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I. ARTYKUŁY

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The Lawyer as Conflict Manager: Exploring the Lawyer's Role in ADR, Especially as an Advisor in Mediation and as Lawyer-Mediator in Germany

Abstract. This article advocates redefining the lawyer's role as a conflict manager, shifting from adversarial approaches to interest-based, consensual conflict resolution. Although litigation remains the norm, alternative dispute resolution (ADR), especially mediation, offers significant benefits that are often underutilized. Lawyers can act as advisors, guiding clients to select and engage in ADR processes tailored to their needs, or as mediators, facilitating neutral, self-determined outcomes.

The article examines key ADR methods, including mediation, collaborative practice, and procedural hybrids like med-arb, highlighting their applications, advantages and challenges. Special emphasis is placed on the lawyer's dual role: advising clients during ADR proceedings and serving as a neutral third party in mediation. Preparation, confidentiality and risk analysis are central to the lawyer's responsibilities in ensuring effective mediation outcomes.

Additionally, the article addresses the professional and ethical considerations for lawyers acting as mediators, including adherence to legal standards and avoidance of conflicts of interest. It argues that adopting a conflict-management approach not only aligns with legal professional standards but also enhances client satisfaction and outcomes by prioritizing efficient, amicable solutions over confrontational disputes.

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By integrating conflict management into legal practice, lawyers can expand their professional scope, offering valuable alternatives that promote long-term cooperation and resolution beyond the courtroom.

Keywords: conflict management – alternative dispute resolution – mediation – lawyer-mediator – lawyer's role in mediation

Introduction

A norm should fundamentally be known to every lawyer, and most likely it is the norm of paragraph 1 section 3 of the Rules of Professional Practice (Berufsordnung der Rechtsanwälte, BORA).[1] Among other things, it states that lawyers should advise and represent their clients, protect them from legal losses, and guide them in a way that shapes the law, avoids conflicts, and resolves disputes.

However, when one looks at legal reality, it becomes apparent that legal practice falls short of what the legislature intended and what is possible in this area. In legal practice, confrontational disputes, the "fight for rights," and consequently, recourse to the courts, regularly take centre stage, while the search for a consensual solution remains somewhat neglected. This occurs despite the (optional) provision in paragraph 253 section 3 number 1 of the German Code of Civil Procedure (Zivilprozessordnung, ZPO), which suggests that the complaint should include information on whether an attempt at mediation or another out-of-court conflict resolution procedure preceded the lawsuit, as well as an explanation of any reasons that may have precluded such an attempt. Conversations with judges and lawyers repeatedly show that only in a very small number of cases are the required details provided, and instances where the court has raised objections to this omission are equally rare.[2]

Fortunately, it is noticeable that those who have gained experience in active conflict management, whether as lawyers or corporate representatives, often become strong proponents of alternative dispute resolution

[1] English Version of the Rules of Professional Practice Version of 1 X 2023 under: https://www.brak.de/fileadmin/02_fuer_anwaelte/berufsrecht/BORA_Stand_01.10.2023-en.pdf (accessed: 21 VIII 2024). For a more detailed description of the lawyer's professional profile, see: J. Lefèvre, *Eine explorative Untersuchung der anwaltlichen Beratungshilfe, Das Berufsbild des Rechtsanwalts und seine Pflicht aus § 49 a Abs. 1 BRAO als Instrument der Sicherung des gleichen Zugangs zum Recht in Recht und Praxis*, Berlin 2024, pp. 53–70.

[2] See https://gemmeeurope.org/en/das-guterichterverfahren-auf-dem-prufstand (accessed: 21 VIII 2024).

methods. Schroeder and Lerch have illustrated this impressively in their insightful article *Interest-Based Legal Conflict Management for Companies*.[3] Nevertheless, there is still a long way to go before these insights are fully embraced by the legal profession as a whole.

With this article, the authors aim to contribute to a changed understanding of legal practice. Therefore, when the term "lawyer as conflict manager" is mentioned, as in the title, it primarily refers to the situation in which the lawyer supports and represents their client in a procedure of alternative dispute resolution (see Section 1), with particular emphasis on the mediation process (see Section 2). It also refers to the scenario where the lawyer takes on the role of a neutral third party, acting as a mediator, helping the conflicting parties to develop a self-determined solution (see Section 3). The article closes with a conclusion.

1. Client support through alternative dispute resolution methods

Acting in a conflict-avoiding and dispute-resolving manner for the client requires interest-based conflict management on a case-by-case basis. In discussions with the client, the lawyer must determine what the client is really seeking within the context of their legal position and what their true interests and needs are. Based on this, the lawyer will consider which alternative method of resolution can best achieve these interests and then discuss their findings with the client. This approach is not limited to the beginning of the mandate but should be kept in mind throughout every phase of the dispute. The goal is to ensure that any potential "mediation window" is not overlooked, even during an ongoing procedure.

In this context, the lawyer will also reflect on and determine what role they will assume in an alternative procedure: as a participating advisor and representative of their client,[4] as a background consultant advocating for their client's interests, or as a "third party" directing the conflict resolution process.[5]

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[3] H.-P. Schroeder, M.P. Lerch, *Interessengerechtes anwaltliches Konfliktmanagement für Unternehmen*, "ZIP" 2024, vol. 45, no. 25–26, p. 1428.

[4] D. Pielsticker, *Kommentierung § 2 MediationsG*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, p. 116.

[5] A. Hacke, *Mediationsbegleitung durch Rechtsanwälte*, in: *Mediationsgesetz*, eds. J. Klowait, U. Gläßer, 2nd ed., Baden-Baden 2018, p. 837.

Among the known ADR (alternative dispute resolution) procedures,[6] in addition to mediation and collaborative practice, which will be discussed again in Section 3, lawyer-supported settlement negotiation (Ger. *Anwaltliche Vergleichsermittlung*), conciliation (Ger. *Schlichtung*), conciliation proceedings (Ger. *Güteverfahren*), mini-trial, and early neutral evaluation should be considered, as they are procedures in which the parties themselves determine the outcome. However, procedures such as adjudication, expert determination (Ger. *Schiedsgutachten*), and arbitration (Ger. *Schiedsverfahren*, also known as *Schiedsgerichtsverfahren* or *schiedsgerichtliches Verfahren*) should also be considered, where third parties make a binding decision, but depending on the case and client preference, these may offer advantages over state court proceedings. Finally, procedural combinations, such as the med-arb procedure (Ger. *Med-Arb-Verfahren*) or the med-adj procedure (Ger. *Med-Adj-Verfahren*), should also be taken into account.

The purpose of this article is not to provide a comprehensive overview of all ADR procedures, as this would exceed the scope of this contribution. However, a brief presentation of some procedures and their essential methodological advantages and disadvantages seems appropriate for a better understanding, before focusing in more detail on the mediation process and the steps to be taken by the consulting lawyer in this context.[7] There are various reasons to choose an alternative dispute resolution procedure: limited time and financial resources, the desire for future cooperation, the importance of confidentiality, and the ability to influence the outcome. Each of the procedures presented below has its own advantages and disadvantages. Reasons that initially favour a particular procedure may change as the conflict evolves. Accordingly, it may be advisable, for example, to switch from an agreed arbitration procedure to mediation, either entirely or for specific disputed issues.[8]

1.1. Lawyer supported settlement negotiation

The term lawyer-supported settlement negotiation (Ger. *Anwaltliche Vergleichsvermittlung*) refers to a process in which, after being duly instructed by the client, the lawyers first assess the other party's willingness to

[6] R. Fritz, *Zusammenfassende Darstellung alternativer Konfliktbeilegungsmethoden im Überblick*, in: *Handbuch Mediationsrecht*, op. cit., p. 936; T. Lapp, *Außergerichtliche Streitbeilegung*, "Anwaltsblatt" 2024, no. 1, p. 64.

[7] R. Fritz, *Kommentierung § 278 ZPO*, in: *Handbuch Mediationsrecht*, op. cit., p. 267.

[8] H.-P. Schroeder, M.P. Lerch, op. cit., p. 1429.

negotiate and reach a settlement, and then work together to find a solution to the existing points of dispute.[9] However, this requires a shift in the traditional role perception of the lawyers involved: the rigidity and legal stringency of asserting claims must be replaced by a firm advocacy for the respective client's interests. These interests must therefore be carefully identified and prepared in advance between the lawyer and the client. At the same time, a shift from a combative approach to a more conciliatory mode of communication is necessary to consider the interests of the opposing party as well, and thereby achieve a mutually agreeable outcome.

1.2. Conciliation

The conciliation process is not dissimilar to mediation: this similarity includes a fundamentally consensual and informal approach, as well as the use of mediation techniques within the process itself. However, the conciliator chosen by the parties will often conduct an inquisitorial investigation of the facts and will not exclude legal issues. The key difference from mediation lies in the fact that the conciliator will present the parties with a non-binding proposal to resolve their conflict (conciliation proposal or conciliator's recommendation). If this proposal is rejected, the conciliation process is considered unsuccessful.[10]

1.3. Conciliatory proceedings

A particular form of conciliation in civil disputes is known as conciliatory proceedings (Ger. *Güteverfahren*), which are conducted before state-recognized conciliation bodies (Ger. *Gütestellen*).[11] These bodies are staffed by individuals who must be qualified to hold judicial office. Each conciliation body operates according to its own specific set of rules, which determine the procedure, methodology, and costs. While the conciliation body is responsible for organizing and conducting the negotiation, the parties themselves remain responsible for reaching a substantive agreement.

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[9] G. Erdmann, *Anwaltliche Vergleichsvermittlung*, in: *Handbuch Mediationsrecht*, op. cit., p. 1064.

[10] M. Lembcke, *Schlichtung*, in: *Handbuch Mediationsrecht*, op. cit., p. 1105.

[11] R. Fritz, *Zusammenfassende Darstellung alternativer Konfliktbeilegungsmethoden im Überblick*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, p. 936.

1.4. Mini-trial

A mini-trial, a voluntary and private negotiation procedure, aims to assess the chances and risks of a judicial process and clarify these for the conflicting parties. It consists of a senior decision-maker from each party, authorized to conclude a settlement, and a neutral chairperson agreed upon by both parties. After the presentations by the parties' lawyers, the respective representatives and the chairperson consult and attempt to reach an agreement.[12]

1.5. Early-neutral evaluation

The procedure is designed to involve a neutral third party at an early stage of the dispute, who, as an independent expert in the relevant area of conflict, provides a preliminary, non-binding assessment of the dispute.[13] In brief negotiations with the parties (and their lawyers), the expert investigates both the facts of the case and the respective legal positions, and then provides a written evaluation of the legal and factual aspects. This allows the conflicting parties to assess their potential success in a judicial proceeding better and to evaluate further actions in a manner appropriate to the conflict. If desired, settlement negotiations can then be initiated based on the expert's assessment.

1.6. Adjudication

Adjudication is a procedure in which an expert (adjudicator) renders a provisionally binding decision on a dispute between the parties, typically in areas such as major construction and plant engineering, both in terms of facts and legal issues.[14] The advantage of this procedure lies

[12] A. May, *Kommentierung § 13 Andere Verfahren einvernehmlicher Konfliktlösung*, in: *Mediation in der Praxis des Anwalts*, eds. F. Schmidt, T. Lapp, A. May, 2nd ed., München 2022, p. 356; R. Fritz, *Zusammenfassende Darstellung alternativer Konfliktbeilegungsmethoden im Überblick*, in: *Handbuch Mediationsrecht*, eds. R. Fritz, D. Pielsticker, 3rd ed., Hürth 2024, p. 938.

[13] R. Fritz, *Zusammenfassende Darstellung…*, p. 939; A. May, *§ 13 Andere Verfahren einvernehmlicher Konfliktlösung*, in: *Mediation in der Praxis des Anwalts*, eds. F. Schmidt, T. Lapp, A. May, 2nd ed., München 2022, p. 355.

[14] M. Lembcke, *Adjudikation…*, p. 1115.

in its ability to minimize disruptions to the construction process and allow for adjustments in the construction schedule.[15] Enforcement of the adjudicator's decision can, if necessary, be pursued through the courts in a so-called 'enforcement process'. The parties are bound by the adjudicator's decision until the conflict is ultimately resolved through (arbitration) court proceedings or an ADR process.

1.7. Expert determination

An expert determination (Ger. *Schiedsgutachtenverfahren*) refers to the binding decision made by a neutral third party, usually an expert with specialized knowledge relevant to the conflict, on the disputed matter presented to them by the conflicting parties.[16] This can involve both factual and legal issues. The written arbitral expert opinion is binding between the parties and thus serves to resolve the dispute.

1.8. Arbitration

Arbitration proceedings are comparable to state court proceedings but differs in that it is voluntary and confidential, the arbitrators can be selected and appointed on a parity basis, the process can be flexibly structured, and typically, only one instance decides the dispute, with the decision being enforceable (paragraph 1060 German Code of Civil Procedure).[17] However, once the process has been initiated, the parties' ability to influence the proceedings, as in the previously described adjudication and expert determination, is extremely limited.

1.9. Combination of procedures (med-arb and med-adj)

Combinations of procedures such as med-arb,[18] a combination of mediation and arbitration, or med-adj,[19] a combination of mediation and adjudication, merge the distinct advantages of each respective procedure.

[15] A. May, *§ 16 Schiedsverfahren*, in: *Mediation in der Praxis des Anwalts*, op. cit., p. 376.
[16] M. Lembcke, *Schiedsgutachten*, in: *Handbuch Mediationsrecht*, op. cit., p. 1168.
[17] M. Löggering, *Schiedsgerichtsbarkeit*, in: *Handbuch Mediationsrecht*, op. cit., p. 1128.
[18] R. Fritz, *Zusammenfassende Darstellung…*, p. 942.
[19] M. Lembcke, *Adjudikation…*, p. 1122.

If interest-based conflict resolution (mediation) does not lead to success, an enforceable decision (arbitration or adjudication) can be promptly rendered afterwards. A potential issue is the mediator's role switching to that of a decision-maker, as this may reduce the parties' willingness to fully engage in consensual conflict resolution.

2. Mediation

2.1. The procedure

The mediation procedure, regulated at the European level by the EU Mediation Directive of 2008[20] and the 2013 Directive on Alternative Dispute Resolution for Consumer Disputes,[21] as well as at the national level by the Mediation Act of 2012 (Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung, or Mediationsgesetz),[22] is a confidential and structured process in which the parties, with the help of one or more mediators, voluntarily and autonomously seek to reach an amicable resolution of their conflict.[23] It is the procedure in which the parties have the greatest influence over the outcome.

Although not specifically regulated, a mediation procedure typically follows this sequence: Initially, the parties clarify which issues they want to discuss and resolve in the mediation, and decide which issue will be addressed first (Phase 1). Then, the focus shifts to exploring the interests and needs underlying each issue (Phase 2), in order to subsequently generate options that may help satisfy those interests (Phase 3). Following this, the parties negotiate (Phase 4) and agree (Phase 5) on which options are suitable for a consensual solution.[24]

[20] Directive 2008/52/EC of the European Parliament and of the Council of 21 V 2008 on certain aspects of mediation in civil and commercial matters.

[21] Directive 2013/11/EU of the European Parliament and of the Council of 21 V 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

[22] Art. 1 of the Mediation Act (Gesetzes zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung) of 21 VII 2012, https://www.gesetze-im-internet.de/englisch_mediationsg/index.html6 (accessed: 21 VIII 2024).

[23] Para. 1 Sec. 1 Mediation Act.

[24] C. Duve, H. Eidenmüller, A. Hacke, M. Fries, *Mediation in der Wirtschaft*, 3rd ed., Köln, 2019, p. 79; R. Fritz, N. Etscheit, *Bedeutung und Methodik der Mediation*, in: *Handbuch Mediationsrecht*, op. cit., p. 747.

Mediation is applicable to nearly all types of conflict situations, ranging from a wide variety of civil disputes to family and inheritance controversies, and even diverse public law disputes.[25] The broad scope of mediation's application highlights two key points: Firstly, the methods, techniques, and tools that mediation offers cannot be universally applied to every conflict in the same way but must be appropriately adapted to the specific case and conflict. Here too, the principle of "one size does not fit all" applies. Secondly, mediation is overestimated and misunderstood if it is assigned an exclusive role, even though it is often considered the "golden path." It is not the ideal tool for every conflict that arises but rather competes with (or complements) the conflict resolution procedures previously discussed.

2.2. Preparatory consultation in connection with the conclusion of a mediation agreement

Comprehensive preparation of the client is essential, particularly for a non-adversarial procedure like mediation, and is crucial for its successful outcome.[26] This includes informing the client about what mediation is, how it works, and what they can expect. It must be clear to the client that the mediator does not make binding decisions but rather assists the conflicting parties in finding their own solution. Furthermore, unlike in court proceedings, lawyers will generally take a more reserved role[27]; therefore, it must be clarified in advance between the lawyer and the client who will say what and when during the mediation. This also applies in cases where mediation is initiated based on a mediation clause[28] agreed upon between contracting parties.

The case itself must be prepared together with the client[29] and, at first, does not differ from the preparation for an adversarial procedure. This includes reviewing the files, requesting documents and materials,

[25] H.-P. Schroeder, *Anwendungsbereiche der Mediation: Zivilrecht, Anwendungsbereiche der Mediation: Öffentliches Recht*, in: *Handbuch Mediationsrecht*, op. cit., pp. 869, 925; R. Fritz, *Einführung in die Mediation im öffentlichen Bereich*, in: *Praxishandbuch professionelle Mediation*, eds. S. Kracht, A. Niedostadek, P. Sensburg, Berlin 2023, p. 733.

[26] H. Friedrichsmeier, H. Hammann, *Der Rechtsanwalt als Mediator*, in: *Handbuch Mediation*, eds. F. Haft, K. von Schlieffen, 3rd ed., München 2016, p. 1123.

[27] C. Duve, H. Eidenmüller, A. Hacke, M. Fries, op. cit., p. 300.

[28] M. Mattioli, *Mediation in der anwaltlichen Praxis*, Frankfurt am Main 2012, p. 44.

[29] C. Duve, H. Eidenmüller, A. Hacke, M. Fries, op. cit., p. 299.

determining the participants/involved parties, assessing the time and financial resources and limitations, as well as evaluating the scope of the willingness to negotiate and possible settlement proposals. In addition, it is essential to discuss the client's underlying interests and needs, as well as, to the extent possible, hypothetically consider those of the opposing party. It is also advisable to begin exploring potential solutions in advance.

Finally, the mediation agreement and the mediator's contract must be discussed and then – after negotiations with the opposing party or the mediator – implemented.

If both conflicting parties are represented by lawyers, it is effective for them to cooperate in the interest of achieving a consensual solution. Building mutual trust is not only desirable but often a crucial component for reaching a consensual resolution. If the parties have already exchanged extensive written submissions, it should be ensured that this correspondence is made available to the mediator, so that they can familiarize themselves with the legal positions taken so far.

2.3. Tasks and role of the lawyer in preparing for mediation, particularly risk analysis

When financial claims are involved, a litigation risk analysis[30] can help clarify the chances of enforcing a claim and thus improve the prospects of reaching an agreement during negotiations. A risk analysis can help challenge over-optimism regarding a disputed claim and provide more realistic expectations about its current value and enforceability. Acting in this way for the benefit of the client is one of the tasks that the lawyer must perform in the run-up to mediation.

2.4. Mediation agreement and mediator contract, particularly ensuring confidentiality

The organization of a mediation requires the conclusion of two contracts at the outset, which provide the framework for the procedure. These are

[30] T. Schömig, *Prozessrisikoanalyse*, in: *Praxishandbuch Güterichterverfahren*, ed. F. Schreiber, Norderstedt 2022, p. 131; J. Risse, *Wirtschaftsmediation*, 2nd ed., München 2022, p. 279.

the mediation agreement and the mediator contract,[31] both of which can also be combined into one contractual document, the mediation contract.[32]

2.4.1. Mediation agreement

The mediation agreement is a contract entered into by the mediation parties, governing their mutual rights and obligations in connection with the mediation process. If no institutional mediation rules are applied (e.g., those of the German Institution of Arbitration – DIS – or the International Chamber of Commerce – ICC),[33] the mediation agreement should at least include[34]:

– A trigger mechanism for the procedure,
– Provisions for selecting the mediator,
– Rules on the participation of third parties,
– A temporary obligation to refrain from litigation (exclusion of enforceability),
– Obligations to support and cooperate during the procedure,
– Termination options,
– Cost arrangements,
– A waiver of evidence submission,
– An obligation of confidentiality for the parties.

Since confidentiality is a hallmark of the mediation process, it is usually advisable to include a comprehensive confidentiality clause, which should also extend to any third parties involved in the procedure.

2.4.2. Mediator contract

The mediator contract is the legal agreement between the conflicting parties and the mediator. It outlines the mediator's role in the process, their authority, liability, compensation, and their (legally mandated) duty of confidentiality. Legally, the mediator contract is considered

[31] R. Fritz, *Mediation*, in: *Verwaltungsrecht*, eds. L. Eiding, J. Hofmann-Hoeppel, 3rd ed., Baden-Baden 2022, p. 330; D. Pielsticker, op. cit., p. 136.
[32] C. Duve, H. Eidenmüller, A. Hacke, M. Fries, op. cit., pp. 101, 294.
[33] J. Risse, op. cit., p. 119.
[34] C. Duve, H. Eidenmüller, A. Hacke, M. Fries, op. cit., p. 295.

a service contract with a management obligation (paragraphs 675, 611 of the German Civil Code, Bürgerliches Gesetzbuch, BGB).

While the mediator is legally obligated to inform the parties about their duty of confidentiality (paragraph 4 sentence 4 of the German Mediation Act – Mediationsgesetz), the advising lawyer should also inform their client about this in advance.

2.5. Tasks and role of the lawyer during mediation

Individual meetings (caucuses)[35] and shuttle mediation[36] are commonly used methods in mediations. The lawyer will prepare their client for these and also participate in these meetings/negotiations.[37]

In as far as this has not already been done during the preparation, the lawyer, especially in business mediations, will work with their client to determine the BATNA ("Best Alternative to a Negotiated Agreement")[38] and, if necessary, conduct a risk analysis to explore how far the negotiation, the actual "deal-making," can go. Additionally, the client should be advised on potentially expanding the negotiation scope by including additional topics if necessary.

What is BATNA? A conflict participant can only rationally agree to an offer in mediation if it is better, in terms of their interests, than their BATNA. Thus, the BATNA serves as a benchmark for proposed or potential settlement options. In this sense, an agreement in a (business) mediation can typically only be expected if it is better for all participants than their respective BATNA. Solutions that meet this standard fall within the so-called 'settlement zone', which outlines the spectrum of solutions that are potentially acceptable to everyone involved.[39]

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[35] D. Pielsticker, op. cit., p. 113; R. Greger, *Kommentierung § 2 MediationsG*, in: *Recht der alternativen Konfliktlösung*, eds. R. Greger, H. Unberath, F. Steffek, 2nd ed., München 2016, p. 110.

[36] R. Fritz, *Besondere Formen: Shuttle-Mediation*, in: *Handbuch Mediationsrecht*, op. cit., p. 817.

[37] D. Pielsticker, op. cit., p. 116.

[38] C. Duve, H. Eidenmüller, A. Hacke, M. Fries, op. cit., p. 219.

[39] A simple example of a two-person negotiation illustrates this clearly: Entrepreneur U wants to sell his company and retire. A potential buyer has already offered him €1.3 million; this is his BATNA. U now enters into negotiations with his competitor K, who could buy a comparable company from a third party for €1.7 million (this is K's BATNA). Any purchase price between €1.3 million and €1.7 million is potentially acceptable for U and K, as it falls within the settlement zone.

To provide qualified advice in this regard, knowledge of business law is required. The accompanying lawyer should be familiar with the decision-making processes within the client's company, as well as the legal framework in which the company operates. This includes, for example, the powers of boards of directors, supervisory boards, or works councils, dependencies on parent companies within a corporate group, or – on a smaller scale – the position of partners in a law firm.

In addition, it is the lawyer's task to behave appropriately for mediation during the procedure. This means holding back during conflict diagnosis and interest exploration and only intervening when it comes to legal assessments, such as during the options phase.

2.6. Tasks and role of the lawyer at the conclusion

The role of the accompanying lawyer is not finished once a fundamental agreement has been reached. A preliminary understanding does not yet constitute a legally binding agreement.

However, a final agreement may not (yet) be possible if certain expert evaluations, such as in tax matters, are necessary. Such situations should be avoided, and relevant experts should be integrated into the process as early as possible to prevent the mediation from failing afterwards. Typically, the accompanying lawyers will at least determine the key points of the agreement, and in some cases, they will address all necessary details up to a legally binding and enforceable settlement.[40] The acronym "SMART," which stands for specific, measurable, achievable, realistic, and timed, provides a good standard for review the above-mentioned points of the agreement.[41] If one party does not adhere to the agreement reached in the mediation, the other party can file a lawsuit for performance and obtain an enforcement order in this way.

Aside from that, there are good reasons to consider making the agreement enforceable at the time of conclusion. In Germany, there are different options available for this purpose, mentioned in the following sections.[42]

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[40] A. Hacke, *Die Abschlussvereinbarung*, in: *Mediationsrecht*, eds. H. Eidenmüller, G. Wagner, Köln 2015, p. 216.

[41] C. Duve, H. Eidenmüller, A. Hacke, M. Fries, op. cit., p. 246.

[42] Ibidem, p. 247.

2.6.1. Notarial deed

The parties can have the settlement agreement notarized.[43] A notarial deed is an enforceable title under paragraph 794 section 1 number 5 of the German Code of Civil Procedure provided that the debtor has submitted to immediate enforcement in the deed. Recognition and enforceability in all EU member states are ensured through Art. 58 of the Brussels I Regulation.[44]

Notary fees arise from notarization, and their amount is determined by the value of the settlement. Declarations that require a party to express intent are not enforceable, even if notarized.

2.6.2. Lawyer settlement

Paragraph 796a of the German Code of Civil Procedure stipulates that a settlement as defined in paragraph 779 of the German Civil Code can be declared enforceable if it was concluded by lawyers in the name and with the authorization of their clients, the debtor submits to immediate enforcement, and the settlement, along with the date of the agreement, is deposited at a local court where one of the parties resides.[45] This settlement also cannot be directed toward the issuance of a declaration of intent. Although this is a cost-effective option, the procedure is cumbersome: the creditor must first obtain an enforceability declaration, which, according to paragraph 796b German Code of Civil Procedure, is issued by the court where the enforceable claim would otherwise be filed.

2.6.3. Settlement before a conciliation body

It is also possible for the parties to formally record their settlement agreement before a conciliation body (Ger. *Gütestelle*) officially established

[43] A. Hacke, *Die Abschlussvereinbarung…*, p. 240.

[44] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 XII 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 XII 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[45] A. Hacke, *Die Abschlussvereinbarung…*, p. 241.

by the state justice administrations.[46] For example, under the Bavarian Conciliation Act,[47] notaries and lawyers who are authorized by the bar association for this purpose are legally recognized as conciliation bodies.

2.6.4. Court settlement

If the mediation procedure was preceded by a pending court case, the parties can also record an enforceable title in court under paragraph 794 section 1 number 1 German Code of Civil Procedure.[48] This approach has the advantage that by court recording, all formal contract requirements are automatically fulfilled under paragraph 127a German Civil Code (e.g., for property transfers or the transfer of company shares). Additionally, this method concludes the pending court case without the need for a cost-incurring withdrawal of the lawsuit.

2.6.5. Arbitral award with agreed terms

The parties also have the option of initially reaching a provisional agreement, then concluding an arbitration agreement and appointing the mediator as an arbitrator. The arbitrator will then issue the settlement as an arbitral award with agreed terms (paragraph 1053 section 1 sentence 1 and section 2 German Code of Civil Procedure).[49] The necessary transition to an arbitration procedure can already be decided in the mediation agreement between the parties, in case they reach a settlement. The advantage of an arbitral award with agreed terms is that it is practically enforceable worldwide under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, there are also pitfalls: paragraph 1053 German Code of Civil Procedure requires that the settlement be reached "during" an arbitration proceeding and that the procedural rules for fair proceedings, as outlined in paragraphs 1025 et seq. German Code of Civil Procedure, are followed.

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[46] Ibidem, p. 240.

[47] BaySchlG: Bayerisches Gesetz zur obligatorischen außergerichtlichen Streitschlichtung in Zivilsachen (Bayerisches Schlichtungsgesetz), https://www.gesetze-bayern.de/Content/Document/BaySchlG (accessed: 21 VIII 2024).

[48] A. Hacke, *Die Abschlussvereinbarung…*, p. 239.

[49] Ibidem, p. 242.

There is a risk that an enforcement court might not consider the arbitral award with the agreed terms resulting from a mediation as enforceable.

If the mediation fails and no agreement is reached, it is the lawyer's task to advise the client on how to proceed. Further bilateral negotiations based on the interim results may be considered.

3. The lawyer as mediator

3.1. Requirements

Unlike the scenarios outlined in sections 1 and 2, where the lawyer, in their legal role, accompanies their clients to avoid conflict and facilitate dispute resolution, especially mediation, this section deals with situations where the lawyer acts directly as a mediator (Ger. *Anwaltsmediator*). A lawyer who is admitted to the bar and also wishes to act as a mediator must comply with the provisions of paragraph 7a of the Rules of Professional Practice[50]: "A lawyer who refers to themselves as a mediator must meet the requirements of paragraph 5 section 1 of the Mediation Act with regard to education, training, theoretical knowledge, and practical experience."

This required training may – but does not have to – include certification as a certified mediator, which is specifically regulated in terms of hours, content, and continuing education in the Training Ordinance for Certified Mediators (Ausbildungsverordnung für Zertifizierte Mediatoren).[51]

Parties who approach a "lawyer-mediator" (Ger. *Anwaltsmediator*) might do so with the assumption that they will receive both procedural guidance and legal advice. However, this assumption is incorrect, as the role of a mediator is characterized, among other things, by the fact that they do not offer solutions or provide legal advice. Therefore, a mediator whose primary profession is law will inform the parties of this at the beginning of the process and ideally agree with them that, before finalizing any agreement, they should have it reviewed by a legal professional, such as a (party) lawyer (cf. paragraph 2 section 6 Mediation Act).

[50] M. Bauckmann, *Anwaltliches Berufsrecht und Mediation*, in: *Praxishandbuch professionelle Mediation*, op. cit., p. 158.

[51] Zertifizierte-Mediatoren-Ausbildungsverordnung of 21 VIII 2016 (BGBl. I S. 1994), last amended by Artikel 1 der Verordnung of 11 VII 2023 (BGBl 2023 I Nr. 185).

3.2. Acceptance of a mandate

When a lawyer is sought out or proposed as a mediator, legal professional regulations and mediation law intersect. Accordingly, activity restrictions can arise from both mediation law and professional legal regulations. An absolute prohibition applies to anyone who has previously acted for a party in the same matter before the mediation. Moreover, the mediator may not act for a party in the same matter during or after the mediation (cf. paragraph 3 section 2 Mediation Act). Additionally, the lawyer-mediator is professionally prohibited from representing conflicting interests, as stipulated in paragraph 356 of the German Criminal Code (Strafgesetzbuch, StGB), paragraphs 43 section 4, 45 of the Federal Code for Lawyers (Bundesrechtsanwaltsordnung, BRAO), and paragraph 3 of the Rules of Professional Practice. This means that the lawyer may not act if they, in any capacity, advise, represent, or have already advised or represented another party in the same legal matter with conflicting interests, or have otherwise been professionally involved in that matter.

This prohibition extends to all professional activities of the lawyer, including advisory, conciliatory, mediative, or legal drafting roles. Therefore, the risk of violating these regulations already exists when a lawyer is approached by a client with the intention of hiring them as legal counsel for a specific case. Only if the lawyer informs the client right at the start of the conversation about the various conflict resolution options in general terms does the possibility remain of considering mediation without breaching the above-mentioned regulations. In the case of a more detailed initial consultation, which addresses not only the chances of success in court but also alternative out-of-court solutions, such as mediation, the lawyer would then only be able to accompany the client in an alternative dispute resolution procedure.

3.3. General activity

The lawyer-mediator is bound by confidentiality, as stipulated by paragraph 4 sentences 1 and 2 of the Mediation Act, as well as by the professional legal regulations of paragraph 203 section 1 number 3 of the German Criminal Code and paragraph 43a section 2 of the Federal Code for Lawyers. The professional confidentiality obligation is

comprehensive and, unlike the confidentiality obligation of the Mediation Act, does not have exceptions. The relevant facts for confidentiality must become known in the course of professional activity.[52]

As long as the lawyer-mediator limits their role to guiding the parties through the mediation process and refrains from developing solutions or providing legal advice, there is little risk of liability.[53] However, if the lawyer-mediator takes on the classic role of legal advisor, they become subject to the liability provisions of the Act on Out-of-Court Legal Services (Rechtsdienstleistungsgesetz, RDG).[54] In this case, the lawyer assumes legal responsibility for the outcome of the negotiation, instead of strongly recommending, as per paragraph 2 section 6 sentence 2 Mediation Act, that the parties have the final agreement reviewed by legal counsel before signing it.

3.4. Collaborative practice

Lawyers trained as mediators have access to another form of alternative dispute resolution beyond those previously discussed, known as "Collaborative Practice (CP)" or "collaborative law."[55] In this process, lawyers work together with their clients to reach a mutual resolution of the disputed issues.[56]

In a contractual agreement, known as a participation agreement, the parties agree to this process, commit to the disclosure of all relevant facts, agree on confidentiality and secrecy, and waive the right to pursue litigation. Additionally, they agree to a disqualification clause, which stipulates that if the process fails, the respective lawyers will no longer be available for court proceedings.

Following preparatory individual meetings between each party and their lawyer, joint four-way meetings take place, modelled on the phases of mediation, with the aim of resolving the conflict. If necessary, experts

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[52] S. Kracht, *Die Verschwiegenheit des Mediators*, in: *Praxishandbuch professionelle Mediation*, op. cit., p. 95.

[53] R. Ponschab, *Der Anwaltsmediator*, in: *Praxishandbuch professionelle Mediation*, op. cit., p. 832.

[54] See https://www.gesetze-im-internet.de/englisch_rdg/index.html (accessed: 21 VIII 2024).

[55] B. Schneider-Koslowski, *Cooperative Praxis – CP*, in: *Handbuch Mediationsrecht*, op. cit., p. 1069.

[56] M. Daube, *Cooperative Praxis*, "Die Mediation" 2023, p. 71.

(e.g., tax advisors, psychologists) can be brought into the process. After the four-way meetings, the lawyers draft the agreement into a contractual form, usually a settlement proposal, which can be enforced – if desired – either through notarization (paragraph 794 section 1 number 5 German Code of Civil Procedure) or as a lawyer's settlement (paragraph 794 section 1 number 4b in conjunction with paragraphs 796a to 796c German Code of Civil Procedure).

The indication criteria for a CP process are similar to those of a mediation process. CP may be preferable in individual cases when at least one party feels the need for stronger support from their own lawyer, when special psychological support is indicated for at least one party on the emotional side, when complex factual, legal, or financial issues are involved but there is still an explicit desire for fair and out-of-court conflict resolution, when there is a (dominant) power imbalance between the conflicting parties that mediation can hardly compensate for, or when at least one of the parties feels particularly insecure in articulating their own interests or desires and believes that the other party can express and assert themselves much better, or for any other reason feels unable to adequately advocate for themselves, or believes they cannot do so.

The advantages of the CP process, especially for lawyers, are clear: CP integrates the experiences and insights of mediation as a learned method. Lawyers do not have to abandon their role as advocates for their clients' interests, even though they must adopt a new understanding of their role. If an out-of-court conflict resolution model is appropriate and desired, a party lawyer who is also a mediator does not need to transfer the process leadership to an external mediator, but can continue to accompany their client. Overall, this allows the lawyer to act as a flexible advisor and practical conflict manager, which can be seen as a competitive advantage.

Conclusion

Active conflict management by the appointed lawyer means moving away from adversarial thinking and shifting toward interest-based client counselling. Starting with a conflict analysis and an exploration of the interests underlying the client's expressed concerns, the question arises as to alternatives to litigation. In this process, the lawyer will regularly accompany and support the client in out-of-court conflict resolution

procedures. If the lawyer is also a trained mediator, they may, with the consent of the client and the opposing party, act as a neutral third party, for example, in a mediation procedure. However, this assumes that the initial consultation has not yet involved a substantive engagement with the subject matter of the dispute. Even in such cases, collaborative practice offers an effective alternative dispute resolution process. This approach consistently provides added value for the client being advised, as it opens up the possibility of realizing their interests as comprehensively as possible.

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