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Business Mediation, ADR and Conflict Management in the German Corporate Sector - Status, Development & Outlook by L. Kirchhoff and J. Klowait

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Business Mediation, ADR and Conflict Management in the German Corporate Sector – Status, Development & Outlook

Prof. Dr. Lars Kirchhoff and Dr. Jürgen Klowait

I. Initial situation and recent developments

Over the last decade, the willingness of German corporations to invest time, energy and funds into conflict management structures has been constantly growing. Many companies have discovered that a superficial approach to dispute resolution and a lack of systematic conflict management has significant negative effects: loss of efficiency, high direct and indirect conflict costs, employee dissatisfaction and high staff turnover. On the other hand, optimizing the handling of internal and external conflicts saves costs and improves employee satisfaction as well as enhancing the company's reputation amongst its customers and business partners.

As a result, the interest in developing professional dispute resolution is significantly increasing. Dozens of German corporations have improved their internal conflict management by setting up "pools" of mediators[1]. Others increasingly make use of business mediation and other forms of Alternative Dispute Resolution (ADR) in Business-to-Business (B2B)-relations[2]. In this field, it is universally accepted that the use of ADR methods reduces "external legal spending" significantly, which enables businesses to save time and preserve a successful long-term relationship with business partners. Similarly, in Business-to-Consumer (B2C) relations, many industry sectors settle disputes with their customers by utilizing conciliation bodies[3].

For the German corporate sector, the foundation and work of the "**Round Table Mediation and Conflict Management of the German Economy"** (the "Round Table") is a living proof for this change in mind-set. The Round Table members consist of German[4] corporations, both major and mid-sized, from various sectors including automotive, utilities, transportation, IT, communication and insurance. Round Table members have proven to be open to new and improved methods of conflict resolution. This paradigm shift has a couple of root-causes. While some businesses are primarily interested in improving their corporate culture, others are rather cost-driven. To that point, legal protection insurance is one of the main drivers for the promotion of mediation in Germany. A large number of German corporations extended mediation offers to their customers and in fact, in a significant number of cases, the use of mediation helped to settle conflicts at an early stage and to avoid costly litigation proceedings. Last but not least, a full picture of this remarkable development requires us to consider the **impact of the German and European legal framework**. The German Mediation Act – adopted in 2012 – has signalled that mediation is an advantageous and legally accepted method of conflict resolution. Just like other legal measures – e.g. in the field of consumer

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[1] So did E.ON, SAP, Lufthansa Technik and Deutsche Bahn, further outlined in section II.2 of this article.

[2] See section II.1 of this article.

[3] Further outlined in section II.3 of this article.

[4] This does not exclude corporations headquartered abroad, as long as the seat of the member corporation is in Germany.

dispute resolution[5] and online dispute resolution[6] - the implementation into German Law has been demanded by corresponding initiatives and directives of the European Union. In short: The legal framework strongly supports the use of ADR and significantly contributes to a new "conflict-resolution-landscape".[7]

This article gives an overview of all these developments and puts them into context. Following this introduction, Section II discusses special areas of application of ADR and conflict management in Germany, section III gives the reader a summary of the study series on conflict management development conducted by the Institute of Conflict Management at the European University Viadrina at Frankfurt (Oder) together with PricewaterhouseCoopers, section IV describes the inner workings of the Round Table, section V briefly sketches cornerstones of the contemporary legal background of ADR, finally section VI concludes with a summary of the key points and insights of our analysis.

II. Areas of application – Where and why do German Corporations make use of ADR-procedures?

The question whether – and if so, with which precise focus – a company increasingly makes use of conflict management and ADR methods is strongly influenced by the experiences made with more traditional conflict resolution procedures, especially with litigation proceedings. Moreover, corporations can only choose the "right" procedure if they are *aware* of alternative methods and know at least their respective basic features and characteristics. Finally, the motivation to actively look for new ways of dispute resolution is not consistent over all industry sectors and businesses. The urge to explore such alternatives might be significantly higher for an EPC[8]-contractor than it is for a consulting firm. Whereas a consulting firm is mainly concerned with sound performance and customer satisfaction with its services, an EPC-contractor is typically subject to high cost pressure, faces penalties when deadlines are exceeded and has to manage long "chains" of contractual arrangements with sub- and sub-subcontractors[9].Therefore, an EPC contractor, and other cost and time pressured businesses, stress, more than others, on the effective, expeditious and cost-efficient solutions for disputes.

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[5] Directive 2013/11 on alternative dispute resolution for consumer disputes, amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

[6] Regulation (EC) No 524/2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR)

[7] Analyzing and fostering these development is the focus of a long-term, interactive research project conducted by the Institute of Conflict Management at the European University Viadrina at Frankfurt (Oder) together with PricewaterhouseCoopers: Starting in 2005, a series of five empirical studies shall document, analyse and also inspire the current paradigm shift in the conflict management practice of German corporations over the course of a complete decade (2005-2016). The publishing of each study is followed up by a conference at which the results of the respective study are discussed with decision makers in legal and human resource departments – and new questions for the next study are generated.

[8] EPC stands for Engineering, Procurement and Construction and regularly is equal to deliver a building or a plant on a full „turn-key-basis".

[9] including the battery limits between individual lots

In other words: The openness towards ADR and conflict management depends on a number of factors and the motivational background of corporations to engage in these fields is manifold. In the following, some key areas and developments in the German Corporate Sector shall be shortly highlighted.

1. Business to Business Context

In general, if conflicts between businesses cannot be settled amicably, the clear majority of those disputes still end up in litigation or arbitration proceedings. As most "traditional" dispute resolution clauses follow this mechanism, it is hardly questioned when a dispute arises. Of course, ad-hoc mediations or other procedures could easily be agreed upon in deviation from such litigation clauses; however, this is a rather rare exception. Once a conflict has arisen, traditional patterns dominate behavior.

In international business relations, German corporations still trust in court proceedings; however, with a clear preference for "private tribunals". This preference again is reflected in the prevalence of "usual" dispute resolution clauses, in which *arbitration* regularly replaces litigation.

While this remains true for most contractual relationships, there is an increasing tendency to resort to less traditional dispute resolution arrangements. This is exceptionally clear in construction contracts. When disputes cannot be settled through negotiations, the pressure to save time and money is tremendous. These goals cannot be reached by opting for litigation or arbitration. Since disputes in the construction sector are typically highly complex and any third party decision requires both legal and technical expertise along with the estimated duration of a domestic litigation procedure, which can take up to 5-8 years or even more of a full stages appeal, it is often considered a "no-go" for litigation. Arbitration is, theoretically, faster than court litigation (as no appeal is possible), but due to the **high amounts in dispute** it is very cost-intensive. Moreover, both litigation and arbitration can seriously harm existing business relations and threaten the suspension of an ongoing project.

As a consequence, both in domestic disputes and in cross-border conflicts German engineering and construction companies increasingly appreciate and make use of alternatives such as mediation or dispute boards. By doing this, they progressively make use of conflict resolution procedures which are suggested by several model form agreements like for example in the different FIDIC[10] Model Contracts. As an example, the recommended dispute resolution clauses of the FIDIC silver book[11] prescribe the establishment of a Dispute Adjudication Board (DAB) as an integral part of the conflict resolution mechanism.

Major German corporations are therefore working on promoting and implementing smart dispute resolution methods. Siemens, for example, adopted a policy in 2007 (updated in 2009) for all its legal disputes which recommends regularly making use of three tier dispute resolutions clauses with negotiation being the first step, followed by ADR as the second step

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[10] FIDIC = International Federation of Consulting Engineers (French: Fédération Internationale des Ingénieurs Conseils)

[11] Conditions of contract for EPC/Turnkey Projects, 1st edition 1999.

and perceiving arbitration – step 3 – only as the last resort to resolve disputes. The ADR mechanism which is typically used as step 2 include conciliation, mediation, expert determination, adjudication and dispute boards[12]. Bombardier Transportation[13], another member in Germany's Round Table, developed an innovative "Dispute-Resolution-Recommendation-Matrix". The Matrix is a question-based and technology-supported tool which helps the user[14] to select the best-fitting dispute resolution method for a specific conflict at hand. The user – after being led through a couple of questions – receives a ranked recommendation for the best and the "second-best" dispute resolution procedure and is thus enabled to come to an informed decision on the question whether to make use of mediation, adjudication, arbitration, litigation or expert determination[15]. Although certainly not all German corporations can compete with such innovative approaches to conflict management and ADR yet, it is encouraging to witness this shift towards an unprejudiced dealing with the full scale of ADR-Procedures.

A general change in corporations' mindsets will take some more time. However, questioning the "traditional" and mostly automatic choice of either litigation or arbitration has started and the openness to explore new ways of dispute resolution is constantly growing. It is quite clear that German law firms – so far rather reluctant and certainly not in the driver's seat of this development – will (have to) follow their clients on this journey. Once this corporate-driven paradigm shift achieves an even broader basis, there will be no need to worry about whether service providers, like law firms, will offer their clients the ADR services they need.

2. Workplace Context

Conflicts and differences are part of our everyday lives – of course this also applies for workplace surroundings. To avoid them entirely is neither possible nor desirable. Often, conflicts and tensions signal a need for constructive change. From a corporate perspective conflicts have an important function: if they are understood as an "early warning system" for necessary corrections and if it is possible to handle and solve the conflict constructively, workplace disputes lose their threatening character. Conflicts then can be perceived as an opportunity to achieve improvements – both for employees and for the company.

The finding that a constructive conflict management is advantageous not only for the parties themselves, but for the company as such, has in recent years led to a significant

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[12] For Dispute Boards see *Ahrens*, Dispute Boards – ADR-Verfahren im Vergleich, Teil 7 -, Zeitschrift für Konfliktmanagement (ZKM) 2013, pp 72 et seq.

[13] The main areas of business for Bombardier Transportation GmbH – based in Berlin, Germany, since 2002 - are railway engineering and aerospace. Bombardier Transportation is part of the Bombardier group with its headquarter in Montreal, Canada.

[14] This tool is restricted for internal use within Bombardier Transportation so far.

[15] *Hagel*, Effizienzgewinnung durch rationale Auswahl des Streitbeilegungsverfahrens, Zeitschrift für Konfliktmanagement (ZKM) 2014, pp 108 (111); *Hagel/Steinbrecher*, Systematik der Verfahrenswahl – die toolgestützte Wahl des geeigneten Konfliktbeilegungsverfahrens, in: Gläßer/Kirchhoff/Wendenburg (eds.), Konfliktmanagement in der Wirtschaft, 2014, pp 53 et seq.

greater openness of German corporations to make use of mediation in the intra group context - whether by use of external mediators, by implementing comprehensive conflict management systems (which are mostly mediation based), through the establishment of ombudspersons or by building up internal mediation capacities[16].

All of these approaches to an improvement of group internal conflict management structures are represented in the Round Table. E.ON and SAP, whose representatives initiated the foundation of the Round Table in 2007/2008, have both been pioneering in the field of group internal "mediator pools", soon followed by Deutsche Bahn[17] and Lufthansa Technik. E-Plus[18], Deutsche Bahn and SAP have installed an ombudsman-function in order to (additionally) make sure a professional dealing with internal tensions and disputes. Finally, Deutsche Bank set up a program called "fairness@work"[19], which also utilizes mediation in order to settle workplace conflicts.

As mediation methods are crucial for such initiatives and programs, their high corporate benefit shall be illustrated by the "pool of mediators" that has been built up in the E.ON group[20]. The basic idea behind this project, which commenced in early summer 2006, was to establish a "pool" of E.ON-mediators in order to solve group internal conflicts – all kinds of workplace conflicts, but also disputes between divisions within one group company and conflicts between E.ON companies. From 2006 to 2012, a pool of "E.ON-mediators" was built up, consisting of more than 120 E.ON employees from about 20 different business units across the group. All of them were trained by a tailor-made, certified in-house mediation training programme.

One of the main drivers for setting up this project – which received the CEDR Award for Excellence in ADR in 2008 – was to introduce a tool which supports certain values and behaviours within E.ON's corporate culture such as openness, respect and mutual trust. However, the motivation to start such initiatives is in each case driven by **individual corporate circumstances** and goals. To improve corporate culture and to defend its values even when it's getting hard to do so – namely in case of conflict – is certainly a very good reason. Saving money, reducing internal costs of conflict, strengthening the commitment and organizational citizenship behaviour of employees, fostering co-operation and communication – all of these reasons are good reasons as well to implement comparable conflict management components.

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[16] For such intra-group mediation approaches see *Klowait*, Innerbetriebliche Mediation, in *Klowait/Gläßer (eds.)*, Kommentar zum MediationsG (Legal Commentary to the Mediation Act), 2014, pp 481 et seq.

[17] *Gantz-Rathmann*, Ombudsstelle und Mediation bei der Deutschen Bahn AG, Konfliktdynamik 2012, pp 160 seq.

[18] *Küchler*, Ombudsstelle und Konfliktlotsen als Beitrag zur Konfliktkultur bei der E-Plus Gruppe, Konfliktdynamik 2012, pp 244 seq.

[19] *Thiesen*, db fairness@work – von der Mobbingberatung zum Konfliktmanagement in der Deutschen Bank, Konfliktdynamik 2012, pp 16 seq.

[20] *Klowait*, Mediation im E.ON-Konzern, Zeitschrift für Konfliktmanagement (ZKM 2008), pp 171 seq.

Of course, the approach actually chosen needs to fit both to the requirements and to the available resources of the individual company. So, small and mid-sized companies will probably not be able to build up comprehensive pools of mediators, recruited from their own staff – while major corporations often choose this method. For smaller companies it is thus often recommendable to commission external mediators on a case-by-case basis. First, this is more reasonable from an economic perspective. Secondly, the smaller a company is, the more difficult it will get to find an internal mediator without any prior relation to the conflict parties involved, which of course is a severe hindrance to act as impartial as an external mediator would.

It is natural that most corporations at first focus on single elements of conflict management. However, certainly also encouraged by the network and exchange of experiences provided by the co-operation in the Round Table, the conscience grows that it makes a lot of business sense to integrate those initial components into a more comprehensive conflict management system (the components of which will be discussed below). And, indeed, some corporations now enter into this next phase and start to combine their different elements to a system. As an example, SAP launched such a broader approach – called Conflict Management System (CMS)@SAP – which comprises internal mediation and coaching resources as well as specially trained employees who act as "conflict advisers"[21].

Summing this up, the development and variety of new paths that have recently been trodden by German corporations in the field of intra-group conflict management is both substantial and encouraging.

3. Business to Consumer/Consumer Dispute Resolution Context

The field of conflict management in B2C-relationships is another sector which received a strong impetus by recent EU-legislation. In terms of consumer dispute resolution ("CDR"), the CDR Directive[22] safeguards that a comprehensive network of CDR bodies will be build by 2015, empowering these bodies to decide most types of breach of contract disputes in the B2C-sector. The Directive prescribes quality requirements that every CDR body must observe. It also contains a regulatory mechanism to control these bodies. In addition, Regulation (EC) No 524/2013[23] creates a single pan-EU online dispute resolution (ODR) platform in order to facilitate, in particular, cross-border CDR claims.

The **legal CDR framework in Germany** is so far clearly shaped in an industry-sector-specific[24] fashion. The participation in such CDR-schemes is always voluntary for consumers, while the participation of businesses may be voluntary or mandatory, depending on the sector.

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[21] *Briem*, Professionelles Konfliktmanagement für innerbetriebliche Konflikte, Zeitschrift für Konfliktmanagement (ZKM) 2011, pp 146 seq.

[22] Directive 2013/11 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

[23] Regulation (EC) No 524/2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR)

[24] *Berlin*, Alternative Streitbeilegung in Verbraucherkonflikten (CDR), in *Klowait/Gläßer (eds.)*, Kommentar zum MediationsG (Legal Commentary to the Mediation Act), 2014, pp 633 et seq.

One of the most established CDR bodies in Germany is the **Conciliation Body for Public Transport** (CBPT)[25]. It is a privately founded scheme that is financed by its members – namely, transportation companies. In addition to a fixed annual fee, every member company must pay case fees. CBPT was founded in December 2009 and deals with complaints regarding travel by train, bus, airplane or ship. If the traveller does not receive a satisfying response to his or her complaint from the transport company, he or she can contact CBPT which then assesses the conciliation request and makes a settlement suggestion to resolve the dispute amicably and out of court. Annually, the scheme receives roundabout 3,000 complaints. Although the CBPT suggestions are non-binding, they are regularly accepted in 80% of the cases.

Already founded in 2001, the **Insurance Ombudsman**[26] – financed by insurance companies - handles about 18,000 complaints annually and is thus sometimes referred to as the "largest German private court". In case of complaints from policyholders against insurance companies the Ombudsman is entitled to render a binding decision if the amount in dispute is less than 10,000 €; otherwise he just makes a non-binding solution proposal[27].

The **Online Conciliator**[28] – founded in 2009 as a common initiative of some federal states and private companies – conducts a voluntary out-of-court procedure to settle disputes arising from B2C-contracts concluded via internet. In 2012 the Online Conciliator received about 900 cases.

Similar nationwide CDR-schemes are available, among others, for the telecommunications industry[29], the energy sector[30], for Financial Services[31], and for the legal profession[32].

In sum, and just like in the two contexts mentioned earlier, sophisticated B2C dispute settlement is a growing field, where a number of innovative actors established well-accepted pioneer programs with significant case numbers.

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[25] https://soep-online.de/welcome.html

[26] http://www.versicherungsombudsmann.de

[27] This procedure is subject to the statutory rules and the code of procedure of the Insurance Ombudsman only, i.e. it is not based on specific legal provisions. It is in the sole discretion of the policy holder to adress his complaint to the Ombudsman. If he does so, he accepts the procedural framework (as the Insurance Companies did generally in advance). If the Ombudsman renders a binding decision, it is only binding for the Insurance Company.

[28] http://www.online-schlichter.de

[29] *Schlichtungsstelle der Bundesnetzagentur im Bereich der Telekommunikation*, http://www.bundesnetzagentur.de/cln_1412/DE/Sachgebiete/Telekommunikation/Verbraucher/Streitbeilegung/streitbeilegung-node.html

[30] *Schlichtungsstelle Energie*, http://www.schlichtungsstelle-energie.de

[31] E.g. *Beschwerdestelle der privaten Banken*, http://bankenverband.de/service/beschwerdestelle; *Ombudsmann der öffentlichen Banken*, http://www.voeb.de/de/ueber_uns/ombudsmann

[32] *Schlichtungsstelle der Rechtsanwaltschaft*, http://www.schlichtungsstelle-der-rechtsanwaltschaft.de/ .

III. Scientific studies and findings

The following overview will present core findings of the first four empirical studies (2005-2013) conducted by Viadrina University and PricewaterhouseCoopers on the field of corporate conflict management in Germany. Especially, it will focus on the Viadrina component model of a conflict management system which is one of the key results of the research so far and serves as a blueprint for the conflict management programs of numerous German companies and organizations.

1. Study Nr. 1 (2005): Surveying Usage and Appraisal of different ADR Procedures

The first study "*Commercial Dispute Resolution - a Comparative Study of Dispute Resolution Procedures in Germany*", published in 2005, was intended to survey the – then – status quo of the approaches adopted by large German enterprises when dealing with external conflicts with other companies.[33] This initial study, conducted by sending out approximately 1000 questionnaires to the legal departments of large companies of all different industrial sectors, showed a significant discrepancy between attitude and actual behaviour with regard to conflict handling: Alternative dispute resolution (ADR) procedures – namely mediation, conciliation, expert determination and arbitration – were highly regarded as saving time and money and being beneficial for business relationships. Yet, at the same time, these procedures were rather seldom used in practice (then). When negotiations failed, most companies habitually went straight to court instead of using procedures from the ADR spectrum even though they had rated the conflict resolution mechanism at state courts as the least advantageous. The described discrepancy was astonishing especially with regard to mediation: Mediation was looked at as the by far most advantageous procedure after direct negotiations, but at the same time then hardly used in practice.[34]

2. Study Nr. 2 (2007): Analyzing the actual Practice of Conflict Management within Corporations

The second study "*Conflict Management Practice in German Companies*", published in 2007, was designed to shed light on the resulting question why most companies obviously dealt with conflicts in the above described way.[35] Reasons for the discovered discrepancy between usage and appraisal of different available procedures were analysed by in-depth follow-up interviews with decision makers in legal departments. The following aspects were found to be hurdles hampering a more consistent usage of conflict resolution procedures:

- Lack of (realistic) information on alternative dispute resolution procedures
- Lack of practical experiences with alternative dispute resolution procedures

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[33] *European University Frankfurt (Oder)/PricewaterhouseCoopers (eds.)*: Commercial Dispute Resolution, 2005; http://www.europa-uni.de/de/forschung/institut/institut_ikm/publikationen/Studie_Commcercial_Dispute_Resolution_2005.pdf

[34] This has meanwhile changed clearly: Mediation is used more frequently.

[35] *European University Frankfurt (Oder)/PricewaterhouseCoopers* (eds.): Praxis des Konfliktmanagements deutscher Unternehmen, 2007 (Authors: Kampherm/Wellmann/Kraus); http://www.europa-uni.de/de/forschung/institut/institut_ikm/publikationen/Studie_KMS_II_2007.pdf.

- Perceived efficiency of German court system
- Organizational and psychological restraints within companies (For example, there was a fear of decision makers to be held personally accountable for non-optimal mediation outcomes as opposed to the possibility to "blame the judge" when a law suit is lost.)
- Lack of structured dispute management processes (Surprisingly, basic management principles, the application of which are self-evident in any other process within a company, were often not applied to the handling of conflicts. This often resulted in intuitive instead of systematic procedural choices.)

3. Study Nr. 3 (2009-2011): Optimising Conflict Management

The third study "*Conflict Management – From Elements to Systems*", published in early 2011, focused on the practical knowledge that the member companies of the Round Table had accumulated and on the models they already successfully apply.[36] The aim of the study was to increase visibility of functioning best practice approaches in the field of conflict management – this time with regard to external as well as internal conflicts – and to make these approaches and models accessible to other companies in a condensed and practice oriented form.

Also, in the work of the Round Table, it became clear very soon how important it is to have a common understanding of conflict management terminology and concepts in order to enable precise and efficient communication, facilitate the comparison of experiences and foster the development of common standards. Therefore, the third study attempted to provide for **commonly accepted definitions of terms** in the area of conflict management[37], gained from intensive discussions in the working groups of the Round Table.

The discussions in the realm of the Round Table and the empirical analysis also showed that the many individual elements existent in the area of conflict management in companies (e.g. ombudspersons, mediator lists, contract clauses, procedural standards or public relation strategies) fulfil very different functions. In order to categorise and organise the confusingly large number of individual conflict management elements according to their functions, a system of so-called **components** was developed in order to be able to sort and **classify the significant measures and actors of business conflict management** (for details, see below under III.5.).

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[36] For the full text of the study, please see the German text version (European University Frankfurt (Oder)/PricewaterhouseCoopers (eds.): Konfliktmanagement – Von den Elementen zum System, 2011 (concept by Lars Kirchhoff and Ulla Glaesser); http://www.europa-uni.de/de/forschung/institut/institut_ikm/publikationen/EUV_PwC_Studie_Konfliktmanagement-Systeme_2011.pdf. There you can also find a short version of the study in English.

[37] For example, mediation was defined as a voluntary process of conflict handling, in which the parties develop a consensual interest-based solution with the assistance of an impartial third party. The mediation process is particularly characterised by a structured communication process and the personal responsibility of the parties for the content of the solution.

4. Study Nr. 4 (2011-2013): Conflict Management as an Instrument for Values-Based Management

In addition to some adjustments to the Viadrina Component Model of a Conflict Management System, the fourth study, published in late 2013, focused on establishing the field of conflict management as an instrument of a corporate management approach that is explicitly based on values. One of its key messages is that conflict management programs can significantly support the process of putting such values into practice that the respective corporation wants to stand for in the eyes of contractual partners as well as employed staff.

Along these lines, the study also develops a number of ethical questions and guidelines that should be taken into account when designing, establishing and running a conflict management system, touching upon, inter alia, who exactly sponsors such a program, how decision-making structures are established and whether the management considers itself to be an integral part of the program or not.

Finally, the fourth study elaborates on the connection between conflict management and related fields such as controlling as well as risk and quality management systems. A clear definition of the similarities as well as dividing lines of these management systems is a precondition to generate synergies between them.

5. Focus: The Viadrina Component Model of a Conflict Management System

For a brief summary of the aforementioned component model as developed in Study 3 and further refined in Study 4, the six key components of a conflict management system shall be briefly described:

- **Conflict contact points** (like ombudspersons or the legal department) are needed to detect and constructively react to conflicts as early as possible. They should take responsibility to steer conflicts towards the best-suited procedure.

- **Systematic choice of procedure** is the necessary precondition for an efficient handling of conflicts. There are choice mechanisms on different levels of elaboration – from simple “check lists” or criteria based schemes up to very differentiated software-based tools as decision making support.

- **Conflict processors** are the experts who are trained to conduct certain conflict resolution procedures (like mediators, arbitrators, barristers etc.).

- **Procedural standards** (which can range from ethical guidelines to legally binding rules of procedure) are the basis for a professional conduct of these experts. They are also important to provide for transparency so parties of a conflict know what they can expect of a certain procedure.

- **Quality assurance** includes, inter alia, basic aspects of documentation and process management that should be applied to the handling of internal and external corporate conflicts[38].

- **Internal and external communication** finally is necessary to make available conflict management structures known and used throughout a company – and to enhance the positive reputation of a “conflict wise company” in the eyes of staff as well as in the eyes of business partners and customers[39].

The following table introduces the various components with their respective objectives, corresponding key questions and examples of concrete elements that fulfil the function of the component.

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[38] *Röpke Zimmermann*, Falldokumentation als Konfliktmanagement-Komponente, in: Gläßer/Kirchhoff/Wendenburg (eds.), Konfliktmanagement in der Wirtschaft, 2014, pp 127 et seq.; *Becker*, Qualitätssicherung von und in Konfliktmanagement-Systemen, in Gläßer/Kirchhoff/Wendenburg (eds.), Konfliktmanagement in der Wirtschaft, 2014, pp 457 et seq.

[39] *Klowait*, Innen- und Außendarstellung von Konfliktmanagement, in: Gläßer/Kirchhoff/Wendenburg (eds.), Konfliktmanagement in der Wirtschaft, 2014, pp 145 et seq.

Table 1 Components of conflict management: key questions, objectives, example elements

Component	Key question	Objective / function	Example elements (conflicts in the workplace)	Example elements (conflicts between companies)
Conflict contact points	Where is the first point of contact in the case of conflict?	Early detection of conflicts and transparent offer of skilled contact persons	• Ombudsperson • Conflict advisor • Conflict navigator • Personnel consultant	• Legal department • External lawyers • Project leaders
Systematic choice of procedure	How can the conflict be allotted to the appropriate procedure?	Criteria-led choice of the appropriate procedure for handling the conflict	• HR department criteria catalogue • Escalation clause in employment contracts	• Conflict management rules of procedure • Technology-based instruments for the allocation of conflicts
Conflict processing	Which qualified specialists are designated for conducting the procedures of choice?	Assurance of availability of qualified specialists to realize the chosen procedure	• In-house mediator pool	• Lists of arbitration experts/ institutional pools with external mediators
Procedural standards	How is the procedure controlled?	Guarantee of a defined and transparent implementation of the procedure	• Internal company code of procedure	• Standards of mediators' organisations • Institutional codes of procedure (e.g. ICC)
Quality Assurance	How is feedback guaranteed?	Creation of a basis for control, further development and quality assurance	• Self-evaluation • Questionnaire survey • Feedback system	• Case documentation[6]
Internal and external communication	How is communication with cooperating companies about specific measures stimulated? How is the corporate culture with regard to conflict communicated internally and externally?	Improved accessibility/ development of a corporate culture with regard to conflict in and between companies	• Intranet presence • In-house road shows • Explicit corporate culture with regard to conflict	• Round Table • Branch specific self-commitment • General ADR pledges

Table 1: explaining the Components of Conflict Management System (CMS)

The six components are to be understood as functional categories and that the individual elements are always just options in a spectrum of alternatives of how conflict management can be performed within the framework of a specific component. In order to explore the crucial aspects and questions in establishing best practices in each of these areas, thorough analyses of specific corporate practices and many in-depth interviews with expert company representatives who work in the area of conflict management had been undertaken. According to the needs of a company and its resources, the establishment of conflict management structures can of course be started by putting into place only one individual element of a component – corresponding to the function most urgently needed. Already then, the company has established a conflict management 'program' and taken a first important step.

At the same time, the component system offers the complete spectrum of components in order to design a complete conflict management 'system', which is tailored to the specific needs of a company.

The study series defined that a **conflict management system (CMS)** in its true sense only exists when:

- **all six of the listed components** have been accomplished through corresponding elements,
- a **coordinating and controlling entity as a seventh component** is added, which systematically links the individual elements and regulates their functional interaction,
- there exists a set of principles, **norms and rules** within the company which lays out and monitors the interaction between the actors, instruments, methods and procedures in conflict prevention and conflict handling and
- the conflict management is integrated into the corporate mission statement and the internal and external **corporate culture**.

6. Focus: Practical Recommendations based on the Viadrina/PwC Study Series

The Viadrina/PwC study series shows that many starting points and possibilities exist for the development of corporate conflict management towards a comprehensive conflict management system. The specific way of such a development can and should be individually tailored to take into account the size of the company, the structures which already exist and the general conditions. The empirical findings of the study series can be pragmatically summarised in ten conclusions, which each offer practical recommendations, applicable independently from factors such as the size or business area of a specific company.

1. Usefulness of establishing single elements of conflict management

Typically, at first only single elements of conflict management are introduced in companies. The triggers for establishing these initial elements are often committed individual pioneers or occasionally also the pragmatic reaction to acute problems. Even when the establishment of a whole conflict management system is proposed already at the outset, the implementation of such a system is frequently delayed by general scepticism or by arguing that the company lacks the necessary resources. The introduction of single conflict management elements (like, for example, an ombudsperson or a mediator pool) does nevertheless make sense as these elements are, of course, also autonomously useful in the service of constructive conflict handling within a company. In a second step, the individual elements can also act as focus points for the further development of a differentiated conflict culture and perhaps later evolve into a complete conflict management system.

2. Necessity of bearing in mind a potential complete system

However, there is a threat of interface and communication problems if these single conflict management elements are introduced without a plan or concept of a more comprehensive conflict management system, which might possibly be desired or required at a later stage. Experience has shown that often such unsystematically established structures can later only be integrated into a complete system with great organisational difficulties and high costs. This

danger can be encountered by designating at least one person already at the outset of introducing single conflict management elements to look at a potential master plan for a conflict management system and to take responsibility for planning the (initially only hypothetical) compatibilities, synergy effects and cost saving potentials, which would arise through the interaction of more than one conflict management element – or, at best, by establishing a whole system.

3. Mapping of existing procedures and actors of conflict management

Particularly in large companies there are many heterogeneous procedures and actors who have something to do with conflict in the widest sense. Sometimes, these actors do not even know of each other – or their functions overlap in a non-productive way. This can hamper the optimisation of conflict management structures. Therefore, a comprehensive mapping of the existing positions, procedures, office holders and their job descriptions is a necessary first step towards producing an overview of the relevant structures and actors in the area of conflict handling as well as conducting a needs analysis as a foundation for the implementation of tailor-made conflict management structures.

4. Commitment of the Top Management

Without an explicit, authentic and binding commitment from the top management, neither individual elements nor a complete system of conflict management can be sustainably established. If such a long term management commitment to the planned activities in the area of conflict management is lacking, there is a danger that in spite of the best conceptual structure, initiatives will remain locked in the pilot phase. If the top management is opposed to making a far reaching commitment right away (e.g. due to legitimate doubts with regard to the overall usefulness or profitability of the suggested conflict management measures), a low threshold approach is recommended. Such approach should be structured in small steps whereby initially only smaller single elements are established and pilot phases are defined. During these phases the operation and efficiency of the selected elements can be tested within the day to day business activities of the company and can then be improved with regard to the respective context and demands of the company.

5. Resources

For the professional and sustainable establishment of conflict management measures not only the (moral and organisational) support of the top management is needed, but also a defined budget. Without an adequate long term financial basis for the conflict management initiatives, particularly for the creation of infrastructure, the training of personnel and the reduction of the workload of the relevant promoters in relation to their normal tasks, there is a danger that activities in the area of conflict management will ultimately have to be discontinued, in spite of high commitment levels from the project pioneers and in spite of the considerable expense in personnel and financial resources in the pilot phase. This would not only be inefficient; it would also severely damage the motivation of those involved as well as the generally positive attitude towards the topic of conflict management in the company.

6. Clarity of roles

Particularly in the pilot phase of the establishment of conflict management structures, individual actors frequently take on a large number of different roles simultaneously (e.g. those of procedural designer, ombudsperson and mediator). There are several dangers in this multiplicity of roles: the person affected by conflict does often not know which role the contact person concerned is representing and what consequences an approach of this person in a specific case may have (e.g. as regards confidentiality). This lack of transparency can lead to the fact that an individual affected by conflict will not approach the contact person. Furthermore it is very time and energy consuming to fulfil several roles with a high degree of competence and with full commitment. In this respect, the clarity and, where needed, also a division of roles, is of key importance to maintain motivation and prevent burnout. It can be achieved by clear role descriptions and by involving additional people. Role clarification can be supported by training measures, which not only provide the necessary skills for core functions but also impart sensitivity for the boundaries of a specific role – together with information about what to do if requests or tasks fall beyond these boundaries.

7. Consistency of structures

The pilot phase in the establishment of conflict management measures is frequently supported and advanced by highly committed and often also charismatic personalities with a pioneering spirit. If these individual actors are no longer available for the area of conflict management – because they leave the company or they are transferred to other tasks – many companies experience problems such as loss of knowledge, drop in motivation amongst others involved in the process or an interruption of important lines of communication both inside and outside the company. To ensure that the continuity of conflict management activities grows as independent as possibly of core individuals, it is necessary to analyse the assumed functions of the pioneers in the field and to establish corresponding abstract job descriptions, which are independent of any individual person, to stabilise the role and structures.

8. Synergy effects within the company

If the office holders and organisational units responsible for conflict processing in the company are not systematically linked with each other and do not have a shared understanding of terminology and conflict processing, there is a danger that the people or entities involved will not work in a coordinated way or may even work against each other. This can lead to a significant loss of efficiency or ultimately to deadlock. In contrast, significant synergy effects can be generated if the development steps in the area of conflict management are taken in dialogue with all the actors concerned and in cooperation with those positions which control the processes of strategic change within the company. In this way, individual conflict management elements or components, in particular also the subsystems for conflicts in the workplace and conflicts between companies, can be coordinated. AIso, the compatibility of the practised conflict resolution approaches and methods as well as the terminology used can be ensured.

9. Controlling and quality assurance

Controlling and quality assurance as instruments of feedback, performance measurement and system improvement are key parts of all management measures – thus also of conflict management. Particularly in pilot phases, the timing and choice of methods of these instruments is crucial: If interim results are demanded too early, there is a danger that no tangible effects have been measured yet and a counterproductive pressure to succeed will develop. If, however, there is too little investment in controlling and quality assurance measures, or if this is done too late, conflict management activities and investments are left without documentation and performance control. If there is too little differentiation in the methodological instruments, effects are depicted inadequately; if these instruments are very complex, they might not be used in day to day practice because of their elaborateness. Prerequisites for a meaningful controlling and quality management are distinct aims and a realistic definition of success for the conflict management measures as well as an adequate timeframe for the evaluation. Particularly in the area of conflict management it is recommended – by using external experts if appropriate – that the quality management concept be developed together with the generally committed actors using indicators which are as simple to operate as possible.

10. Exchange with other companies and experts

In pilot phases particularly – as currently in the area of conflict management – there is intensive experimentation with the development of structures and processes, whilst the growing level of practical knowledge is still barely recorded. Thus, there is a danger that existing models of success will have to be reinvented elsewhere. Also, a company runs the risk that aspects, which are suboptimal in its own structures, will be detected too late or not at all – or, at the worst, that the connection to ongoing developments will be lost. Therefore, regular exchange and communication with conflict management promoters in other companies, academics and qualified advisors as well as the practical inclusion of these external perspectives and experiences prevent blind spots from arising, bring valuable new stimuli and strengthen the motivation within the company itself. The use of common terminology and documentation systems guarantees an uncomplicated knowledge transfer. In Germany, the Round Table took over this function as discussed in the following section.

IV. Round Table Mediation and Conflict Management

In 2008, the desire of many leading German companies to engage in even more intense experience exchange in order to improve their conflict resolution practices has led to the formation of the above mentioned "Round Table Mediation and Conflict Management of the German Economy", which as of now includes more than 50 large German companies.[40] By fostering systematic exchange of innovative concepts, best practice-approaches and valuable practical experiences, the Round Table promotes the potential for innovation in the area of commercial conflict management.[41] In continuous cooperation with the Institute of Conflict

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[40] E.g. E.ON, SAP, Siemens, Bombardier, Audi, Porsche, Deutsche Bank, Deutsche Telekom, e-plus etc.

[41] See also the Round Table's Homepage: www.rtmkm.de and *Briem/Klowait*, Der Round Table Mediation und Konfliktmanagement der deutschen Wirtschaft -

Management at the European University, the Round Table also provides empirical data for research and serves as a "test track" for the practical value of theoretical models and concepts.

1. What makes the Round Table unique?

The Round Table is the *user's* platform for exchange and cooperation in the field of commercial mediation and other forms of corporate conflict management. Unlike the composition of most German mediation associations, the Round Table does not represent mediators who are service providers; at the contrary, the Round Table focuses on the **inside perspective of companies** and thus clearly focuses on the requirements and objectives of the potential *users* of mediation. Since its foundation in spring 2008 on a common initiative of E.ON and SAP, the corporate membership figures of the Round Table have constantly grown. Membership includes major companies like Audi, Siemens, Deutsche Bahn, Deutsche Bank, Deutsche Telekom, Porsche, Bombardier Transportation and E-Plus Group as well as a significant number of smaller and mid-sized companies.

The **Round Table is corporate driven** as evident from the caliber of its company representatives. Most Round Table representatives work in the Legal- or HR Department of their company. Each member corporation can nominate up to two representatives – ideally from different divisions in order to also foster the internal network and exchange in that corporation.

Finally, the **close cooperation between corporations and science** is another remarkable feature of the Round Table. The Round Table enjoys constant scientific support by Viadrina University and – vice versa – the University can rely on open-minded corporate counterparts, willing to share their experiences and practices for scientific purposes. On the one hand members of the Round Table are interested in highly qualified academic consultancy and supervision of their conflict management initiatives and on the other hand the approach of conducting a practice-oriented research requires close collaboration with the research subjects. The co-operation between the Round Table and Viadrina University has turned out to be a real win-win-situation that both sides highly appreciate and take advantage of. The series of empirical studies highlighted in section III. of this article certainly represents one of the most prominent results of this complementary approach. Its findings have set an impetus also for many corporations outside the Round Table to play an active role and to become part of a development in German Economy which is characterized by a broad openness for making use of mediation and other ADR-procedures.

2. Vision and Mission

The Round Table members expressed a shared vision. In their own words:

> *The key methods, instruments and players in the area of conflict prevention and – resolution in German Economy are efficiently linked and combined with each other. The topic "conflict management" is established in German corporations, both in an institutional and in an organizational way. The contribution of an efficient conflict*

Wegweiser für einen Paradigmenwechsel im unternehmerischen Konfliktmanagement?, Konfliktdynamik 2012, pp 66 et seq.

management to the idealistic, strategic and commercial success of a company is widely accepted and appreciated.

German corporations especially acknowledge mediation as an important element of a modern conflict management system and – where ever suitable – make use of it regularly and successfully in order to achieve an interest-oriented and sustainable conflict resolution.

In the German Economy, the Round Table is established as the central forum in the field of mediation and conflict management. It closely cooperates with science in order to further develop and foster conflict management, based on input derived from practical experience. The Round Table also serves as a competent contact towards politics with regard to the items of conflict management in general and commercial mediation in particular.

Derived from this vision, the business mission of the Round Table comprises the following elements:

- *Exchange of experiences in the field of conflict management & mediation*
- *Build a network between the mediators & conflict managers of corporations*
- *Establish mediation & provide corresponding support for the (Round Table) members*
- *Clarify/promote the benefit of conflict management & conflict management systems*
- *Support Know-how transfer regarding ADR-topics also to and with third parties*
- *Support exchange with scientific research*
- *Be independent from other ADR-Associations*
- *Support a conflict culture which aims at transparency & values*
- *Act as a contact point for politics/institutions*
- *Provide active support for member interests*
- *Support the acceptance of and knowledge about mediation*
- *Foster the perception of conflicts also as an opportunity for change and improvement*

3. Organisation of the Round Table

The ***plenum meetings*** of the Round Table take place quarterly. The plenum sessions are organised as full-day and in-person meetings of all active members, from time to time complemented with invited guest speakers from external corporations or institutions. Those general meetings are hosted by the participating corporations in a rotating system.

Usually the meetings start with a short presentation of the hosting company, with a focus on the respective plans, efforts made or "lessons learned" in terms of corporate conflict management. The following "flashlight", which addresses a specific question to the plenum, provides an overall insight into the status and development of this topic among all Round Table members (e.g. "What are the main efforts in conflict management achieved in your company since we met the last time?" or "What are the main obstacles for implementing mediation as a regular conflict resolution procedure in your business?"). As the specific tasks of the Round Table are subject to continuous work of individual working groups, it is a fixed

item of the agenda of each general meeting to get a report from those working groups, discuss their findings and recommendations and come to common conclusions and resolutions. Last but not least, another important item on each meeting's agenda is the report from the world of academia and science, presented by Viadrina University.

In addition to these established items and reports, each general meeting is subject to an individual "main topic", e.g. the work of ombudsmen, the specifics of B2B-mediation, the strategic development of the Round Table, conflict management in the intra-group context, the legal framework provided by the German Mediation Act, the presentation and analysis of various conflict management procedures etc. Dealing with such main topics often allows to invite guest speakers with corresponding expertise and experience and/or to conduct practical advanced training sessions for the participants.

A ***strategy team*** – an integral part of the Round Table's working groups – prepares and analyses the general meetings, coordinates the other working groups and focuses on strategic questions and items of overriding importance like e.g. the vision and mission of the Round Table.

Finally, the ***working groups*** deliver constant in-depth-work on specific items of high relevance for the Round Table-members. As soon as final results have been elaborated, the working groups may dissolve and address new topics by establishing new corresponding working groups. In other words: They follow a dynamic approach and adapt their workforce in a flexible way to various "up-to-date-topics". Usually there are about five to seven working groups in parallel. They are working continuously and regularly present their findings, results and recommendations to the general meeting. Some of the main topics that are or have been dealt with by the respective working groups are the following:

- *Mediation Act*: Develop and represent the position of the Round Table related to legislative measures regarding mediation in Germany[42]
- *Documentation*: Documentation of mediation cases / establishment of an Internet-Platform
- *Marketing*: Support regarding the „Inhouse-Marketing" of mediation and conflict management (i.e. the marketing within corporations)
- *Conflict Management Systems*: Demonstration of the benefit of conflict management systems and development of a common understanding of the underlying key terms and definitions
- *Quality*: Definition of quality standards for mediation and mediators
- *External Conflicts / B2B conflict management*: Defining and building up external conflict management

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[42] *Round Table Mediation & Konfliktmanagement der Deutschen Wirtschaft*, Positionspapier der deutschen Wirtschaft zur Umsetzung der EU-Mediationsrichtlinie, Zeitschrift für Konfliktmanagement (ZKM) 2009, pp 147 seq.; this document and other results of the working group Mediation Act can be downloaded under http://www.rtmkm.de/home/welcome/downloads/

V. Relevant Legal Background of ADR

In July 2012, the German '**Act to Promote Mediation and Other Methods of Out-of-court Dispute Resolution**'[43] (hereinafter the "Act") entered into force. It provided numerous amendments to the procedural codes, in particular the German Code of Civil Procedure (Zivilprozessordnung, ZPO) and – as its core element – it enacted the Mediation Act (Mediationsgesetz, MediationsG[44]). By doing this, the German legislator created the first codification of mediation and related provisions in German law. However, contrary to what could be expected in view of the full title of the act, German legislation refrained from adopting any codification for other out-of-court dispute resolution methods.

The adoption of the Act was triggered by EU-Directive 2008/52/EWG[45] ("EU Directive") and the inherent requirement to implement its rules into national law. Compared to the basic goals of the EU-Directive – i.e. 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 – the German legislator in many ways exceeded those requirements, without, however, choosing an approach of over-regulation. While the EU-Directive focuses on cross-border mediations between EU-member states, the German Mediation Act also applies to domestic mediation proceedings. Also, to be in line with EU requirements, the German legislator could have restricted itself to adopt regulations for certain aspects of mediation in "*civil and commercial matters*" only. Instead, the scope of the Act also embraces conflicts in the fields of labor law, tax law, patent- and trademark-law as well as social- and administrative law. On another note, the MediationsG mainly focuses on prescribing basic principles, procedural rules, and minimum duties of the mediator. In that regard one could argue that the German legislator did not "take the bait" of over-regulation.

The basic provisions of the MediationsG can shortly be highlighted as follows[46]: Basically in line with the definition of the EU Directive, the German Mediation Act defines mediation as a confidential and structured process in which the parties strive, on a voluntary basis and autonomously, to achieve an amicable resolution of their conflict with the assistance of one or more mediators (sec. 1 par. 1 MediationsG). The term "mediator" is defined as an independent and impartial person without any decision-making power who guides the parties through the mediation (sec. 1 par. 2 MediationsG). Section 2 provides some basic principles of the mediation process and the tasks of the mediator. As part of these obligations, the mediator shall verify that the parties have understood the basic principles of the mediation process and the way in which it is conducted, and that they are participating in the mediation voluntarily (sec. 2 par. 2 MediationsG). Section 3 focuses on the independence and

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[43] Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung, BGBl. 2012 I, 1577

[44] An English version of the MediationsG is available under http://www.gesetze-im-internet.de/englisch_mediationsg/englisch_mediationsg.html#p0008

[45] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, Official Journal of the European Union, L 136, 24 May 2008, pp 3 et seq.

[46] For details see *Klowait/Gläßer (eds.)*, Kommentar zum MediationsG (Legal Commentary to the Mediation Act), 2014; an extended overview of is provided by *Goltermann/Klowait* in: Gläßer/Kirchhoff/Wendenburg (eds.), Konfliktmanagement in der Wirtschaft, 2014, pp 285 et seq.

impartiality of the mediator. Amongst others, the mediator is obliged to disclose all circumstances to the parties which could impede his independence or impartiality (sec. 3 par. 1 MediationsG). According to sec 3 par. 2 a person who has acted in the same matter for one of the parties prior to the mediation shall not be permitted to act as a mediator. Section 4 makes sure that the mediator is subject to a strict duty of confidentiality. However, as these legal confidentiality obligations do neither refer to the *parties* of a mediation nor to their *lawyers* involved in the process, in practice of commercial mediations this gap is typically closed by imposing such confidentiality obligations on the parties and their lawyers by means of a mediation contract. Sections 5 and 6 deal with the initial and further training of the mediator and set the conditions for certification of mediators. The title 'certified mediator' (zertifizierter Mediator) may be used only by persons who have completed specific training pursuant to a decree to be set forth by the German Federal Ministry of Justice[47]. Finally, sections 7 to 9 of the German MediationsG contain specific provisions for academic research projects, financial support of mediation, the evaluation of the MediationsG (which will take place in 2017) and its transitional applicability.

The agreement reached by mediation can be made enforceable either via a lawyers' settlement (sec. 796a ZPO) or by means of notarization by a German notary public or a German court pursuant to sec. 794 par. 1 no. 5 ZPO. A suspension of the statute of limitations during the mediation proceedings is effected by sec. 203 par. 1 of the German Code of Civil Law (Bürgerliches Gesetzbuch, BGB) – which says that in case of ongoing negotiations between the parties in respect of the claim or the circumstances giving rise to the claim the limitation period is suspended until one party or the other refuses to continue such negotiations. As these provisions – which are not new – have been considered to be sufficient by the German legislator, the Act did not provide specific (new) rules for the topics of enforceability and the suspension of the statute of limitation.

Finally, it should be noted that the Act refers to three types of mediation related proceedings: the standard out-of-court mediation, the out-of-court mediation upon proposal by the court and mediation in judicial conciliatory proceedings.

Empowered by the newly introduced sec. 278a ZPO, the court may propose mediation or any other proceeding for out-of-court settlement. If the parties agree, the court is entitled to suspend the court proceedings for the duration of the subsequent mediation. The mediation within judicial conciliation is based on the new sec. 278 par. 5 ZPO. It allows the litigants to enter into conciliatory proceedings before the court upon the referral of the court at any time during the court proceedings. These proceedings are conducted by a judge acting as judicial conciliator ("Güterichter"). As the judicial conciliator is not authorized to render binding decisions upon the parties, such conciliation clearly aims to reach a mutual agreement. In his conciliatory role the judge may also make use of the methods of mediation.

In sum, the provisions of the Act have certainly contributed to set a reliable legal framework to mediation[48]. Nevertheless, the legislatory approach to adopt only basic provisions in order

[47] In February 2014 the Federal Ministry of Justice published a draft bill of this decree, which by now (August 2014) has not yet entered into force, see: Verordnung über die Aus- und Fortbildung von zertifizierten Mediatoren (Zertifizierte-Mediatoren-Ausbildungs-Verordnung – ZMediatAusbV), http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Verordnungsentwurf_ueber_die_Aus_und_Fortbildung_von_zertifizierten_Mediatoren.pdf?__blob=publicationFile

[48] For the legal provisions in the realm of Consumer Dispute Resolution see section II.3 of this article.

to not over-regulate the field of mediation leads to an ambivalent intermediate result: On the one hand it seems reasonable to refrain from exceeding legal provisions as it enables a rather young and new method like mediation to develop in a flexible way; the flip side of the coin, however, shows that the numbers of mediations actually conducted in Germany have not risen as significantly as intended by the legislator. Although mediation has become much more popular and accepted in the German society and business context, it might thus require a stronger legal impetus in the future in order to promote mediation more effectively.

VI. Conclusion and Outlook

This article draws a rather positive and optimistic picture of the status quo and future of ADR and conflict management in the German corporate sector. The wealth of positive ADR experiences, collected by many dozens of pioneer actors, and the existence of numerous corporate conflict management programs strongly support this view. Increasingly, the mid and top management levels of companies also recognize the less visible positive effects in connection with measures in the field of conflict management: they realize that advanced conflict and communication skills should be an integral part of management, and that a clear confession to constructive conflict management can serve as an important part of the corporate culture and philosophy. At the same time, it should be stressed that the majority of German companies so far did not invest into the establishment of professional conflict management structures. And that many ADR provisions which have been integrated into contracts and project agreements still do not translate into actual practice in a straightforward fashion.

However, although some areas still leave room for optimization, the progress recently made clearly should not be underestimated. The interest in and openness to conflict management and ADR is constantly growing. Especially mediation has become much more known and more frequently used in Germany.

In addition, the multiple and serious efforts made by the European Union to further promote the use of ADR allow an optimistic outlook. As not only the German Mediation Act, but also the underlying EU Directive will be evaluated soon[49], it appears predictable that lessons learned on the basis of the current legal framework will be considered and will lead to future legal amendments and revisions[50].

It may be safely assumed that the Round Table – as it did from its very beginning – will continue to be an important impetus for fostering the increased use of ADR and conflict management in the German corporate sector. Currently, among the ongoing initiatives, steps are taken to publish a corporate ADR pledge of the German economy. In addition, in 2015 the

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[49] According to sec 8 par. 1 of the German Mediation Act this evaluation has to be accomplished by July 26th 2017 the latest, while Art. 11 of the EU Directive sets the evaluation date for the Mediation Directive on May 21st 2016.

[50] Amongst others, the findings and recommendations of the EU-initiated study „Rebooting the Mediation Directive“ suggest that the promotion of business mediation and ADR is really taken seriously, see http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET%282014%29493042_EN.pdf

Round Table will name the leading law firm in Germany with special expertise in the field of ADR with the “Round Table award for excellence in mediation and conflict management”.

It is the combination of all these developments, together with the fact that the major paradigm shifts in the German corporate conflict resolution culture have been initiated by the users rather than the providers of ADR services, that leads us to the conclusion that the future of corporate ADR in Germany will be a bright and interesting one.