is part of a lawyer's role (§ 18 *Professional Code for Lawyers* Berufsodnung für Rechtsanwälte, BORA), mediation may involve the provision of legal advice, and therefore falls within the terms of the RBerG.

It seems to follow that on this interpretation of Article 1 § 1 RberG, unless otherwise expressly authorised by law, lawyers are the only professional group permitted to conduct mediations.[66]

The developing case law surrounding Article 1 § 1 RBerG has fuelled tension between non-lawyer and lawyer mediators in practice. In addition, it has escalated the debate about the facilitative versus advisory role of the mediator. The immediate implications for practice have been a growing differentiation between "legal" mediation offered by lawyers and facilitative or transformative mediation offered by non-lawyers. Should this trend continue one could expect, in addition to the cost differentials between legal and non-legal mediation that facilitative non-lawyer mediation ultimately becomes an alternative or a preliminary process to an increasingly expensive and perhaps complex legal mediation. In short, it is likely that two very different mediation markets would emerge with very little cross fertilisation between the two. While non-legal mediation would remain transdisciplinary in nature due to the various professional backgrounds involved, legal mediation would remain the monopoly of lawyers and as such lose the benefits that the current transdisciplinary approach has been able to offer. Needless to say these decisions have led to considerable confusion in the mediation community.

Discussions about an amendment to Article 1 § 1 RBerG are taking place at the time of writing. In the context of the movement towards uniform legal market in the European Union, the writers are optimistic that mediation will be made an exception to the legal monopoly established by the RBerG. In the interim, the federal Minister of Justice has issued a statement to the effect that the practice of mediation is not reserved for lawyers and that other professions have equal access to the practice of mediation.[67]

65 *See* the decision of the Rostock Court of Appeal, OLG Rostock 20.06.2001; *NJW-RR* 202, at 642.

66 *See*, for example, OLG Rostock (2001) *ZKM* 192; LG Hamburg (2000) *NJW* 1514; OLG Hamm *MDR* 1999 at 836.

67 BT-Drs. 14/9306 at 11.

4. Current (... and Eternal) Themes in Mediation

This section will explore the current German discussions on the global themes of the modern mediation movement that have been the subject of heated debate and discussion in each country where mediation has made its mark. The first theme relates to the voluntary versus mandatory nature of mediation; the second explores the desire for regulation and performance standards while at the same time being able to maintain the core characteristic of flexibility in the mediation process; the third theme considers the judicial role in mediation.

a) Mandatory vs. voluntary mediation

A controversial issue in Germany today is whether or not attendance at a mediation or mediation information session can be mandated as a pre-condition to litigation as envisaged by § 15a EGZPO. From a pragmatic perspective, the debate remains academic. Legislation mandating attendance at mediation is already operating in Germany and has been operating in other countries for quite some time. The argument that mediation is voluntary process and therefore cannot be mandated is typically met by three counterarguments. The first is that parties are not mandated to agree, rather they are only compelled to attend. Generally speaking, provided the parties act in good faith, the extent to which they participate in the mediation remains their choice. The second counterargument draws upon empirical research from the US that demonstrates a phenomenon aptly called the mediation paradox. According to the mediation paradox, even those parties who reluctantly engage in a mandated mediation process appear to be at least as satisfied with the fairness of the mediation procedure and the outcome as parties who have voluntarily gone to mediation. Indeed on many occasions those parties most reluctant to enter mediation appeared significantly more satisfied with the procedure and outcome of mediation.[68] Finally, global reality seems to have moved far beyond theoretical discussions. Worldwide trends indicate a tendency towards mandatory mediation programs. The real issue now has become how to mandate. Should all matters be referred to mediation before court, or should the mandatory referral lie within the discretion of a judge or registrar, or be set out in legislation? Where discretion

68 C. McEwen and T.W. Millburn, "Explaining a Paradox in Mediation", (1993) 9(1) *Negotiation Journal* 23.

is employed, then the next question concerns the nature of referral criteria.[69] § 15a EGZPO has adopted the approach that all disputes that meet certain criteria (one of which is low monetary value) must go to mediation as a pre condition to court. In Germany VOM research indicates that whatever the relevant referral criteria might be, they have nothing to do with the seriousness of an offence.[70] One could extend the argument to civil mediation and suggest that the value of the dispute is irrelevant to the suitability of a particular case for mediation.

b) Experiment or regulate

The idea behind the experimentation clause in § 15a EGZPO as well as pilot projects such as the project in Lower Saxony is that diverse experimentation accompanied by independent evaluation provides the most valuable basis for future more detailed legislation. There is, however, a very real risk that this concept might prove more illusory than real for two reasons. First, experimentation in the judicial system has been, until recently, rarely used in Germany. In other words, there is no existing culture of innovation through experimentation in German policy making and legislating. Accordingly, the likelihood that state legislators under the umbrella of § 15a EGZPO would abstain from meticulous regulation and leave substantial room for experimentation was never high. As outlined earlier (see Part 2 a)viii) above) these fears appear well founded as various German States have regulated mediation under § 15a EGZPO to a high degree. Second, voluntary referral projects such as the pilot project in Hannover have become increasingly popular before the extent to which they have achieved their objectives has been demonstrated. Justice ministries at both federal and state level are desperately eager to ease their court budgets and look to court related mediation to fulfil this objective. With all stakeholders jumping on the court related bandwagon at once, those holding the purse strings will wield the most influence and the economic objectives of reducing court budgets may override other mediation goals. Accordingly, the vision of "first experiment, than regulate" risks frustration at the hands of eager mediation disciples and zealous regulators.

69 F.E. Sander, "Konflikt und Regelungsform", in W. Gottwald & D. Strempel, above Note 58 at 4.5; H. Astor, *Quality in Court Connected Mediation Programs* (Carlton: AIJA, Inc., 2001) at 29.

70 *See* the discussion on empirical research in Part 2 e) above.

c) Judges as mediators

Whereas external mediators who are neither judges nor other officers employed by the court will conduct mediations within the § 15a EGZPO scheme, mediation in the pilot projects such as in Hanover may be referred from trial judges to other judges who also serve as mediators in the same court (mediator judges).[71] A significant advantage in appointing judges as mediators in court related matters, especially during the pilot phase of a project, relates to cost. The cost for the mediations will be borne at least to a considerable part by the funding institution and will not add additional cost to the parties if mediation fails and the trial continues. However, there are also risks involved. First, even where judges undergo thorough mediation training and supervision – as they do in the pilot project of Lower Saxony – are judges able to overcome the judicial mindset, which tends towards adjudication and settlement mediation rather than towards facilitative mediation? Second, in order to promote mediation, courts may provide mediation as part of their consumer orientation and service function free of charge.[72] But how long can the court system afford to provide cost free mediation services to disputing parties? In Germany it remains difficult to convince politicians of the utility of the court system providing free mediation services to disputants as part of the dispute handling function of the justice system. It is precisely on these types of issues that it is hoped the current court related empirical research projects will shed light.

d) Implications for mediation referral schemes

Where disputants are compulsorily referred to mediation and especially where they must cover the additional cost of the mediation themselves a new issue emerges. If a body such as a court has the power to mandate mediation, that body must also hold certain responsibilities for the nature of the process to which it is referring parties. In other words, there seems to be an affirmative obligation on the courts to ensure first, that parties are well informed about the type of dispute resolution process to which they are being referred, including the type of mediation process, second, that the mediation

71 *http://www.niedersachsen.de* (search "Presse & Service") (4 January 2003); W. Gottwald, "Gerichtsnahe Mediation", in F. Haft & K. v. Schlieffen, (eds.), *Handbuch Mediation*, above Note 3 at 421.

72 *See* on the functions of modern courts: R. Sackville, *From Access to Justice to Managing Justice: The Transformation of the Judicial Role*, paper delivered at the Australian Institute of Judicial Administration Annual Conference, Brisbane 2002.

or other ADR process meets certain quality criteria, and third, that justifiable reasons for referring a particular dispute to mediation are provided.[73]

Furthermore, where referral to mediation is conditional upon the consent of the parties, and therefore not mandatory, it is submitted that these obligations still exist. As a dispute management centre of expertise, the referring court has a duty to inform and advise its clients, the disputants.

The mandatory referral schemes in Germany discussed in Part 2 a)viii) above have not addressed these issues.

5. The Road Ahead

Which mediation path will Germany take in the future? What do the current road signals indicate? It seems that the *stop* signs have been abandoned in favour of cautious yet progressive *proceed with caution* signs. Nevertheless, there are still a number of unexpected speed bumps that remain as leftovers from the 1980s and 1990s. While some drivers find themselves going around in circles on the new round-a-bouts, others are eagerly searching for the autobahn entrance: no turning back and no speed limits.

a) Developing quality mediation

Independent of practice area, the fate of mediation in general will depend on the value that it is able to add to unassisted negotiation and other advisory or determinative processes such as case appraisal, arbitration and adjudication. In terms of measuring the success of mediation, the first step is to identify what the goals of mediation are and then, whether or not they have been achieved.

i) Where are we going: the aims and objectives of mediation

There are as many goals of mediation as there are styles of mediation. Breidenbach describes five types of mediation projects with very different aims.[74]

1. Service delivery: to enhance speed and efficiency of the resolution of the dispute as defined.
2. Access to justice: to empower parties disadvantaged by power imbalance so that they can achieve an outcome that is just for them.

73 H. Astor, above Note 69 at 14.

74 S. Breidenbach, above Note 3 at 119 et seq.

3. Individual autonomy: to enable parties to focus on what is of value to them as individuals (for example, their emotional and financial needs) in negotiating their way through their differences and (possibly) towards a workable future relationship with each other.
4. Reconciliation: to change the way that parties relate to each other and move them towards reconciliation.
5. Social transformation: to change community and societal attitudes to and culture of conflict and disputing.

In Germany it is now fundamentally important to clearly set goals and objectives for mediation programs if one is to be able to measure their success. For instance, what is the objective of court related mediation? Is it to reduce delay and the backlog of courts? If yes, than ADR has achieved its goals if the courts have no waiting list at all as it happens, for instance, in state courts in Queensland Australia.[75] If, however, the objective of mediation is to reduce the cost of disputing for the parties, how do we know whether or not mediation has achieved this goal? And what about the goals of access to justice, self determination and transformation that exist to varying degrees in court related and other mediation programs both in the public and private sectors? In relation to the public sector, it is up to policy makers ultimately to set the objectives; in the private sector it lies within the responsibility of the respective industry leaders and organisations. Unfortunately, there has been no useful discussion on this point in Germany to date.

ii) Designing the road map: a framework for standards

The task ahead for key German ADR stakeholders is to design a road map for the future. Especially if the final destination and the objective remain unclear, a road map will provide travellers with options and potential destinations as well as a variety of ways to get there.

In terms of mediation, German policy makers have recognised the need for experimentation in the context of court related mediation programs and legislated in different ways to allow for experimentation at various levels (see Part 2 a)viii) above). At the same time mediation practice standards have been developed in virtually all practice areas (see Part 2 c) above). A nationally accepted set of uniform standards, however, has not emerged.

75 *See*, for example, the Annual Report of the Supreme Court 2000/2001, *http://www.courts.qld.gov.au /publications/annual/default.htm* (4 January 2003). Annual Report of the District Court 2000/2001 *http://www.courts.qld.gov.au/publications/annual/default.htm* (4 January 2003).

On the one hand the drive towards standards is based on the desire to create a certain level of consistency in mediation standards. On the other hand the diversity of mediation practice is a highly valued consequence of the flexibility of the mediation process – a characteristic which enables mediation to provide a real alternative to determinative processes such as trial.

The US has been the first country to attempt legally binding uniform mediation standards through the *Uniform Mediation Model Law*, which may now be adopted by the various US states.[76] The Model Law is the result of a long consensus based process and does not deal comprehensively with all issues relating to standards.

A very different approach has been taken in Australia where a recent report to the Commonwealth Attorney General recommended that all ADR service providers adopt a code of practice dealing with specific issues, while at the same time encouraging diversity by leaving the particular choice of standard up to specific practice areas and service providers.

The mediation landscape in Germany is dotted with diverse stakeholder groups representing very different interests. For this reason and also to maximise opportunities for experimentation it seems that the Australian framework approach to standards may be a valuable resource for German mediation.

b) Institutionalisation and legalisation

i) The unstoppable path to professionalisation and specialisation

The evolution of modern mediation in other countries indicates the unstoppable path towards professionalisation and specialisation. Such a trend certainly follows well known patterns in other professions and occupations that strive to gain ownership of a field of knowledge, autonomy over practice, control over entry and credentials, state recognition and social status.[77] Concomitant with professionalisation will be a growing specialisation of the field, leading to sector specific standards and accreditation. The current structure of the German mediation market place as described in section two

76 The Uniform Mediation Model Law can be located at *http://www.nccusl.org/nccusl/Annual_Meeting_2001/MED01AM.pdf* (4 January 2003).

77 *See* National Alternative Dispute Resolution and Advisory Council (NADRAC), *A Framework for Standards* (Barton, 2001,) at 15, for Australia, with a convincing description of the four phases of process professionalisation and references to the very similar situation in the United States; *see* also S. Press, "International Trends in Dispute Resolution – A US perspective" (2000) 3(2) *The ADR Bulletin* at 23.

of this essay already indicates a strong tendency towards institutionalisation in this sense.

ii) Putting the brakes on legalisation and judicialisation

Although the paths to professionalisation and specialisation seem to be well travelled and, in the case of mediation, unstoppable, it has to be asked to what extent Germany is prepared to accept complex traffic regulations in the form of legalisation and judicialisation of mediation at least at this current early stage. As mentioned above, the first court cases involving mediation have entered the German judicial system (see Part 2 b) above). The first calls to regulate issues in mediation such as the confidentiality of mediation communication, the indemnity of mediators, the qualification and certification of mediators and the like can also be heard. The *Uniform Mediation Law* in the US, which regulates a number of important issues in mediation, above all confidentiality, may encourage the German legal community, especially the Bar, to ready imitation.

The greater the relevance of legal issues for mediation, however, the more mediation becomes legalised and judicialised, the more lawyers become a necessary part of mediation, and the more likely it becomes that non-lawyers might be excluded from mediation. In other words, the roadmap as a whole with its diverse myriad of paths might be easily abandoned in favour of a couple of well travelled downtown streets. In the long run, mediation could suffer from the same speed bumps and complex traffic regulations that have seen domestic arbitration move to the less travelled roads of dispute resolution. Arbitration, initially conceived as a speedy and rather inexpensive procedure, has become so expensive and time consuming that many have looked to mediation as alternative to arbitration.[78] There is no easy solution to this dilemma. Perhaps the real challenge lies in overcoming the inherent need on the part of legal trained professionals for certainty in process and outcome. Focusing on the introduction of standards and code of conducts as industry guidelines and contractual terms rather than legislation, particularly in the early days of the mediation movement, may increase the likelihood of mediation remaining a true alternative to litigation and arbitration.

c) More mediation – less access to justice?

The mobilisation of mediation in common law jurisdictions was – at least partly – a reaction to an impossibly expensive, long and drawn out litigation

78 I. Dezalay & B. Garth, "Fussing about the Forum: Categories and Definitions as Stakes in a Professional Competition" (1996) 21 *Law and Social Inquiry* 285.

process. By comparison, the German legal system is significantly more attractive for consumers than those of common law systems. It is less expensive due to the fees and cost structure, as well as the availability of legal costs insurance and legal aid. German litigation cost structures are not based on hourly rates but rather a percentage of the value of the dispute. In addition German courts have shorter waiting lists and trial time. Therefore, clients of the German legal system have not suffered the same level of inability to access justice as did their Anglo-American counterparts prior to the introduction of court related mediation systems.[79] Accordingly, in Germany it may, in fact, be more expensive to mediate a case successfully than to take it to court.

In this context a particular challenge for voluntary mediation in pilot projects like in Lower Saxony will be the mobilisation of stakeholders in the legal system – the legal profession, the disputants and the judiciary – to utilise mediation. As a consequence there will certainly be calls for empowering the courts to mandate mediation. But is it really desirable for the German court system to restrict its accessibility for the sake of promoting high use mediation? No doubt court budget administrators will embrace the idea in order to save money. There is, however, a considerable risk that the transplanting of common law mediation referral structures in countries such as Germany may have negative effects on disputants' ability to access German courts – courts that were never excessively expensive or subject to delay. What if by handing the keys to justice over to mediation, we are effectively closing the door to the court?

The motto cannot be mediation at any price, but rather to give mediation the opportunity to fulfil its promises, while keeping the courts as accessible as possible. As the highly successful German VOM programs demonstrate, mediation can be much more than a simple dispute resolving mechanism. Mediation possesses the potential to transform the way we think and act towards each other in conflict.

79 N. Alexander, *Wirtschaftmediation in Theorie und Praxis*, (Frankfurt: Peter Lang, 1999) at 220–234.