Mediation in Germany and the United States

A Comparison

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A. Objective of the Comparison

Nowadays, modern mediation can be referred to as one of the most popular dispute resolution instruments, apart from litigation. Several studies concordantly report on both a high settlement rate and a high degree of satisfaction once mediation had been conducted.[1] Despite these promising facts, the introduction of mediation has not always been appreciated immediately and everywhere. Similarly, the degree to which mediation is used and to which extent it has been coupled with the legal system varies greatly, depending on continent and country.

The following general statements can be made: Mediation developed faster in common law jurisdictions, such as the United States, England and Wales, and Australia.[2] Civil law jurisdictions, in contrast, run at a slower pace to transform mediation from the status of a more or less exciting newcomer to a broadly approved and valued practice.[3] Moreover, among the civil law countries in turn, Germany can still be considered as a country where the mediation movement has fallen far short of its developments compared to other European countries.[4]

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1 In 2000, for example, the release of a study on the ADR use of Assistant United States Attorneys revealed that ADR was successfully used in 63% of all cases and that it added value to 80% of all cases (the survey focused predominantly on the use of mediation), *see* A. P. Ordover & A. Doneff, Alternatives to Litigation: Mediation, Arbitration, and the Art of Dispute Resolution 6 (2002).

2 N. M. Alexander, *Global Trends in Mediation: Riding the Third Wave*, *in* N. M. Alexander (Ed.), Global Trends of Mediation 1, at 4 (2006).

3 *Id*., at 7

4 H.-U. Neuenhahn, *Mediation – ein effizientes Konfliktlösungsinstrument auch in Deutschland*, 10 Neue Juristische Wochenschrift 663 (2004); it seems, however, that mediation in Germany is currently shifting from being completely unknown to becoming more and more recognition. Correspondingly, *Alexander*, in the first edition of her book *Global Trends in Mediation* characterized the German mediation movement to be still in its infancy, apart from victim-offender and family mediation (N. M. Alexander, W. Gottwald & T. Trenczek, *Mediation in Germany: The Long and*

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The purpose of this article is to compare the mediation landscape in Germany with that in the United States and give explanations for the different situation in both countries. The article begins with an introductory chapter on mediation, followed by the next four chapters which will review the respective historical developments of modern mediation, the legal frameworks, the acceptance and opinion of its providers, and the training systems of mediation in Germany and the United States. The seventh chapter is devoted to a comparison of the German and American mentalities which, as will be shown, have contributed essentially to the different developments. The final chapter contains a conclusion on all matters that have been discussed.

In the framework of this analysis, two surveys were conducted to identify the present disposition towards mediation. Its results will be factored into the comparison, giving a contemporary impression of the overall mediation picture.

B. Introduction

I. Mediation Defined

The word mediation derives from the Latin verb 'mediare', which means "to halve; to be in the middle."[5] To find a universally accepted definition of mediation is a challenge. This text will predominantly focus on mediation as it is practiced in the Western world to date. However, even with this restriction, many varying definitions exist, due to multiple mediation forms, styles, and practice areas.[6] Standing for those, this rule of thumb can be created: Mediation implies a third neutral person without the authority to make a decision assisting two or more parties to negotiate a resolution in a dispute.

II. Benefits of Mediation

Mediation can benefit its clients in various ways: Compared to litigation in court, mediation is a *fast* dispute resolution method.[7] A mediation session from beginning to end might only take a couple of hours with the disputants' authority to choose date and time.[8] Mediation can also lead to a reduction of costs. In the

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Winding Road, *in* N. Alexander (ed.), Global Trends in Mediation 179, at 181 (2003).) The second edition 2006, however, does not contain such a phrase. On the contrary, *Alexander* now regards German mediation as "gradually repositioning itself from the academic to the political, practitioner-focused arena" (N. M. Alexander, W. Gottwald & T. Trenczek, *Mediation in Germany: The Long and Winding Road*, *in* N. Alexander (ed.), Global Trends in Mediation, at 224 (2006).)

5 *See, for example*, on dictionary.com: http://dictionary.reference.com/browse/mediate.

6 *See* N. von Marcard, Das Berufsrecht des Mediators 6 (2004).

7 *See* N. Alexander, J. Ade & C. Olbrisch, Mediation, Schlichtung, Verhandlungsmanagement – Formen konsensualer Streitbeilegung 3 (2005).

8 *See* E. J. Costello Jr., *Whether and When to Use Alternative Dispute Resolution*, *in* N. F. Atlas, S. K. Huber & E. W. Trachte-Huber (eds.) Alternative Dispute Resolution: The Litigator's Handbook 20 (2000).

United States especially, litigation is very expensive. Attorneys' fees and general litigation-related costs can reach an exorbitant level.[9] Contrary to this, mediation is, after negotiation, the dispute resolution method with the lowest transaction costs, usually only involving the payment for the mediator, and, conceivably, the cost for the own attorney.[10] Furthermore, the mediation process is not particularly focused on the revision of legal matters of a dispute.[11] Yet, its purpose is not to completely ignore the legal framework but rather to expand that spectrum to developing interest-based solutions.[12] Often, it might be discovered in mediation sessions, that the parties' drive to litigate is not caused by a legal problem but conscious or unconscious needs to seek revenge or express anger.[13] Solving such a dispute via mediation encompasses the discussion and understanding of a party's emotional needs, thus enabling the clients to continue or improve their relationship, respectively.[14] Finally, during mediation, the *parties*, not a third person are the decision makers. They select the mediator and decide on whether and how to settle the dispute, based on their own terms. This enables mediation to solve disputes while acknowledging the parties' individualism, contemporaneously.

After all, mediation still does not constitute an all-purpose tool. As such, the parties may rather go to trial in order to gain public attention or to establish a precedent.[15] Similarly, trying the dispute will be useful if the case is likely to be decided in favor of one party. Mediating is also unnecessary if a settlement was reached in the past, but one party breached the settlement agreement.[16]

III. Mediation as Part of the ADR Umbrella

In the United States, mediation has commonly been regarded as one process of the broad *Alternative Dispute Resolution* (ADR) spectrum.[17] ADR has offered several ways to solve a conflict outside of the formal and public trial court setting.

In contrast, the German ADR landscape has first and foremost been dominated by mediation.[18] Other ADR techniques do exist and are applied in Germany.

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[9] *Id*., at 6; in Germany, the losing party needs to compensate the winning party with all litigation costs including the payment of fees of the opposing attorney, while the winning party does not have to pay anything.

[10] *Id.,* at 8

[11] *See* Alexander, Ade & Olbrisch, *supra* note 7, at 3

[12] S. Breidenbach, Mediation für Juristen: Konfliktbehandlung ohne gerichtliche Entscheidung 14-15 (1997).

[13] G. Goodpaster, A Guide to Negotiation and Mediation 205 (1997).

[14] K. K. Kovac, *Mediation*, *in* M. L. Moffitt & R. C. Bordone (Eds.), The Handbook of Dispute Resolution 305 (2005).

[15] *See* A. P. Ordover & A. Doneff, Alternatives to Litigation: Mediation, Arbitration and the Art of Dispute Resolution 8 (2002); in a civil law country such as Germany, creating a precedent is usually of little interest, due to the lower weight attributed to a case decision.

[16] B. G. Picker, Mediation Practice Guide: A Handbook for Resolving Business Disputes 18 (2003).

[17] Other ADR methods include, *inter alia*, arbitration and negotiation.

[18] *See* W. Gottwald, *Alternative Streitbeilegung (Alternative Dispute Resolution, ADR) in*

However, they have rather been considered as isolated methods not connected to each other under a general term. Moreover, ADR is slowly but surely encountering a modification: Based on the continuous pursuit of improvement and the broad acceptance of ADR in the United States, the original idea to merely provide *alternatives* to trials is seen as less useful than the concept of ADR as *Appropriate* Dispute Resolution.[19] The change emanates from the notion that sometimes, one Alternative Dispute Resolution method can be inappropriate for a particular dispute, and therefore, another might be the better alternative.[20] Additionally, the goal changed from avoiding litigation to seeking the most promising method to settle a dispute, which also includes the trial.[21]

IV. The Survey

For this article, two surveys were composed, one mainly addressing lawyers and mediators in Germany, the other focusing on American lawyers and mediators as a target group.

The questions asked in both surveys were principally identical. Adjustments were made exclusively to take the differing circumstances and developments of both countries into account. In order to obtain responses, the following steps were taken: In the United States, all of the 50 State Bar Associations were emailed a request to forward the survey to its respective members. Moreover, an email with the same request was sent to the Alternative Dispute Resolution Section of the American Bar Association. Additionally, various law firms residing in the United States received a fax including an introductory letter and a request to fill out the survey.

In Germany, equal efforts were made. The same email requests with the survey attached were sent to all of the 28 existing *Rechtsanwaltskammern* (similar to the American State Bar Associations). An additional email was submitted to the *Bundesrechtsanwaltskammer* (comparable to the American Bar Association). Simultaneously, several law firms situated in the German States Berlin and Schleswig-Holstein directly received the survey via fax.

1. Number of Responses

Despite a larger number of lawyers and mediators as a target group in the United States compared to the one in Germany, the responses from American lawyers were rather scarce. Out of 51 Bar Associations, only seven replied out of which

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Deutschland – Wege, Umwege, Wegzeichen, 4 Familie, Partnerschaft, Recht 163, at 164 (2004). (*Gottwald* criticizes that development and attributes the German condensation of ADR to the eye-catching label "mediation.")

[19] *See for the United States* C. A. Constantino & C. Sickles Merchant, Designing Conflict Management systems: A Guide to Creating Productive and Healthy Organizantions 41 (1996); *see for Germany* Alexander, Ade & Olbrisch, *supra* note 7, at 2.

[20] C. Menkel-Meadow, *Symposium: Ethics in ADR: The many "Cs" of Professional Responsibility and Dispute Resolution*, 28 Fordham Urb. L.J. 979, at 979-980 (2001).

[21] Alexander, Ade & Olbrisch, supra note 7; for the need of this thesis, the Akronym ADR will still stand for *Alternative* Dispute Resolution

five were able to provide further help or forward the survey to their members, respectively. From the surveys directly faxed to the American law firms, one response was received. In total, 18 mediators and 8 lawyers not practicing mediation replied from the United States.

The picture was quite different in Germany: 14 *Rechtsanwaltskammern* (including the *Bundesrechstanwaltskammer*) responded. 10 out of the 14 provided further suggestions or actually forwarded the survey to the target group. In addition to those, five *Rechtsanwaltskammern* did not respond to the email request but still forwarded the survey to some of their members. In total, 124 answered surveys from 10 different German States were obtained[22]out of which 42 results were coming from lawyers not practicing mediation, and 82 responses were received from lawyers practicing mediaton.

2. Use and Evaluation of the Return Rate

a) The American survey results

Due to the small number of responses from American lawyers and mediators, generalized conclusions cannot be drawn from the survey results. Yet, some responses were telling and informative. Therefore, the American survey responses will be mentioned within the chapters, but it should be taken into account that they can only serve as a vague indication for the present perceptions towards mediation.

b) The German survey results

Approximately 10.000 mediators currently exist in Germany.[23] At the same time, the number of licensed attorneys in Germany amounts to 142,830 (in 2007).[24] Due to the high response rate in correlation to the entire number of the target group, the survey responses can be taken as a probable assessment of the current German mediation scene. Nevertheless, two constraints need to be taken into account when the results are reviewed:

- 86 % of the respondents work at a small law firm (1-5 attorneys), only 2 % practice at major law firms (more than 100 attorneys) [25]
- All the mediators worked as attorneys. The survey did not cover the point of views from judges or others in the legal field who additionally work as mediators, and whose opinions might have produced different results.

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[22] Germany consists of 16 States in total.

[23] W. M. Deutschmann, *Mediation, Konfliktlösung der anderen Art*, article written for the website www.förderland.de, available at http://www.foerderland.de/755+M5abb9a97289.0.html; however, it has to be mentioned that the title 'mediator' is not legally protected in Germany. Anyone can call himself a mediator, even though he has never accomplished a certified mediation education. That complicates the prediction of an exact number of mediators who are in fact practicing. Hence, any proclaimed quantity can only be treated as a rather imprecise estimate.

[24] Statistics collected by the *Bundesrechtsanwaltskammer*, available at its official website: http://www.brak.de/seiten/pdf/Statistiken/2007/Entwicklung_Gesamtzahlen_2007.pdf

[25] In contrast to the United States, a smaller amount of big law firms (more than 100 attorneys) does exist in Germany.

3. Survey Instrument

The anonymous survey was composed of 15 questions in multiple choice and text comment format. The instrument was split in two parts. Part one provided questions on education and attitudes regarding mediation. Part two requested the recipients to anonymously fill in general data related to their gender, age, origin, profession, and size of their law firm.[26] The purpose behind the core questions in part one will be briefly characterized in the following subsections.

Q.3: What is your overall opinion of mediation in general?

This question was created to sense the present disposition of mediation offering three multiple choice answers and a comment option. The prearranged answers seek to evaluate the ranking mediation has received as a dispute resolution method alongside litigation. Each answer represents one common opinion which is, to a certain extent, supported in law review articles and other media. Some given answers were slightly adjusted to the German environment. Since there mediation can still be considered as being a relatively new method, answer option two, "mediation has already reached its peak," was modified into "[…] is a temporary current without a promising perspective in the future".

Q.4: With which allegation(s) would you agree effects the practice of mediation in a negative way, in the US / Germany?

Every respondent had the option to check as many answers as apply to him. With question four, the respondents were asked to think about changes which needed to be made in order to improve the practice of mediation. Similarly to above, each of the given allegations represented a common complaint that has been expressed with relation to mediation.[27] To avoid that the recipient might feel forced to give only a negative answer the option 'neither one [of the negative allegations]' was added. The results are examined in chapters four and five.

Q.5: What kind of education did you get to become a mediator?

Due to multiple ways to educate oneself in mediation or to get mediation training, it was intended to detect the most popular way in doing so. Additionally, it should be examined if some respondents work as a 'mediator without having received any education. The results will be discussed in chapter six.

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[26] *See* Appendix.

[27] While one checkable allegation says "not good mediation law" in the English version, the German version had to be modified to "mediation not sufficiently regulated by the legislature" taking into account the fact that no German statutes exist which deal with mediation standards in particular, *see infra* figures 2.1 and 2.2.

Q.8: If you are not currently involved in mediation, could you imagine yourself doing so in the future?

This question was mainly created to address German respondents. Mediation is still relatively unknown and has not yet established in the German market. The assignment was to explore how many percent of the lawyers decided not to educate themselves in mediation for the reason that (a) they do not like mediation as a method, or (b) they are first observing, whether mediation can prove itself in the market making it valuable to subscribe to it, eventually. The results of that question will also be presented in the fifth chapter.

C. The History of Modern Mediation

I. Related Survey Results

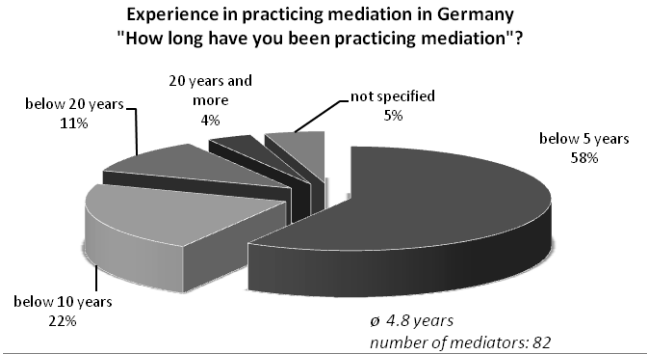

figure 1.1[28]

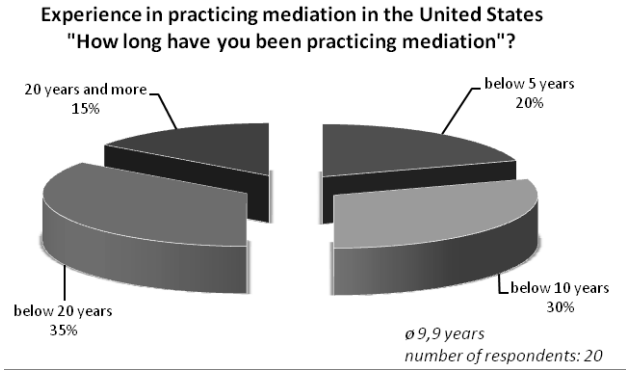

figure 1.2

[28] The number of respondents always relates to the particular question taking into account that a few respondents did not answer every question.

The results document that, on an average, German mediators have fairly little experience in the practice of mediation (4,8 years) compared to their American counterparts (9,9 years).[29] Noticeable is also the fact that the biggest part (35%) of the American mediators who responded had between ten and twenty years of experience in mediation, whereas most German mediators cannot document more than five years of mediation practice (58%).

II. The Development of Modern Mediation in the United States

Although many see the official beginning of mediation as being in 1976, the mediation movement had an earlier silent beginning.[30] Therefore, the history will be examined starting in the late 1950s. Writing about the American history of mediation always encompasses two formative and opposed catchphrases, frequently named 'litigation explosion' and 'the vanishing trial'. Both will be illustrated throughout this chapter.

1. The Early Beginning

In the late 1950s, several states as New York, Massachusetts, Pennsylvania, Michigan, Wisconsin, and Minnesota established agencies to provide mediation in private sector labor disputes.[31] Previously, in 1947, the federal government had supported the use of mediation in the collecting bargaining arena by forming the *Federal Mediation and Conciliation Service* (FMCS).[32] Prior to the 1960s, Mediation had already been used and belonged to the dispute resolution landscape.[33] Yet, its practice area was limited in scale and scope. The average law practitioner was still likely to have practiced his entire career without being involved in mediation.[34]

2. From the 1960s to the 1980s – the Litigation Explosion and the Pound Conference

Starting in the 1960s, the United States faced a period characterized by strife, conflict, and discontent on many sides.[35] The comments about that time described

[29] Although the American survey can only provide a vague indication on the real situation, the different results between figure 1.1 and 1.2. are also likely to exist in reality considering the early stage of development of German mediation.

[30] Mediation had always been used in US history. The start of the 'modern' mediation movement, however, can be traced back prior to the 1960s, *see* also R. Birke & L. E. Teitz, *US Mediation in the Twenty-first Century: The Path that brought America to Uniform Laws and Mediation in Cyberspace*, *in* N. M. Alexander (Ed.), Global Trends of Mediation, at 361 (2006).

[31] J. T. Barrett & J. P. Barrett, A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement 146-147 (2004).

[32] The *Federal Mediation and Conciliation Service* was legally established through the Taft-Hartley Act of 1947 and officially born on August 22, 1947, aiming to create a better balance between labor and management; *see* Barrett & Barrett, *supra* note 31, at 129-137.

[33] Birke & Teitz, *supra* note 30, at 361.

[34] *Id.*

[35] J. Folberg, *et al*., Resolving Disputes: Theory, Practice, and Law 5 (2005).

Americans as having lost their ability to restrain themselves, having become unreasonably assertive, aggressive, and rights conscious.[36] The Vietnam War, civil rights struggles, student unrest, growing consumer awareness, examination of gender roles, and racial discrimination, all produced distrust of the actual situation.[37] A culture of adversaries had developed in which everybody was eager to place his opinion against the interest of others, even when they expose the interests of all in the process. America reacted to the extent, inflexibility, and bureaucratization of modern life or counter reacted to the malaise of a society that had succeeded too well and, in so doing, had become spoiled and childish.[38]As a result, the American culture, on the one hand, transformed to a 'litigious society'.[39] On the other hand, the run to the bench was enhanced by the legislation and new court cases which afforded new procedural rights to criminal defendants, and litigation involving these rights consumed much of the time and effort of the judges.[40] By the time the litigious movement started to decrease, the courts were virtually backlogged, thus offering almost no access to justice, which lead to the famous term of the 'litigation explosion'.[41] All of these developments increased opportunities for the rise of ADR and mediation because it avoided the courtroom.

First and foremost, the growth of mediation was supported by an expansion of labor management dispute settlement processes.[42] Additionally, the change of social behavior effected mediation practice in neighborhood conflicts. Whereas labor mediation was referred to as a 'private' event between collective bargainers and management, neighborhood mediation was considered to be a forward thinking way to resolve community issues.[43] The increase of community dispute resolution in the 1960s can be traced back to the Community Relations Service, a federal program established through the Civil Rights Act[44] to prevent violence and encourage dialogue in communities.[45] Another arena that enhanced the development of mediation was a growing criticism towards the litigation process with respect to the creation of large construction projects, the planning of streets and other changes with an impact on the infrastructure such as building new

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36 A. Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 Rutgers L. Rev. 319, at 321 (1984-1985).

37 Folberg *et al*, *supra* note 35, at 5.

38 *See* Sarat, *supra* note 36, at 321.

39 *See* J. K. Lieberman, The Litigious Society (1981)

40 Birke & Teitz, *supra* note 30, at 361.

41 *Id.*

42 Barrett & Barrett, *supra* note 31, at 159-176.

43 *See* Birke & Teitz, *supra* note 30, at 362.

44 The Civil Rights Act of 1964, proposed by President Johnson, is considered as one of the most important laws with regards to civil rights. The act created new rights intended to stop discrimination based on race, color, gender, religion, or national origin. Additionally, the Equal Employment Opportunity Commission (EEOC) was launched to investigate charges on discrimination and disability. Violations identified by EEOC staff members were assigned to mediation for resolution; for more information *see* Barrett & Barrett, *supra* note 31, at 149.

45 *See* K. K. Kovac, *The Evolution of Mediation in the United States: Issues Ripe for Regulation May Shape the Future of Practice*, *in* N. M. Alexander (Ed.), Global Trends of Mediation, at 392 (2006).

public waste disposal systems.[46] The complexity of many projects and the long litigation procedure resulted in frustration and a lack of comprehension among the people concerned; all of which were crucial factors to clear the way for ADR.[47]

In another area of law, supporters of mediation began to argue that voluntary agreements between parents on post dissolution issues would help their children more than obtaining a judicial decision and it being imposed on them.[48] Mediators assisted in custody and child raising issues leaving the financial matters to litigation. Again, mediation proved to be faster, cheaper, and more satisfying for the parties, and thus drew particular attention to the judges working in an overloaded court system and looking for solution.[49] Both legislators and courts launched small mediation programs for domestic relations and neighborhood level cases; many of these programs became mandatory due to the strong feelings of mediation among judges.[50]

For many commentators, April 1976 marks the official starting point of court-related mediation.[51] At that time, at the 'Roscoe Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice',[52] Harvard Law Professor Frank E. A. Sander gave a speech on 'Varieties of Dispute Processing'.[53] Sander suggested the idea of a "multi-door-courthouse" at which everybody could choose among a number of alternative methods to resolve a conflict, such as mediation, negotiation, arbitration and other forms of ADR.[54] Sander's vision primarily attracted the attention of two social forces: The first group was led

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46 F. Haft & K. Gräfin von Schliefen, Handbuch Mediation 163 (2002).

47 *See id*.

48 Birke & Teitz, *supra* note 30, at 363.

49 *See* J. R. Schwartz, *Laymen Cannot Lawyer, but is Mediation the Practice of Law*, 20 Cardozo L. Rev. 1715, at 1717 (1999).

50 Birke & Teitz, *supra* note 30, at 363; the debate about the preference for mandatory or voluntary mediation continues until today, *see* G. Smith, *Why Voluntary Mediation Works, Why Mandatory Mediation Might Not*, 36 Osgoode Hall L. J. 847 (1998) (arguing that mandatory mediation being imposed on unwilling parties will hinder its efficiency); D. A. Gaschen, *Mandatory Custody Mediation: The Debate over its Usefulness Continues*, 10 Ohio St. J. on Disp. Resol. 469 (1994-1995) (voting for the use of mandatory mediation due to the lack of familiarity among its clients).

51 *See* Kovac, *supra* note 45, at 392.

52 The name of the conference already indicated its purpose: Roscoe Pound, botanist, educator, and jurist, was a celebrated Harvard Law Professor and legal scholar whose theory of sociological jurisprudence earned a reputation for promoting court reform and improvements in the administration of justice in the first half of the twentieth century, *see* Encyclopedia Britannica Online (Academic Edition), available at http://search.eb.com/eb/article-9061101; *see also* Barrett & Barrett, *supra* note 31, at 182.

53 C. Menkel-Meadow, *Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution*" *in* M. L. Moffitt & R. C. Bordone (Eds.), The Handbook of Dispute Resolution 19 (2005); *see also* F. E. A. Sander, *Varieties of Dispute Processing*, 70 Federal Rules Decisions, 79, at 111-123 (1976); whereas the Pound Conference is often described as having initiated the beginning of the modern ADR movement including mediation, its theoretical nascency can be traced back to Harvard Law Professor Lon Fuller and Soia Mentschikoff, *see* C. Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 Ohio St. J. Disp. Resol. 1, at 13-25 (2000-2001).

54 Barrett & Barrett, *supra* note 31, at 183.

by Supreme Court Chief Justice Warren Burger who hoped to reduce the high load of cases through diversionary processes and institutions. The second group consisted of advocates for greater party control and participation in dispute resolution, stimulated by political empowerment movements in the 1960s.[55]

A few years after the Pound Conference was held, mediation centers were established, initially funded by outside sources such as the Law Enforcement Assistance Administration (LEAA), a former division of the United States Department of Justice. Some practitioners related to the centers preferred the approach to resolve matters at the very beginning of the dispute, and to keep the parties out of court. Others favored greater emphasis on party participation and individual empowerment.[56] Courts and agencies obtained financial support from both the federal and state governments to start experimentation with a variety of processes such as neighborhood justice centers,[57] community board mediation, and court-annexed programs of mediation.[58]

Another stimulus in increasing mediation awareness derives from numerous educational institutions which started to offer courses in negotiation, mediation, arbitration and other ADR forms.[59] While, in the 1960s, Law Schools in the entire nation hardly provided a single class devoted to mediation skills and training, by the mid-80s, there was virtually no existing Law School that did not offer education in mediation.[60] Law Schools started to expand their curricula to ADR and mediation classes; additionally, multiple training organizations offered courses for anyone willing to become a mediator.[61]

From the beginning of the 1970s to the 1980s, mediation grew from a rather small and limited movement to an industry that impacted various dispute arenas.[62] Among those new fields, a number of reformers in the community mediation movement in the late 1980s propounded an alternative type of criminal justice which is most commonly called 'Victim-Offender-Mediation' (VOM).[63] VOM advertised high levels of participant satisfaction; a better understanding of the justice process; reduction in fear among victims of juvenile offenders; high rates of successfully negotiated compensation contracts, accompanied by high levels of contract completion, and fewer and less serious crimes committed by participating juvenile offenders, when compared with non-participants.[64]

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55 Menkel-Meadow, *supra* note 53, at 19.

56 *See* Kovac, *supra* note 45, at 392.

57 Pilot programs were founded in Kansas City and Los Angeles, providing local part-time mediation to relieve courts from handling small cases. The success of the centers resulted in legislation introduced by Senator Ted Kennedy providing funds for grants to enable similar programs, *see* Barrett & Barrett, *supra* note 31, at 187.

58 Menkel-Meadow, *supra* note 53, at 19.

59 *See* Kovac, *supra* note 45, at 404.

60 *See* L. L. Riskin, *Mediation in the Law Schools*, 34 J. Legal Education 259 (1984); Birke & Teitz, *supra* note 30, at 369

61 *Id.*

62 Barrett & Barrett, *supra* note 31, at 188.

63 Menkel-Meadow, *supra* note 53, at 19.

64 *See* J. R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, 1 W. Criminology Rev. 3 (1998).

Mediators had organizations and training but aside from this, they had not much in common: There was no commonly accepted degree that was required before somebody could call himself a mediator; some efforts to create certification rules for mediators failed to have widespread effect.[65] In some states, a mediator is supposed to be licensed as a lawyer in order to mediate specific types of cases, whereas others have none of those requirements.[66] The dilemma inflamed a debate on the question to which degree a mediator can be seen as a practitioner in law.[67] As there is still no national agreement that determines the qualification a mediator needs to provide, the general rule applies that a mediator is anyone who has a paying client.[68] Apart from this, the agreement and desire emerged to keep mediation a confidential process.[69] Protection of confidentiality had already been provided by a few statutory provisions with regards to labor and family disputes; additionally, statutory protection was extended to the growing VOM matters.[70] Among all the statutes, there was a lack of uniformity, however:[71] While some statutes provided almost complete protection, others offered only limited privileges.[72]

3. The 1990s until Today – Expansion and Professionalism

The 1990s were characterized by a booming economy and by the run to the stock market. Along with the development of the Internet ADR covered virtually every part of law and society.[73] The growing and expanding rapidity of human interactions in areas as intellectual property, international contracts, and complex construction especially cultivated the development of specialized dispute resolution processes.[74] Furthermore, major steps were taken by the federal government: Among others, in 1990, the United States Congress promoted ADR by enacting the *Civil Justice Reform Act* (CJRA),[75] reinforced by the Alternative Dispute Resolution Act of 1998,[76] demanding federal courts to consider mediation specifically.[77] What the CJRA did to the judicial branch was done to the administrative branch with the implementation of the *Administrative Dispute Resolution Act* (ADRA).[78]

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65 Birke & Teitz, *supra* note 30, at 369.

66 Kovac, *supra* note 45, at 430; for example, Indiana regulations do not allow registration as a civil law mediator unless the applicant can prove he has taken the bar exam.

67 J. R. Schwartz, *Laymen Cannot Lawyer, but is Mediation the Practice of Law*, 20 Cardozo L. Rev. 1720 (1999); the debate has lasted until today.

68 Birke & Teitz, *supra* note 30, at 369.

69 *Id*., at 373.

70 *Protecting Confidentiality in Mediation*, 98 Harv. L. Rev. 441, at 442 (1984-1985).

71 Birke & Teitz, *supra* note 30, at 373.

72 *See Protecting Confidentiality in Mediation*, *supra* note 70.

73 Barrett & Barrett, *supra* note 31, at 239; for example, public policy disputes are now mediated as a matter of course, *see* Birke & Teitz, *supra* note 30, at 376.

74 Menkel-Meadow, *supra* note 53, at 22.

75 28 U.S.C.A. s 471-482 (1993).

76 28 U.S.C.A. s 651-658 (1998); its section 2 provides:

> Congress finds that –
> (1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the

Another indicator for the prosperity of ADR was the growth and its increased activity of ADR membership organizations during the 1990s such as the Victim Offender Mediation Association (VOMA),[79] the Association for Conflict Resolution (ACR),[80] or the National Association for Community Mediation (NAFCM)[81].[82]

While mediation has reached the point at which it is treated as a "legitimate" method of dispute resolution[83], mediation experienced a refinement: People debated best practices and predominantly discussed the style of mediation and the protection of confidentiality.[84] With regards to the favorite style of a mediator, three methods emerged in the debate: facilitative, evaluative, or transformative mediation.[85] With respect to confidentiality, the National Conference on Uniform State Law in 1998 adapted the Uniform Mediation Act (UMA) in order to standardize the way mediation is practiced throughout the 50 states. To a great

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> court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;
> (2) certain forms of alternative dispute resolution, including mediation, […], may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently […]

77 *See* Kovac, *supra* note 45, at 398-399; there is also comparable state legislation in a large number of states referring particular cases to ADR or authoring judges to do so with their discretion, *see* F. E. A.Sander, *The Future of ADR – The Earl F. Nelson Memorial Lecture*, 2000 J. Disp. Resol. 3 (2000).

79 *See* Birke & Teitz, *supra* note 30, at 369; Public Law 101-552 (1991), amended by Public Law 104-320 (1996); Section 3 of Public Law 104-320 provided that:

> (a) […] Each agency shall adopt a policy that addresses the use of alternative means of dispute resolution and case management. In developing such a policy, each agency shall –
> (1) consult with the agency designated by, or the interagency committee designated or established
> by, the President under section 573 of title 5, United States Code, to facilitate and encourage agency use of alternative dispute resolution under subchapter IV of chapter 5 of such title; and
> (2) examine alternative means of resolving disputes in connection with –
> (A) formal and informal adjudications;
> (B) rulemakings;
> (C) enforcement actions;
> (D) issuing and revoking licenses or permits;
> (E) contract administration;
> (F) litigation brought by or against the agency; and
> (G) other agency actions. [...]

79 Available at http://www.voma.org/.
80 Available at http://www.acrnet.org/.
81 Available at http://www.nafcm.org.
82 Barrett & Barrett, *supra* note 31, at 252.
83 *See* Menkel-Meadow, *supra* note 53, at 24.
84 Birke & Teitz, *supra* note 30, at 377.
85 Birke & Teitz, *supra* note 30, at 380.

extent, the UMA addresses confidentiality matters.[86] Its final draft had been approved and promulgated by the National Conference of Commissioners for Uniform State Laws (NCCUSL) in 2001, and its commissioners are now trying to have it adopted as law by the states.[87]

As ADR developed and expanded, the question was raised again how to look at it. Some practitioners argue that ADR and mediation has changed from being an alternative resolution instrument to the primarily used method.[88] While the use of mediation and other alternatives has increased, the number of trials including the creation of new case law has noticeably decreased. This leads experts to believe that ADR might have changed from a solution for the litigation explosion to the new phenomenon of the vanishing trial.[89]

III. The Development of Mediation in Germany

Compared to the historic review of mediation practiced in the United States, German history of modern mediation is fairly brief. The idea of amicably coming to an agreement in a legal dispute has a long tradition in Germany reaching back to the 14th century.[90] However, until the 1990s, litigation was the only perceived and universally accepted dispute resolution instrument apart from negotiation while mediation was virtually non-existent in the legal spectrum. In fact, writing about the development of mediation, the majority of the German law review articles and legal books tend to portray the history of mediation in the United States only adding one or two more sentences to the evolution of mediation in Germany.[91] Different from the development in the United States, mediation in Germany primarily developed in its respective dispute areas.[92] Taking this into account, this chapter will also distinguish between mediation fields.

1. The Late Beginning

Mediation in Germany was originally 'imported' by European and German experts who visited the United States and, having returned to Germany, reported on their new experience with mediation.[93] The pioneers of mediation in Germany were legal sociologists, criminologists, social workers, and a few judges and lawyers.[94] In the beginning of the 1980s, they began to publish essays on different options of dispute resolution. Thus, mediation provided a popular topic for sociological,

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[86] Barrett & Barrett, *supra* note 31, at 264; among confidentiality, the UMA also addresses neutrality, fairness, qualifications, and training.

[87] Birke & Teitz, *supra* note 30, at 383; nine states have enacted the UMA so far (information taken from the ACR-website, available at: http://www.acrnet.org/uma/index.htm).

[88] Barrett & Barrett, *supra* note 31, at 256.

[89] For further information *see* M. Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts (2004).

[90] *See* Alexander, Ade & Olbrisch, *supra* note 7, at 5.

[91] *See, for example*, von Marcard *supra* note 6, at 5-6.

[92] *See* Alexander, Ade & Olbrisch, *supra* note 7, at 191.

[93] *See* Haft & Gräfin von Schliefen, *supra* note 46, at 167.

[94] Alexander, Gottwald & Trenczek, *supra* note 4 at 224.

criminological, and legal discussions.[95] However, it did not start to draw attention to mainstream legal practitioners before the second half of the 1990s when the rumor of successful US mediation practice became louder and crossed the Atlantic.[96]

2. The Particular Dispute Areas of Mediation

a) Victim-Offender Mediation

VOM (German: *Täter-Opfer-Ausgleich*, TOA) was among the first forms of mediation that gained recognition in both theory and practice in Germany starting with pilot programs with regards to juvenile matters.[97] Having completed the various programs, a new juvenile law was enacted in 1990 which officially provided VOM as a special measure to be imposed upon young criminals (Section 10(1) No. 7 Juvenile Criminal Code – German: *Jugendgerichtsgesetz*, JGG).[98] Furthermore, the JGG enables the office of public prosecution to refrain from initiating a formal procedure if the criminal juvenile seriously attempts to reconcile with his victim (Section 45(2)2 JGG).[99]

In contrast, German criminal law does not provide the same extensive use of the discretion to refer to VOM followed by refraining from a prosecution.[100] However, improvements occurred with the enactment of the Anti-Crime Law (German: *Verbrechens-bekämpfungsgesetz*) of 1994.[101] It added Section 46a to the German Criminal Code[102] (German: *Strafgesetzbuch*, StGB) which, similar to Section 45 (2)2 JGG, provides the option to mitigate or refrain from imposing a sentence under the condition that first, the penalty does not exceed one year's imprisonment, and second, VOM has been undertaken.[103] Furthermore, to both foster and simplify the application of VOM, Section 153a(1)1 Code of the Criminal Procedure (German: *Strafprozeßordnung*, StPO) was changed, and Sections 155a and 155b StPO were added.[104]

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95 *Id*.

96 Gottwald, *supra* note 18, at 163.

97 Alexander, *supra* note 2, at 225.

98 M. Lösching-Gspandl & M. Kilchling, *Victim/Offender Mediation and Compensation in Austria and in Germany: Stocktaking and Perspectives for Future Research*, 5/1 European Journal of Crime and Criminal Justice 55, at 66-67 (1997).

99 Alexander, *supra* note 2, at 226; the development regarding the treatment of juvenile criminals has recently experienced a variety of calls back to a strengthening of juvenile penalties, *see* A. Kreuzer, *Ist das deutsche Jugendstrafrecht noch zeitgemäß*, 33 Neue Juristische Wochenschrift 2345 (2002).

100 *Id.*

101 BGBl.I, at 3186 *et seq*. (1994); *Förderung des Täter-Opfer-Ausgleichs bei Erwachsenen*, 46 Neue Juristische Wochenschrift 3407 (1998).

102 The German Criminal Code is a federal statute. There are no state statutes existing with respect to criminal matters.

103 K. Leipold, *Der Täter-Opfer-Ausgleich*, 7 Neue Juristische Wochenschrift-Spezial 327 (2004)

104 BGBl. I, at 2491 (1999) (with the enactment of the *Gesetz zur strafverfahrensrechtlichen Verankerung des Täter-Opfer-Ausgleichs und zur Änderung des Gesetzes über Fernmeldeanlagen*)

To educate, promote, and offer advice on VOM matters, as a supra regional institution, the office for VOM and conflict resolution (German: *Servicebüro für Täter-Opferausgleich und Konfliktschlichtung*) was established in 1992.[105] Accompanied by the significant statutory changes, VOM programs are growing. Nevertheless, mediation is still utilized in less than 5 per cent of criminal matters throughout the country, although present victim-offender-mediation legislation enables VOM to be used 95 per cent of all cases.[106]

b) Family mediation

Family mediation in Germany is regarded as the most frequently practiced mediation type.[107] It primarily refers to separation and divorce matters and family disputes over wills using a more transformative, therapeutic approach to mediate.[108]

In 1989, mediators and trainers coming from the private sector started to practice family mediation in regionally limited areas.[109] To improve the procedure and development of family mediation, and to introduce professional standards for family mediation training, the Federal Working Group for Family Mediation was founded in 1992.[110] In 1993, the BAFM developed guidelines for family mediation followed by a mediation accreditation program and the formal recognition of family mediation throughout Germany.[111]

With respect to legal provisions, Sections 52 and 52a of the Law on non-contentious Jurisdiction (German: *Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit, FGG*) enabled the courts to foster consensual solutions in family matters.[112] Moreover, in 1998, the Reform of Law Relating to Children (German: *Kindschaftsrechtsreformgesetz*) encouraged the use cooperative conflict resolution methods.[113] Regarding court-related mediation, a pilot project involving the use of family mediation at two superior courts in the state of Lower-Saxonia recently proved to be successful.[114]

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[105] Available at http://www.ausgleichende-gerechtigkeit.de/servicebuero; it was established by a resolution of the German federal parliament and the federal Government in 1992, and is now funded and counseled by the German federal department of justice.

[106] Alexander, *supra* note 2, at 226

[107] R. Bastine, *Mediation bei Familienkonflikten*, 1; article to be published *in* G. Hörmann & W. Körner (Eds.), Einführung in die Erziehungsberatung, Kohlhammer (2006). Available through the website of the University of Heidelberg at: http://www.psychologie.uni-heidelberg.de/ae/klips/mitarbeiter/bastine/Medbei-FamKonf06(webPI).pdf.

[108] Alexander, *supra* note 2, at 192.

[109] M. Hehn & U. Rüssel, *Institutionen im Bereich der Mediation in Deutschland*, 5 Neue Juristische Wochenschrift 347, at 348 (2001).

[110] *Id*.; the website of the organization (in German: Bundesarbeitsgemeinschaft für Familen-mediation, BAFM) is available at http://www.bafm-mediation.de/.

[111] Alexander, *supra* note 2, at 227.

[112] *Id.*

[113] Alexander, Ade & Olbrisch, *supra* note 7, at 192.

[114] *See* F. Entringer, *Projekt Gerichtsnahe Mediation in Niedersachsen – Praktische Erfahrungen mit Familienmediation*, 4 Neue Juristische Wochenschrift 196 (2004).

Being the most popular mediation field in Germany, the percentage use of mediation of family matters does still not cross the 10% margin.[115]

c) Commercial mediation[116]

Commercial mediation is still a relatively new development in Germany. The first mediators practicing in the commercial sector can be found in 1998.[117] Since then, commercial mediation has experienced a rapid spread.[118] The field is especially characterized by its great number of associations and institutions. As such, the most prominent organization, the National Association for Mediation in Business and the Workplace (German: *Bundesverband Mediation in Wirtschaft und Arbeitswelt*, BMWA) needs to be mentioned.[119] The association's main goal is to encourage the practice of commercial mediation and to establish standard rules for commercial disputes. Commercial mediation has primarily been chosen because of the benefit of being a confidential process which does not need to be made public.[120] Therefore, it is not easy to obtain detailed information about its success and development.[121]

With respect to legislation, Section 305(1) Nr. 1 the German Insolvency law (German: *Insolvenzordnung*, InsO) was introduced in 1999 and orders creditors and debtors to mediate their dispute before they can continue with litigation.

d) Environmental mediation[122]

The first application of environmental mediation was conducted in 1990 in the State Lower-Saxony.[123] In 1993 and 1994, it was more broadly discussed by

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[115] Alexander, *supra* note 2, at 227.

[116] Labor mediation and commercial mediation is often summarized as 'commercial mediation' or it is regarded as the same mediation field, *see* Haft & Gräfin von Schliefen, *supra* note 46, at 169; *see also* B. Oppermann & K. Langer, Umweltmediation in Theorie und Anwendung 11 (2000) – available at: http://elib.uni-stuttgart.de/opus/volltexte/2003/1541/pdf/Umweltm.pdf; labor mediation in particular will not be discussed in this article; for a more detailed examination compare H. Ehlers, *Personalabbau in schwierigen Zeiten – Ein Plädoyer für einen Beschäftigungspakt und Mediation*, 33 Neue Juristische Wochenschrift 2337 (2003).

[117] Neuenhahn, *supra* note 4, at 664.

[118] M. Patera & U. Gramm, *Beruf oder Berufung? – Wirtschaftsmediation zwischen Professionalisierung und Profession*, 3 Zeitschrift für Konfliktmanagement 85 (2006).

[119] Alexander, *supra* note 2, at 231; available at: http://www.bmwa.de; other organizations are the German Society for Mediation in commerce (German: Deutsche Gesellschaft für Mediation in der Wirtschaft e.V., DGMW), and the Society for Commercial Mediation and Conflict Management (German: *Gesellschaft für Wirtschaftsmediation und Konfliktmanagement*, gmwk)

[120] Neuenhahn, *supra* note 4, at 664.

[121] *Id.*; it is known that in 2000, commercial mediations had a turnover of 393 million US Dollars (Euro-exchange rate from 3/16/2007).

[122] Due to the fact that environmental mediation often refers to a conflict with multiple parties from the private and public sector, it is also called 'mediation in the public sector' (German: *Mediation im öffentlichen Bereich*), *see* J. Neumann, Konfliktvermittlung im Öffentlichen Bereich: Die Rolle von Emotionen im Mediationsprozess 3 (2002), file available at: http://www.ipu-ev.de/web/dokumente/jutta_neumann.pdf.

[123] *Id.* at 21.

political stakeholders in order to adopt a process to be used in relation to town-planning laws.[124]

According to a research project from April 2004, conducted by the University of Oldenburg, environmental mediation has changed from being a process with a significantly low success rate in the second half of the 1990s to a blossoming mediation arena in the first years after the turn of the millennium.[125]

Two organizations are exclusively dealing with matters on environmental mediation: The Interest Society for environmental Mediation which was founded in 1997 (German: Interessengemeinschaft für Umweltmediation ev., IGUM) and the Association to Enhance Environmental Mediation, founded in 1998 (German: Förderverein Umweltmediation e.V.).[126]

e) Court-related mediation and mediation in courts

Mediation with respect to a cooperation of courts had primarily been conceived to relieve the national budget.[127] Starting from the legislative initiative of the German Federal Council (German: *Bundesrat*) in October 1996,[128] Section 15a of the Introductory Law of the Code of Civil Procedure (German: *Einführungsgesetz zur Zivilprozessordnung*, EGZPO) was finally enacted as of January 1 2000. Section 15a EGZPO provides the option for all German States to introduce mandatory court-related ADR (German: *außergerichtliche Streitschlichtung*) with respect to a certain number of disputes.[129] In total, eight States[130] introduced mandatory mediation and conciliation provisions. A few states, however, chose not to mandate ADR strategies; this decision seems to be based on the idea that mandatory mediation does not fit every case, and consequently, might be inappropriate.[131]

Section 278(5)2 of the Code of Civil Procedure (German: *Zivilprozessordnung,* ZPO) had been enacted as of 1 January 2002 to provide for the courts (not for the States) to suggest the disputing parties alternative dispute resolution.[132] Although the German wording of Section 278(5)2 ZPO does not mention

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[124] *See* Alexander, *supra* note 2, at 231.

[125] D. Meuer, Mediation im öffentlichen Bereich – Status und Erfahrungen in Deutschland 1996-2002, at 87-88 (2004).

[126] Hehn & Rüssel, *supra* note 109, at 348-349.

[127] A. Stadler, *Außergerichtliche obligatorische Streitschlichtung – Chance oder Illusion?*, 34 Neue Juristische Wochenschrift 2479 (1998).

[128] *See id.*

[129] Alexander, *supra* note 2, at 233; s15a EGZPO is also called experimentation clause (German: *Experimentierklausel*) because its purpose was to encourage experimentation in mediation and conciliation process design (Alexander, Ade & Olbrisch, *supra* note 7, at 234); in addition to few clauses in labor and business statutes, mandatory dispute resolution outside the courtroom had already been statutory by Section 495 (outdated version) of the Code of Civil Procedure (German: *Zivilprozessordnung*) from 1924 – 1950. Therefore, 15a EGZPO could also be seen as a rediscovery of earlier German ADR practice, *see* Stadler *supra* note 127, at 2480.

[130] Baden-Württemberg, Bavaria, Brandenburg, Hesse, Northrhine-Westphalia, Saxony-Anhalt, Saarland, and Schleswig-Holstein.

[131] Alexander, *supra* note 2, at 235.

[132] *See* Alexander, Ade & Olbrisch, *supra* note 7, at 212.

'mediation', background papers document that fostering mediation in particular had been the main focus of the provision.[133] Similar to Sander's idea of a "multi-door-courthouse," pilot projects had been launched in several States within the framework of that provision to offer mediation by specially trained judges within the courthouse.[134]

f) Mediation at school

Being one of the oldest mediation fields in Germany, mediation at school was first used in 1993.[135] It involves the development and use of conflict solving strategies to meet with the growing violence in schools.[136] Practitioners in this field are usually peer mediators like students, social pedagogues, or teachers.[137] Lawyers are not represented.[138]According to evaluations on mediation at school, schools that implemented mediation had the same amount of conflicts as those that did not. But, likewise, the tendency could be noticed that both students and teachers benefitted by a more cooperative relationship and constructive approach towards evolving conflicts.[139]

3. National Mediation Organizations

Finally, the German national mediation organizations should be mentioned. The National Mediation Organization (German: *Bundesverband Mediation e.V.*, BM) was founded in 1992 and belongs to one of the oldest and largest mediation organizations in Germany. Inter alia, it offers educational programs and workshops on mediation and supports the broadening of mediation in Germany.[140] In 1998, the German Society for Mediation[141] (German: Deutsche Gesellschaft für Mediation, DGM) was founded which focuses on research, the promotion, and mediation training, and acts both on the national and international level.[142] The Center for Mediation[143] (German: Centrale für Mediation, CfM) was also established 1998

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133 H. Prütting, *Mediation und Gerichtsbarkeit – Änderung gesetzlicher Rahmenbedingungen –*, 4 Zeitschrift für Konfliktmanagement 100, at 101 (2006).

134 For further information on mediation practiced by judges along with an exemplary evaluation of the court project in Lower-Saxony *see* P. Götz von Olenhusen, *Gerichtsmediation – Richterliche Konfliktvermittlung im Wandel*, 3 Zeitschrift für Konfliktmanagement, at 104-106 (2004).

135 U. Noack, *Mediation – das Schulstreitschlichter-Modell in der Bewährung zur Entwicklung einer konstruktiven Konfliktkultur in der Schule* 1 (revised article from the original which was published in Vol. 2 in the magazine Wissenschaft und Frieden) (1998), available at http://www.learn-line.nrw.de/angebote/schulberatung/main/downloads/noack.pdf.

136 Alexander, Gottwald & Trenczek, *supra* note 4, at 230.

137 Hehn & Rüssel, *supra* note 109, at 349; Alexander, *supra* note 2, at 230.

138 *See* H.-G. Mähler & G. Mähler, *Streitschlichtung – Anwaltssache, hier: Mediation*, 19 Neue Juristische Wochenschrift 1262, at 1263 (1997).

139 Alexander, *supra* note 2, at 230 (referring to a report on that matter, available at: http://www.hws-albstadt.bl.schule-bw.de/projekte/praeven/dateien/ag_01.pdf).

140 Available at http://www.bmev.de/ – information taken from the website.

141 Available at http://dgm-web.de/.

142 Hehn & Rüssel, *supra* note 109, at 348.

143 Available at http://www.centrale-fuer-mediation.de/.

as a subsidiary of the German publishing house *Dr. Otto Schmidt KG*. Along with the incentive to professionalize mediation, the CfM issues two mediation journals, named *Zeitschrift für Konfliktmanagent* and the *mediations-report*.[144]

IV. Comparison

1. The Length of Time to Develop

The lower practice rate of mediation in Germany relates to a great extent to almost thirty additional years of development and experience, the United States can exhibit. Starting as a small domain in the 1950s, it also took more than twenty years until mediation along with other alternative dispute resolution methods reached larger public advertence. The evolution of German mediation started late in the 1980s discussed and known only within small circles and started to get greater recognition within the 1990s. Taking that into consideration, it might no longer appear unforseen that it took another 10 years until the legal society noticed mediation for the first time.

Nevertheless, less time to let mediation grow ought to be expected from a country that does not need to develop a product from scratch: In the 1980s and 1990s, mediation in the United States had already reached a phase of enhancements. Negotiation strategies and styles to mediate had already been discussed in various books and taught in workshops. Therefore, in order to let mediation find its way to Germany, the method had to be mainly adjusted to the German legal system, and of course be promoted and advertised.

2. The Rationale Behind the Mediation Movement

Another explanation for a relatively slow growth of mediation in Germany can be identified in the urgency and degree of desire for an improvement of the legal system. American ADR answered the call for a change at the outset of the litigation explosion which paralyzed the American court system. A new method needed to be found to avoid a collapse. Mediation and other methods represented the longed-for cure. Contrary to that, ADR in Germany was first and foremost introduced as a solution to inject money into the treasury by a reduction of court litigation. A litigation 'explosion' as seen in America had never occurred to the same extent.

Additionally, it appears that American mediation developed alongside the respective needs and then started to be regulated, while German mediation has immediately and only grown along and within the limits of its legal areas.[145] On the one hand, the German model fosters the specialization of techniques and

[144] Hehn & Rüssel, *supra* note 109, at 347-348.

[145] This trend is also shown by the large number of organizations which are arranged around particular fields; supporting this idea: Gottwald, *supra* note 18, at 164-165; with regards to the regulation of mediation, taking some pleasant exceptions into account, it seems that the United States predominantly used rules and law to improve the use of mediation while German regulations were applied to check if mediation fits into the legal system rather than to help mediation grow and improve.

procedures which are particularly needed in the relative field. On the other hand, however, a strong degree of specialization might lead to a situation where the wood is not seen for the trees: Mediation lives on creativity with regards to the procedure as well as to its further development. Framing mediation without the opportunity of a broader exchange of ideas apart from the own practice field might run the risk of slowing down the overall development of mediation.

Still, the ambitious response of German states and courts to the enactment of the Section 15a EGZPO, and Section 278(5)2 ZPO raises the hope that some divisions in Germany are now on their way from experimentation to further expansion.

D. Legal Structures and Regulations with Regards to Mediation

I. Survey Results Related to this Chapter

The survey shows related results on Question 4. With respect to the German survey, it will be distinguished between lawyers who are mediators and lawyers without any experience in mediation.

1. German Results

a) German lawyers without experience in mediation

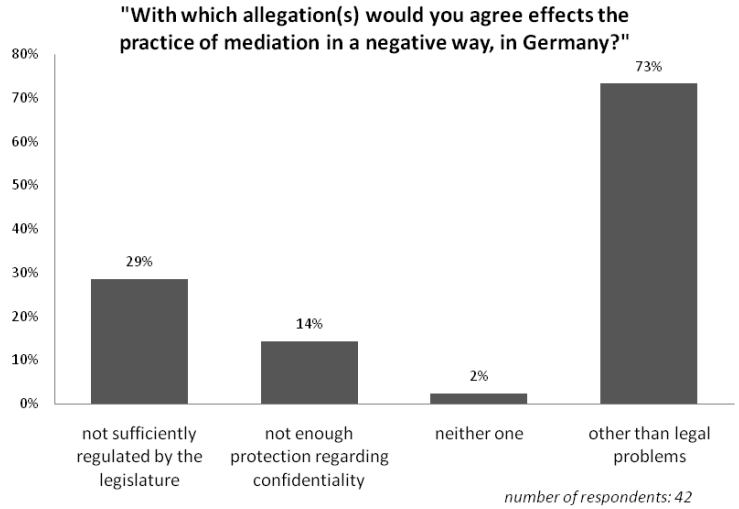

figure 2.1

b) German lawyers with experience in mediation practice

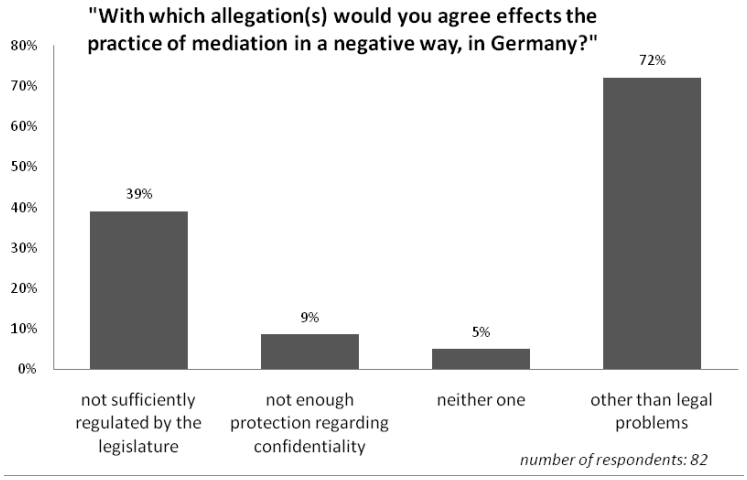

figure 2.2

c) Summary of the respondents' comments on the topic[146]

The majority of the respondents (both mediators and other legal practitioners) who commented on the topic complained about the fact that in certain situations, people with low income is awarded legal aid (German: *Prozesskostenhilfe*, PKH) in order to take court action, while PKH is not awarded for mediation as an alternative dispute resolution. Hence, mediation would be artificially made more expensive.

[146] As mentioned above, the respondents were given the option to comment on the topic in addition to the checkable allegations.

2. Result from the United States

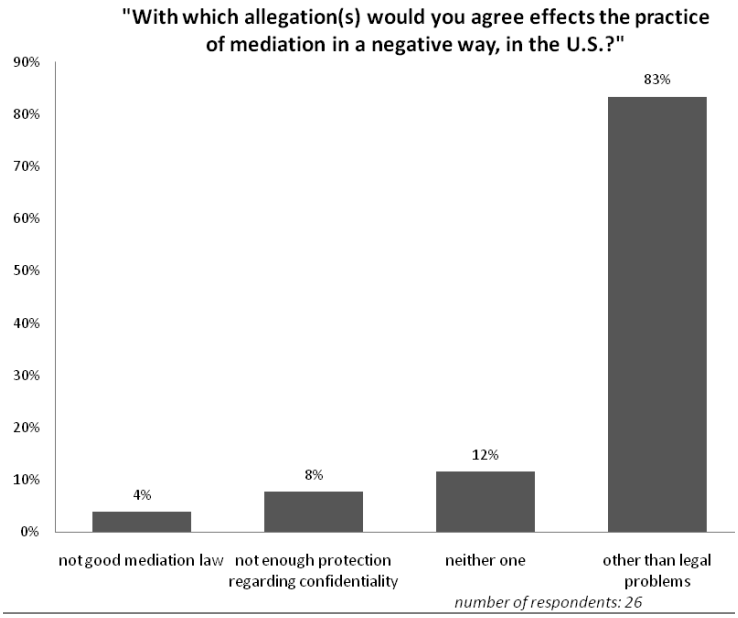

figure 2.3

– No relevant comments on this topic by the respondents –

3. Evaluation of the Results

The results lead to the following conclusion: First, only a small number of the respondents are completely satisfied with the present situation of mediation. At the same time, the German respondents[147] seem to see relatively more need for improvement (2% / 5% without complaints) than their American counterparts (12% without complaints).[148] Second, both German and American respondents attribute their discontent only to a minor degree to the *legal* embedding of mediation. Third, in Germany, a noticeable dissatisfaction with regards to the assignment of legal aid can be recognized.

[147] Both mediators and respondents who do not mediate provide comparable results. Therefore, they are not treated separate in this evaluation.

[148] As mentioned earlier, the low response rate must be taken into consideration making the result less respresentative.

II. General Aspects of Legal Systems Related to Mediation

Every mediator has to work within the framework of a legal system. It defines mediation and determines how and to which amount it is practiced.[149] Therefore, the next two sections will focus on the foundation of the respective legal systems and its impact on mediation.

1. Common Law and Civil Law

The American common law system refers to the following structural elements: Some American law is made by the legislative branch.[150] Additionally, some law is created by individual judicial decisions which become a part of the body of law and must be respected by the public, by lawyers, and the courts (concept of precedent, *stare decisis*).[151] In contrast, the civil law system, as it is applied in Germany, is based on statutes and not on custom. Judges apply principles embodied in statutes, or law codes, rather than turning to case precedent.[152] Furthermore, the decisions of a court are generally not relevant in subsequent cases involving other parties.[153] Apart from that, certain institutions such as juries are inherent to the common law but have virtually disappeared in civil law jurisdictions.[154]

Generally, a larger distribution of mediation can be detected in common law countries, such as the United States, England, Australia, and Wales; civil law countries as Germany are usually less developed in this respect.[155] This significant structural impact on the different level of acceptance of mediation can be attributed to following circumstances: First, the great expansion of mediation occurred as a result of pressure on politicians and governments to respond to an inefficient, protracted and, for many citizens, unaffordable and highly unsatisfactory litigation process.[156] In most civil law countries as Germany, courts have shorter waiting lists and going to trial is less expensive regarding legal fees and cost structure as well as the availability of legal cost insurance[157].[158] Second, common law courts generally are given the power to change their own rules of practice, while civil law countries leave that right to the legislature.[159] Thus, U.S. courts are able to

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149 Alexander, *supra* note 2, at 19

150 P. J. Messitte, *Common Law v. Civil Law Systems, 4 No.2 Issues of Democracy: How U.S. Courts Work* 1, at 25 (Electronic Journal of the US Information Agency) (1999).

151 *Id.*

152 'civil law'. Encyclopædia Britannica.

153 A. Dörrbecker & O. Rothe, Introduction to US-American Legal System, Vol.1 for German Speaking Lawyers and Law Students 1 (2005); even though court decisions do not have the binding force of law in succeeding cases (as they do in a common law system), it might happen that lower courts tend to follow the decisions of higher courts in the system because of their persuasive argumentation, *see* Messitte *supra* note 150, at 26.

154 Messitte *supra* note 150, at 28.

155 *See* Alexander, *supra* note 2, at 4.

156 Alexander, *supra* note 2, at 20.

157 Probably due to insufficient knowledge of the process, many legal cost insurance companies do not offer covering of the litigation costs.

158 Alexander, *supra* note 2, at 20.

159 *Id.*

adjust the mediation procedure to their individual needs while civil law courts need to wait for the next legislative resolution.[160]

In conclusion, the evolution of mediation in Germany is retarded by less legal flexibility along with well functioning and highly appreciated court system, while the US system had been very welcoming for an alternative solution to overcome its structural problems with litigation.

2. Juries as Fact Finders in the United States

In brief, the jury can be defined as a randomly selected group of citizens to determine the facts in a lawsuit.[161] Many years ago, inspired by the French revolution, juries existed in many civil law countries. Today, they have virtually disappeared with only a few exceptions.[162] Common law countries in turn regard the jury is as an elementary component of the legal system.

Nowadays, the presence of juries in the United States seems to be fading away, while, at the same time, the ADR enthusiasm is unbowed and still increasing.[163]

Thinking of juries, many might still be reminded of the famous O.J. Simpson murder case[164] or the McDonald's coffee case[165] where an elderly woman accidentally spilled coffee onto her lap, sued over her injuries, and finally, was awarded $2.9 million by a New Mexico trial jury. Independent from the fact that a lot of myths have been added especially to the real facts of the latter case, it is evident that many negative perceptions exist on the way in which juries act: As such, juries are often seen as being biased and incompetent on reaching a verdict, and issuing it in favor to the plaintiff or the little person on liability and towards generosity on damages.[166] Dissenting with those perceptions, in their empirical research project on jury behavior, *Clermont* and *Eisenberg* reach the conclusion that plaintiffs are actually the ones who are often disadvantaged and often not winners of a jury verdict.[167]

Yet, irrespective of the question about how juries really perform, it can be considered that some Americans also fall back on alternative dispute resolution methods to escape the application of an "unpredictable" jury in trial. Germany, in turn, does not employ juries, using the judge both as a fact-finder and legal decision maker in trial.[168] Consequently, the benefit mediation might receive from the fear of juries in the United States does not impact on legal landscape in Germany.

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[160] *Id.*

[161] Messitte, *supra* note 150, at 28.

[162] W. Burnham, Introduction to the American Legal System of the United States 86 (2002)

[163] K. D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. Rev. 1935 (1996-1997).

[164] People *v.* Simpson, BA 097211 (L.A. Super Ct. 1995).

[165] Liebeck *v.* McDonald's Restaurants, P.T.S., Inc., No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. Aug. 18, 1994).

[166] *See* K. M. Clermont & T. Eisenberg, *Trial by Jury or Judge: Transcending Empirism*, 77 Cornell L. Rev. 1125, at 1149 (1991-1992).

[167] *Id*., at 1178.

[168] However, in the German legal system lay judges exist to minor degrees who decide along with

III. Regulation of Mediation

This section will additionally feature selected topics involving the regulation of mediation which are discussed at present throughout the mediation landscape in the United States and Germany.

1. The United States

a) Overview

In virtually every case, American lawyers must determine whether the dispute should be solved by negotiation, litigation, mediation, or another ADR method.[169] Due to the rising use of mediation, there have been many attempts to regulate a variety of aspects of mediation practice.[170] At present, regulations include multiple matters, such as the management of cases that use mediation; how mediation shall be conducted; how participants of a mediation session should behave; and how to set and maintain quality standards for mediators.[171] Several jurisdictions regulate mediator practitioners in various ways. However, their quality standards vary, and additionally, they do not have a lot of similarity to one another.[172] Furthermore, only a few states set practice standards for mediation which openly deal with the problem to find a balance between strict regulations, which would limit the mediator's flexibility to handle disputes, and fewer restrictions, which might lead to lower quality of mediation in general.[173]

Finally, regulation on mediator ethics should be mentioned.[174] Many states have developed specific guidelines.[175] On the national level, two codes have been enacted: The Model Standards of Conduct for Mediators[176] and the Model Standards of Practice for Family and Divorce Mediation[177].[178]

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a professional judge a case.

169 Picker, *supra* note 16, at 2.

170 Kovac, *supra* note 45, at 420

171 Kovac, *supra* note 14, at 314.

172 *Id.*

173 *See* Kovac, *supra* note 45, at 420.

174 Questions on mediator ethics, inter alia, include confidentiality, impartiality, ensuring the fairness of the process, and encouraging self-determination and voluntary actions, Ordover & Doneff, *supra* note 1, at 123.

175 *Id.*

176 *The Model Standards of Conduct for Mediators* was prepared from 1992 through 1994 by a joint committee composed of two delegates from the American Arbitration Association, John D. Feerick and David Botwinik, two from the American Bar Association, James Alfini and Nancy Rogers, and two from the Society of Professionals in Dispute Resolution, Susan Dearborn and Lemoine Pierce. The Standards have recently been revised with the compliance of all organizations involved.

177 *The Model Standards of Practice for Family and Divorce Mediation* were approved by the ABA and apply only to family law cases. They serve three major functions:

1. to serve as a guide for the conduct of family mediators;
2. to inform the mediating participants of what they can expect; and

b) Selected topics

Confidentiality

The open and honest exchange of dialogue between the disputants in a mediation session is vital for a successful settlement.[179] Keeping the session confidential, without being allowed or forced to disclose gained information in court, constitutes a basic advantage of mediation that needs protection.[180] Because of its importance, confidentiality is regarded as the single issue that has the potential for creating the most difficult problems for mediators.[181] Mediation confidentiality protections cannot be absolute, and in some contexts, the question of what needs to be protected and what does not, is unclear.[182] Some states have responded to rigorous protection of anything said or written during a mediation session; likewise, mediators enjoy strong protection.[183] However, having over 300 statutes regarding confidentiality in the United States,[184] the manner how protection and rights are guaranteed differ greatly from state to state.[185] Due to that lack of uniformity, confidentiality always runs the risk of being undermined as soon as a dispute later continues to be carried out in a different state.[186]

Uniform Mediation Act

To approach and to diminish the problem of diversity regarding mediation regulations including confidentiality in particular, both the ABA Section of Dispute Resolution and the National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted a uniform law with respect to mediation.[187] The *Uniform Mediation Act* (UMA) was finally adopted by the ABA House of Delegates in February of 2002 and has now been enacted in nine states.

The UMA primarily addresses the issue of confidentiality, but comprises some affirmative duties for mediators, disclosure of the mediator's qualifications and a general statement of neutrality.[188] Despite noticeable criticism,[189] the UMA's

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> 3. to promote public confidence in mediation as a process for resolving family disputes;

taken from www.mediate.com, available at http://www.mediate.com/articles/afccs.

178 Kovac, *supra* note 45, at 425.

179 M. Rausch, *The Uniform Mediation Act*, 18 Ohio St. J. Disp. Resol. 603 (2002-2003).

180 *See id*.

181 S. Stahl, *Ethics for the mediator*, *in* N. F. Atlas, S. K. Huber & E. W. Trachte-Huber, The Litigator's Handbook 92 (2000).

182 Kovac, *supra* note 14, at 312.

183 A. Lodge, *Legislation Protecting Confidentiality in Mediation: Armor of Steel or Eggshells*, 41 Santa Clara L. Rev. 1093, at 1108 (2000-2001).

184 According to *Kovac*, it is likely that thousand of statutes, rules and regulations on confidentiality have been enacted, Kovac, *supra* note 45, at 443.

185 *See* Birke & Teitz, *supra* note 30, at 377-379.

186 *See* Rausch, *supra* note 179, at 603.

187 Kovac, *supra* note 45, at 443.

188 *Id.*

189 As such, it is argued that the UMA differs greatly from confidentiality regimes which have already been created by many states. Additionally, it is asserted that mediation lived on diversity

greatest advantage is its goal to unify mediation standards; in other words, it is certainly not what everyone wants, but it is a good start towards what everyone needs.[190]

2. Germany

a) Overview

At present, no general laws about the mediation process or the conduct of mediators exist in Germany.[191] Standards for mediation are found as guidelines or codes drafted by mediation organizations in specific practice areas.[192] Even though the provisions are not binding law, courts tend to resort to the standards using them as a persuasive authority.[193] Existent German laws on mediation only direct the premises which enable mediation to take place within a litigation process. As such, Section 15a EGZPO enables the German states to mandate the application of alternative dispute resolution as a prerequisite for a later trial. Further, Section 278(5)2 ZPO allows the judge to suggest mediation for the parties. Comparable laws exist with respect to the relative practice area.[194] With respect to current legal topics, the discussion continues in Germany how mediation can be best integrated in the legal system. Until a short time ago, inflammatory debates arose on the question whether mediation is a practice of law which could then only be practices by lawyers.[195] Also greatly controversial is the issue of whether among litigation, mediation should also be covered by legal aid.

b) Mediation regulations released by the European Union

The European Union has been a crucial supporter of the development of alternative dispute resolution in Europe. In 2002, the European Commission published the so-called Greenbook on ADR in April 2002, to give an overview on the actual situation regarding ADR in Europe.[196] Thereupon in 2004, the European Commission adopted the European Code of Conduct for Mediators which sets out non-binding guidelines for impartiality, confidentiality, training, and other issues encouraging.[197] Its aim was to encourage, but not to force, ADR providers to apply the code as a minimum standard. Finally, the latest effort made by the European Union is the Proposal for a Directive of the European

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and adaptability, and these qualities were inconsistent with uniform laws, *see* Birke & Teitz, *supra* note 30, at 387-388.

190 *See* Rausch, *supra* note 179, at 618.

191 Alexander, *supra* note 2, at 237.

192 *Id.*, at 238-239.

193 *See id*., at 239.

194 A brief overview is given by K. Mundschütz, *Mediationsrechtliche Bestimmungen in Europa – ein kurzer Überblick*, 2 perspektive mediation 87, at 88 (2005).

195 *Compare* M. Herrmann, Wirtschaftsrecht und Mediation – Festschrift für Walter Gottwald 43-57 (2005).

196 *See* N. Pitkowitz, *Der Mediations-Richtlinienvorschlag der EU: Gleichstellung der Mediation mit Gerichtsverfahren!*, 2 Zeitschrift für Konfliktmanagement 68 (2005).

197 Alexander, *supra* note 2, at 239.

Parliament and Council on certain Aspects in Civil and Commercial Matters.[198] Art. 2 and 4 of the Proposal set a general definition of mediation and encourage quality standards.[199] However, probably the most important provision is Art. 5 which virtually provides a settlement agreement reached in mediation with the power of a court decision.[200] All these made efforts indicate that it is expected that mediation in Germany and in entire Europe will come alive, eventually.[201]

c) Selected topics

Is a Mediator Giving Legal Advice?

One of the most controversial subjects on mediation in Germany is about to be finally solved. As a concomitant phenomenon of the growth of mediation, a debate had been initiated on the issue of who actually ought to be a mediator. Lawyers have challenged the legitimacy of mediation conducted by non-lawyer mediators due to the fact that the Law on Legal Advising (German: *Rechtsberatungsgesetz*, RBerG) provides lawyers a monopoly in all matters involving legal advising.[202] Based on its Section 1(1) RBerG, non-lawyer mediators are prohibited from mediating a case that directly influences the legal rights of the represented parties.[203]

The potential for a conflict particularly arose from the fact that non-lawyer mediators[204] are not subject to the Professional Code for Lawyers (German: *Berufsordnung für Rechstanwälte*, BORA) and therefore, would not have to comply with its rules.[205] Inter alia, to solve that matter, on 8 August 2006, the federal government presented a draft for a new Law for the Provision of Legal Services (German: *Rechtsdienstleistungsgesetz*, RDG) which is supposed to replace the Law on Legal Advising by midyear 2007.[206] According to Section 2(3) No.4 of the draft, mediation and comparable forms of dispute resolution are deemed not to involve legal advice-giving.[207] Based on the RDG, non-lawyer mediators will then be allowed to work as mediators, as long as they do not actively give their own opinion on a legal matter; however, they will be allowed to moot legal information leaving the decision on the legal matter to the

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[198] Commission Proposal for a for a Directive of the European Parliament and Council on certain Aspects in Civil and Commercial Matters, COM (2004) 718 final (22 October 2004) (the proposal addresses the Member States to implement the Directive by 1 September 2007); the original text of the proposal is available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0718en01.pdf.

[199] *Id*., at 10.

[200] *Id*., at 10-11; *see* also Pitkowitz *supra* note 196, at 70.

[201] *Id.,* at 71.

[202] Alexander, *supra* note 2, at 251; non legal matters which are mediated are excluded from the discussion.

[203] *Id*., at 252.

[204] As mentioned earlier, the title 'mediator' is not legally protected.

[205] M. Henssler, *Mediation und Rechtsberatung*, 4 Neue Juristische Wochenschrift 241 (2003).

[206] BT-Drs. 16/3655; the draft is available on the website of the federal department of justice, at: http://www.bmj.bund.de/files/-/1306/RegE%20Rechtsdienstleistungsgesetz.pdf

[207] *See* Alexander, Ade & Olbrisch, *supra* note 7, at 252.

parties.[208] It is predicted that the RDG will change the market for legal services fundamentally.[209] The domain which has solely been reserved for lawyers will be essentially narrowed down to establish a new quality of competition on within the legal profession.[210]

Legal Aid

An often-heard complaint of German mediators is the fact that mediation is not eligible for legal aid. Consequently, in case that the parties are allowed to apply for it, mediation becomes more expensive than going to trial. To equalize this imbalance, many mediators, mediation organizations, and the federal bar association demand the introduction of legal aid particularly designed for mediation.[211] However, as of now, attempts to challenge the actual situation in court have still remained unsuccessful.[212] After all, it will eventually depend on the persuasiveness of all supporters to convince the state to finance 'mediation aid'. Thus, due to a financially burdened treasury, to make the introduction of mediation aid palatable, scientifically founded evidence of the cost-saving attribute of mediation will have to be provided to the state.[213]

IV. Comparison

The United States and Germany are facing different problems regarding the legal structuring of mediation. The United States created hundreds of predominantly state-based regulations that deal with the practice of mediation. However, most of the regulations are lacking uniformity which, to some degree, complicates the use of mediation across state border lines. The UMA is at least one way to constitute the desired uniformity, but it may well take a long time until it will be implemented into the law of the most American states. All the statutes that deal with mediation in Germany do not face those problems since they are federal laws. But, at the same time, Germany has to handle the issue that, at present, no law exists to regulate quality standards of mediation or the conduct of the mediator and his clients.

Furthermore, it seems that the United States first introduced mediation and later, after a period of deployment, started to regulate it in order to improve its

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208 BT-Drs. 16/3655 at 50.

209 V. Römermann, *Rechtsdienstleistungsgesetz – Die (un)heimliche Revolution in der Rechtsberatungsbranche*, 42 Neue Juristische Wochenschrift 3025, at 3031 (2006).

210 *Id*., at 3025.

211 C. C. Paul, *Ausbildung und Kosten der Mediation: Konzepte und Kosten auch im internationalen Vergleich*, 4 Familie, Partnerschaft, Recht 176, at 180 (2004); statement of the federal bar association on the Greenbook on ADR from the Commission of the European Union, available at http://www.brak.de/seiten/pdf/Stellungnahmen/gruenbuch-adr.pdf (at 8).

212 *See, for example*, Oberlandesgericht Dresden [OLG] [trial court for selected civil matters and court of appeals] Oct 9, 2006, 6 Zeitschrift für Konfliktmanagement 190 (2006): The court states explicitly that legal aid could only be provided for legal aid because, with regards to the legal aid, the whole purpose of mediation could not just be the same as a trial.

213 Paul, *supra* note 211, at 180.

quality. The German approach in turn reveals a different picture: Right at the beginning, efforts had been made to press mediation into already existing legal patterns, rather than allowing it some time to develop some independence. As such, it can be referred to as the huge debate on who is allowed to be a mediator. Nowadays changes are in sight: The RDG and the efforts made on the European level might help to promote the further ways mediation will take in Germany.

E. How Mediation is Accepted and Negative Impacts on Mediation Other than Legal

I. Related Results of the Survey

1. The Overall Opinion on Mediation

a) Responses from Germany[214]

The Mediator's Perspective

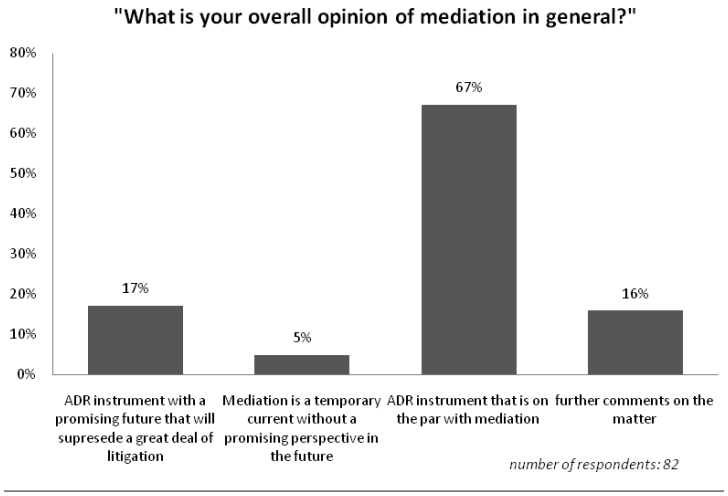

figure 3.1

Selected Comments on the Question by the Respondents[215]

> "The success of mediation will depend on how often lawyers will inform their clients of its existence and the option to use it"
> "Good alternative to litigation. However, its acceptance is limited."

[214] As indicated above, the German formulation of the questions slightly varies from the American version due to the different development of mediation in Germany.

[215] All the comments are taken from the category 'further comments on the matter'.

> "In many cases a great alternative to litigation but a lot of people have still reservations."

Comments on Figure 3.1.

It is noticeable that only a small number (17%) of the mediators see in mediation the ultimate cure for all disputes which is superior to litigation. However, the vast majority (67%) of the respondents is convinced of the equal quality mediation exhibits compared to the trial procedure. Finally, the worried comments indicate that reservations towards the new creation that is 'mediation' are still recognizable.

The Lawyer's Perspective (Non-Mediators)

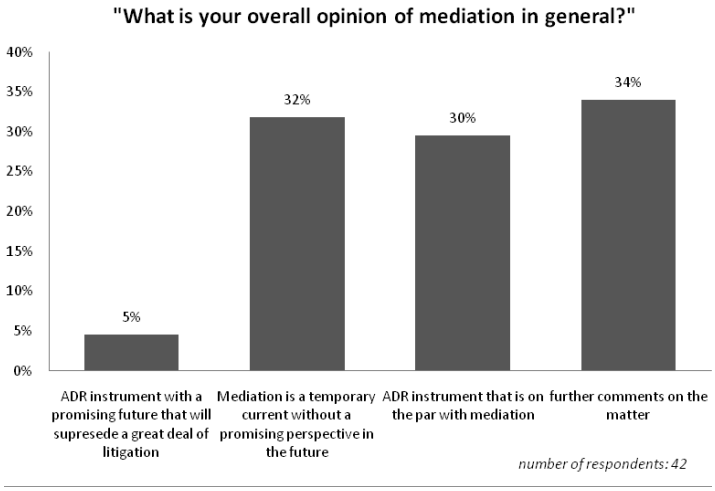

figure 3.2.

Selected Comments from the Respondents

> "I never got in touch with mediation. Therefore, I cannot judge it."
> "[Mediation is] only useful in extraordinary situations."
> "A complement to the usual work of a lawyer"

Comments on Figures 3.2.and 3.3.

Contrary to the opinions of the mediators, remarkable doubt exists among the respondents that mediation will establish as a serious alternative to litigation (32%). Nevertheless, a notable number of non-mediators (30%) credit mediation a value equal to litigation, and, surprisingly, many lawyers consider practicing mediation in the future (61%). The comments of the respondents added to the survey results (figures 3.2 and 3.3.) lead to the following conclusion: Among the lawyers, there still seems to be some lack of knowledge on how mediation works

and how it can be applied. The ones who appreciate the value of the method apparently seem to await the answer to the question whether mediation will pay off as an accepted dispute resolution instrument in the future (see figure 3.3.).

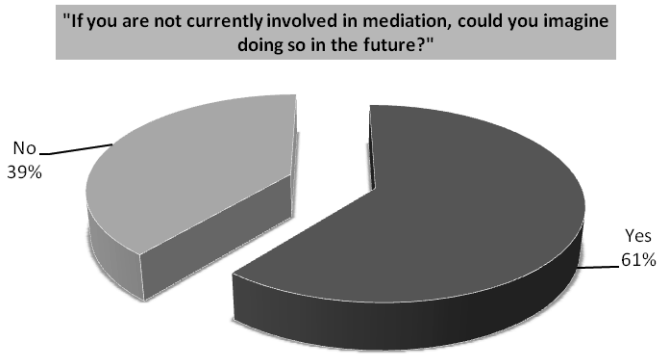

Figure 3.3

b) Responses from the United States (Mediators and Non-Mediators)

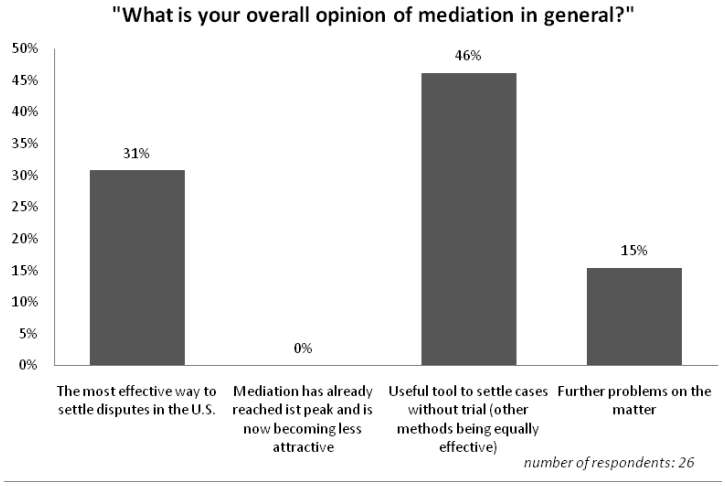

figure 3.4.

Selected 'Further Comments' from the Respondents

"Effective way to settle disputes"
"Situation dependant"
"Somewhat helpful but overrated"

Comments on Figure 3.4.

Different from the German results, all the respondents agree that mediation is an important tool to settle disputes even if they are not practicing mediation. Additionally, the enthusiasm about mediation seems to be greater than it was seen to be in Germany (31% see in mediation the best dispute resolution instrument).

2. Negative Impacts on Mediation Other than Legal[216]

a) Responses from Germany

The Mediator's Perspective

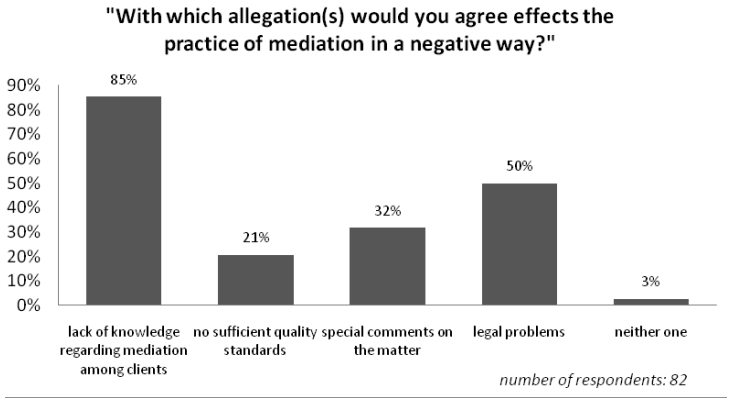

figure 4.1

Selected Comments made by the Respondents

> "People do not trust in the mediation process"
> "Not enough marketing for mediation"
> "Many lawyers are against it"

Comment on Figure 4.1.

Only 3% of the mediators are content with the present situation. The biggest complaint made by the respondents is the lacking awareness of the existence of mediation (85%).[217] Most clients do not seem to know about a different way to solve a dispute apart from litigation. Furthermore, the third comment alludes to the problem that many lawyers appear to feel impelled to compete with mediation rather than seeing a new option to do business with it.

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[216] Since this some parts of this topic have already been treated earlier (*see supra* figure 2.1. and 2.2.), it will be focused on aspects which are related to aspects other than legal structures.

[217] Many mediators still complain that a lot of people confused the word *mediation* with *meditation* when asked about it; *see*, for example, the German ADR-Blog by Marcus C. Brinkmann, available at: http://www.adr-blog.de/?p=56.

The Lawyer's Perspective (Non-Mediators)

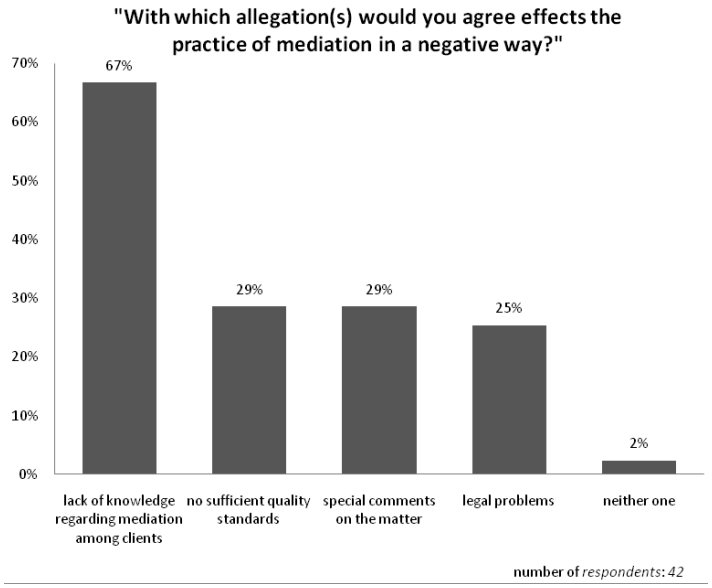

figure 4.2.

Selected Comments Made by the Respondents

"The whole purpose of mediation is vague"
"Training to become a certified mediator is too expensive"
"Mediation is just a new expression for what has been done for years by lawyers"

Comment on Figure 4.2.

Similar to the mediators, the lawyers not practicing mediation see the biggest obstacle to the growth of mediation in the lacking knowledge among the German population (67%). Apart from this, the exact picture and definition of mediation still seems to be quite unknown and to vary greatly among the respondents (see comments).

b) Responses from the United States (Mediators and Non-Mediators combined)

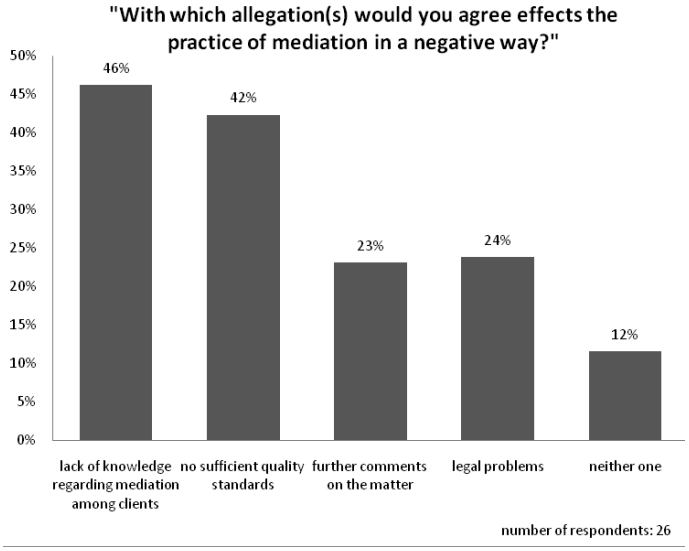

figure 4.3.

Comments made by the Respondents

> "[Mediation is negatively affected by] lawyers who undermine the process (probably client's attorneys)"
> "Attorneys"
> "Deprives attorneys of fees for trying a case"

Comment on Figure 4.3.

Surprisingly, the lack of knowledge about mediation is also the biggest complaint made by the respondents (46%) even though it did not reach the same level as it did in Germany.[218] Furthermore, the quality standards of mediation appear to be a more important problem in the United States than in Germany (42%). Finally, it is noticeable that, similar to Germany, American mediators are partly displeased with the lawyer's attitude towards mediation.

[218] However, once again, due to the small number of respondents, all the results from the United States should be taken with care.

3. Time of Work Actually Spent on Mediation

a) Responses from Germany

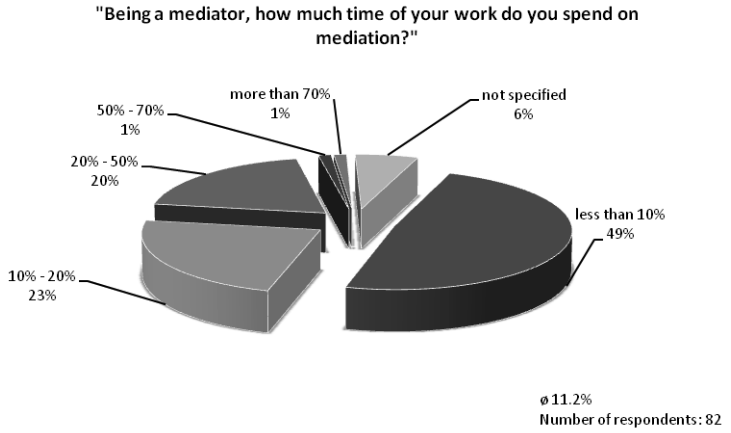

figure 5.1.

b) Responses from the United States

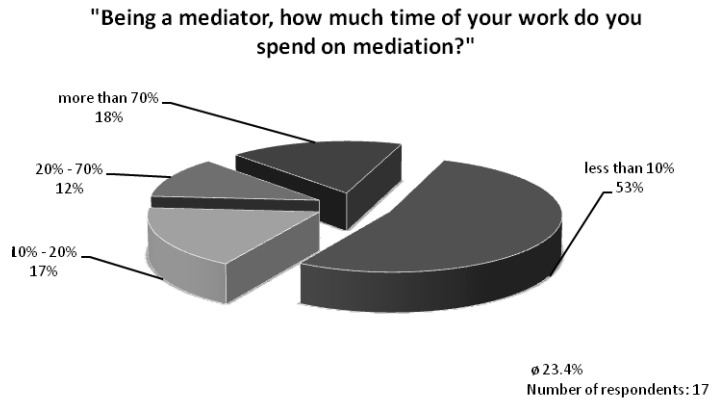

figure 5.2.

c) Comment on Figures 5.1. and 5.2.

The results from above show that the average mediator in Germany does not spend more than 11.2% on mediation with the vast majority of respondents not using more than 10% on practicing mediation. Even though the American results

(23.4%) can only vaguely indicate the real figure, it is very likely that the average will be above 11%.[219]

F. Education and Training in Mediation

I. Responses from Germany

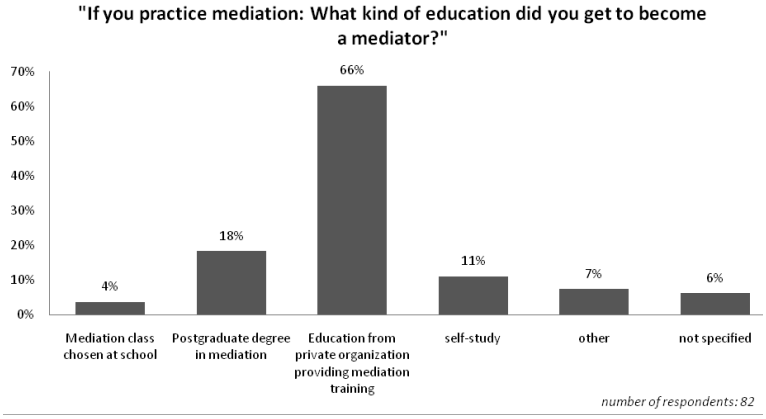

figure 6.1.

II. Responses from the United States

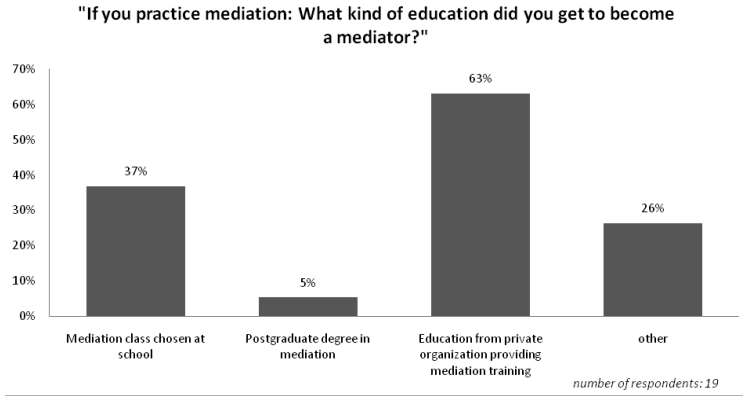

figure 6.2.

[219] This assumption takes into account that several mediation firms exist in the United States which deal exclusively with mediation while in the whole of Germany, only one or two 'mediation firms' exist.

1. Comment on Figures 6.1. and 6.2.

The survey on education in mediation indicates that both in Germany and in the United States, private organizations are the major providers of mediation training. In contrast to the United States, postgraduate programs appear to be more important in Germany than in the US. Nevertheless, mediation classes at Law Schools in Germany appear to be almost irrelevant for an education on mediation; however, the results cannot explain whether mediation classes were not offered at Law School or whether they were simply not attended.

III. Training in Mediation: How to Become a Mediator

The way mediation works is essentially influenced by the professional training a mediator obtained.[220] The value of mediation training virtually determines the quality standards of the profession and thus, the level of appreciation by its clients. Hence, the educational aspects of mediation will be briefly discussed in this section.

1. Mediation Training in the United States

a) Mediation training at university

By 2006, around 850 ADR classes were offered at 182 ABA accredited law schools.[221] The classes range from theoretical to the very practical, and include mediation, arbitration and other ADR techniques.[222] Additionally, several law schools have begun to introduce master programs specialized in ADR matters, and a few offer LL.M. degrees in dispute resolution.[223]

b) Mediation training in general

Besides, training is offered by a countless number of mediation organizations, centers, and other providers. Typically, mediation training courses do not exceed 40 hours, and some require its attendants to shadow more experienced mediators.[224] Legislative requirements on the education of mediation are virtually non-existent.[225] Currently, a few states have started to approve and certify mediator training, however, very little has been done with regard to uniform content or methodology.[226]

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220 Kovac, *supra* note 45, at 444-445.
221 *Id*., at 404.
222 *Id*.
223 *Id*.
224 Birke & Teitz, *supra* note 30, at 372.
225 Kovac, *supra* note 45, at 445.
226 *Id*.

2. Mediation Training in Germany

a) Mediation training at university

The German legal education system at law school reflects the way how law is traditionally taught in many civil law countries; its approach is more theoretical and scientific compared to the legal education given by law schools in common law countries.[227] This might also be a reason why German law schools have resisted for a long time to introduce mediation classes and still do to some extent.[228] Another structural problem is of importance: Having passed the exams at Law School, German law students still need to pass a final state exam[229] in order to obtain a law degree (comparable to the J.D. degree). Because of its great relevance, German students tend to primarily focus on subjects to be examined by the state; at present, mediation is not among those.[230] In July 2003, a big step was made by the enactment of the Law on the Reform of the Legal Education (German: *Gesetz zur Reform der Juristenausbildung*) which complements the legal education by integrating so-called key qualifications such as mediation and other 'skill' classes into the law curriculum.[231]

Apart from this, a few German Universities have also introduced postgraduate degrees in mediation. Usually, the curricula encompass about two years of training focusing on both the theoretical background of mediation and its application in practice.[232]

b) Mediation training offered by private entities

The market for mediation training is constantly growing. Private providers offer 100-240 hours of training sessions within a price range of $2,600 to $20,000.[233] Often, training organizations offer mediation services, information and practice guidelines as well as training.[234] The contents of the respective mediation courses vary greatly; due to this lack of uniform quality standards, mediation training has often been criticized.[235] To solve the dilemma, the debate continues to introduce a *uniform mediation code* to set general training standards in analogy to the

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[227] Alexander, *supra* note 2, at 248; the German term for legal education can be translated as study of legal science (German: Rechtswissenschaft).

[228] *See id*.

[229] To get a license to practice as a lawyer, students have to pass two sets of final state exams. With the first exam, law graduates are already eligible to start an academic legal career at University, however, only the successful completion of the second state exam enables legal practice as a judge or lawyer.

[230] Alexander, *supra* note 2.

[231] Art. 1(2c), available at: http://www.bgblportal.de/BGBL/bgbl1f/bgbl102s2592.pdf; *see* also *id*. at 248-249.

[232] *See* Alexander, *supra* note 2, at 240.

[233] M. Stamer & I. Pfeiffer, *Außenwirkungen und Innensicht – zur Landschaft der Mediationsausbildung in Deutschland*, 1 perspektive mediation 5 (2006).

[234] Alexander, *supra* note 2, at 241.

[235] *See* Stamer & Pfeiffer, *supra* note 233, at 5-6.

Austrian Mediation Code for Civil Law (German: *Zivilrechts-Mediationsgesetz*, ZivMediatG).[236]

IV. Comparison

The results of the survey reveal that the United States have long ago overcome their negative perceptions towards mediation. Contrary to this, many German lawyers still think that mediation is just a temporary movement that will not have further impact on the German dispute resolution landscape. With regards to the clients of mediation, German as well as American lawyers criticize a lack of knowledge towards its existence. With regards to mediation training, private organizations are the preferred providers. The discrepancy between Germany and the United States with respect to the length of training programs is remarkable. The reason for this difference might be rooted in the common law and civil law tradition: Whereas Germany, as a civil law country, tends to focus more on a rather scientific approach in order to eliminate as many mistakes as possible before a real mediation is conducted. The American way seems to be rather pragmatic, enabling the future mediator to start as soon as possible to collect experience (the phrase 'learning by doing' appears in the mind).

G. The Different Development of Mediation in Germany and the United States as a Matter of Different Mentalities

Modern mediation can be seen as a fairly new dispute resolution method first introduced in the middle of the last century in the United States and about thirty years later in Germany. Turning away from the firmly established litigation procedure to a completely new approach of dispute resolution, mediation has oftentimes been exposed to prejudices and doubts. How those perceptions and opinions impact the success and the growth of a new method depends to a great extent upon the different mentalities that are inherent to a nation. This chapter is therefore devoted to answering the question of how the different mindsets of Germans and Americans might have affected the development of mediation.

I. Introduction

At first glance, speaking of the 'German' or the 'American' mentality sounds careless and appears to be naïve: Contrasting two cultures with each other can

[236] P. Tochtermann, *Alternative Dispute Resolution – Einführung in die alternative Streitbeilegung*, 2 Juristische Schulung 131, at 134 (2005); the Austrian ZivMediatG, inter alia, sets education standards that allow people to register as qualified mediators. For further information regarding the ZivMediatG *see* F. A. Becker & C.-H. Horn, *Notwendige Regelungen eines deutschen Mediationsgesetzes*, 5 SchiedsVZ 270 (2006).

only be undertaken by generalizing and referring to certain stereotypes, prejudices and clichés.[237] However, the diversity and complexity of a nation should not be underestimated. Especially in the globalized world of today, it is quite likely that German and American lawyers have more in common than German lawyers and German industrial workers.[238] Second, in principle, every picture of reality might be perceived differently by each cultural observer due to various reasons: different occupations and interests, personal beliefs, and character unconsciously acts as a filter for the senses to be transformed within each person's mental field in order to maintain a psychological balance.[239] Hence, nobody including the most competent scholars and social scientists can claim to be able to observe and understand other humans and groups from an absolutely neutral position that does not inherently contain subjective biases.[240]

Taking everything mentioned above into account, the reason why it does make sense to observe and to generalize is that when used carefully, generalizations still contain an element of truth, as they refer to dominant cultural patterns: While all individuals of one culture are unique in many ways, they are also alike in other ways; of course, a cultural generalization will never tell how people *will* behave in a given situation, however, it might tell how they *may* behave.[241] Finally, it should be emphasized that the behavioral patterns which will be presented do on no account presume to judge or grade the respective culture - its sole purpose is to show distinctions that might affect the development of mediation.

II. The Society of 'Immigrants'

The United States is a nation founded by immigrants who predominantly came from a variety of European countries.[242] Germany in turn lies in the heart of Europe and is not considered to be an immigrant country. Germans who emigrated to the United States quickly adopted the American lifestyle and thus became Americans. Consequently, one can distinguish between Americans as a nation of immigrants and Germans as a nation of people who chose to remain and live in their country.[243]

Raeithel describes American immigrants as people with a certain temperament, which was needed to make the serious decision to emigrate: The emigrants were predominantly people who were optimists, full of hope, looking for liberty, and

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[237] *See* H. Bausinger, Typisch deutsch: Wie deutsch sind die Deutschen? 7 (2000).

[238] E-Mail from Bernd-Jürgen Warneken, Professor of Cultural Science at the University of Tübingen (Germany) to Alexander Hoffmann (02/11/2007 10:58pm EST) (on file with author).

[239] *See* R. J. Rummel, *The Conflict Helix*, *in* J. Folberg, *et al*., Resolving Disputes: Theory, Practice, and Law, at 30 (2005).

[240] G. Nees, Germany: Unraveling an Enigma xi (2000).

[241] *See* C. Storti, Old World – New World: Bridging Cultural Differences: Britain, France, Germany, and the U.S. 10 (2001).

[242] *See* G. Raeithel, "Go West" – Ein psychohistorischer Versuch über die Amerikaner 11-12 (1981).

[243] In line with Nees *supra* note 240, 'Americans' in this chapter will be referred to as white, middle-class, mainstream culture in the United States only in order to simplify the contrasting and comparing of the two countries. The same approach is undertaken to characterize the Germans.

striving forward.[244] They were ready to take the challenge of starting from scratch in the New World and breaking up with the known.[245] Those patterns of behavior are still used to reflect typical Americans today.[246] In contrast, people who did not leave their country can often be attributed a certain lack of readiness to give up familiar surroundings and a greater need for safety and security.[247]

III. Risk and Certainty

Deriving from the foundation given in B. above, Germans and Americans show a different understanding towards risks and the degree to which certainty in life is needed.

Hofstede developed the so called uncertainty avoidance scale that measures how some people easily cope with the life's punches, whereas others might fear them and are threatened by them; according to him, Germans (at 65) are ranked 19 points higher (more anxious about uncertainty) than Americans (at 46).[248] Apart from other reasons, the Germans' drive to regulate might in fact illustrate one sign to minimize any possible arising risks to make life more predictable and secure.[249] Surprisingly, the famous need for orderliness has not always been inherent to the German life: Around 1600, in a comparison with other nations, the Germans were criticized as to exhibit a lack of order, affection to exorbitance, and great love of life.[250] About 400 years later, however, Germany had experienced a number of both civil and European wars that brought chaos and suffering with them and destroyed the social and economic advantages the Germans had worked so hard to achieve.[251] In addition to that, unemployment and inflation made Germans lose almost all of their personal savings from the past century. [252] All of this left a profound mark in the German psyche and constituted a risk-aversive pattern of behavior.[253] Hence, it might appear to a foreigner that, at present, almost every aspect of German life needs some regulation, preferring

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244 Raeithel *supra* note 242, at 9.

245 *See id.*

246 As such, the mentioned attitudes are frequently discussed in books to describe Americans today, *see, for example*, E. C. Steward & M. J. Bennett, American Cultural Patterns: A Cross-Cultural Perspective 123 (1991) (stating that "[b]ound with the idea of progress in American culture is a feeling of general optimism towards the future.").

247 *See* Raeithel, *supra* note 242 at 28-29: Raeithel names that attitude "having a strong relationship to known objects" (German: *Objektstärke*), whereas the immigrants were featured a rather loose relationship to the known.

248 G. Hofstede, *Culture's Consequences: International Differences in World-Related Values*, *in* C. Storti (Ed.), Old World – New World: Bridging Cultural Differences: Britain, France, Germany, and the U.S., at 196-197 10 (2001); the range of the scale ranges from 112 (most anxious) to 8 (least anxious).

249 *See* Storti, *supra* note 241, at 197.

250 Bausinger, *supra* note 237, at 83.

251 Nees, *supra* note 240, at 41.

252 *Id*.

253 *Id*.

to err on the side of prohibiting behavior rather than allowing it.[254] For the sake of more security, a system of regulation is inevitably less flexible and less accepting of innovations.[255]

In the New ('uncertain') World, Americans have ever since had to deal with the unknown, and they finally learned to accept it and live with it.[256] Arriving in America, they were immediately faced with a bewildering variety of unprecedented circumstances and unfamiliar situations; surviving was only possible by discarding years of habit, tradition and precedent and placing trust in the untried and the untested.[257] The immigration phenomenon has coined American culture to this day. As a result, Americans tend to rate the German devotion to order as being obsessive and highly constricting.[258]

With regards to mediation, well-known and well-tried litigation process gives more security than the introduction of a new and thus fairly uncertain method that adheres to the risk of not becoming as successful as predicted or as proclaimed. As an illustrative example, in November 2004, PriceWaterHouseCoopers (PWC) in cooperation with the University of Frankfurt/Oder (*Europa-Universität Viadrina*) surveyed 158 German businesses to report on their experience with ADR instruments.[259] According to the survey results by PWC, 83 % of the respondents had some kind of experience with ADR methods including mediation. But still, German businesses primarily chose negotiation and then litigation to solve a dispute. Mediation turned out to be one of the least used dispute resolution instruments. The respondents' explanation for the minor use of mediation might appear astonishing but can be explained by the mentality of risk-aversion: Litigation is to a great extent perceived as being the inevitable consequence once a dispute has been begun. At the same time, even though mediation was considered one of the best and most satisfying methods to solve a dispute, companies often refused to select it because of lacking experience they had with it.[260] The survey reflects the German need for being sure in advance that something will finally turn out to be beneficial. To the German companies, taking the risk to try out the new and possibly more appropriate method did not seem to be worth turning away from an established but perhaps inappropriate dispute resolution instrument. Corresponding to that behavior, another survey done by TNS EMNID in 1999 attests that Germans have a fairly low level of flexibility

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[254] Storti, *supra* note 241, at 197; a fun anecdote that compares Germans with Americans illustrates this: At a competition in the construction business, a German and an American company start to plan for a major project. A few weeks later, a fax from the Americans is received saying: "Ten more days and we will be done." At the same time, the Germans also faxed a message: "Ten more days left and we will get the administrative authorization to start," Bausinger, *supra* note 237, at 80.

[255] *See id.*

[256] Storti, *supra* 241, at 198.

[257] *Id.,* at 198-199.

[258] Nees, *supra* note 240, at 40.

[259] C. Nestler *et al*., *Commercial Dispute Resolution – Konfliktbearbeitungsverfahren im Vergleich* (Research study conducted by PriceWaterHouseCoopers and the University of Frankfurt/Oder, 2005), available at http://www.pwc.de.

[260] *Id*., at 21-22.

compared to other 15 European countries.[261] Finally, figure 3.3. from the survey[262] should be mentioned: The fact that almost two-thirds of all respondents who do not practice mediation (61%) thought about practicing mediation in the future might indicate that German lawyers are to some extent not yet willing to take the risk of applying a new method as long as its importance and value has not been explicitly proven.

Americans, in turn, appear more willing to seek the new, even though they needed to give up some security in return.[263] Consequently, it is not surprising that mediation, having passed a small period of introduction, had more readily been adapted to the American dispute resolution landscape than in Germany.

IV. The German Aspiration for Perfection

Germans are great believers in doing things thoroughly, which leads to their characterization as being perfectionists.[264] If they do something, they tend to weigh quality higher than expenses and time. If they cannot do something as thoroughly as they would like, they would rather do it not at all.[265] Americans also appreciate quality but not to the same extent. The quality of a product is more expected to be weighed against cost and efficiency.[266]

At the same time, Germans hate to make mistakes. A product has to be perfect when it is introduced to the market; a business plan needs to be planned thoroughly in order to avoid any risks that lead to a failure of the plan. Second tries are rarely accepted and often regarded as a lack of careful preparation.[267] The Americans handle such matters differently: They are less focused on doing things right than just doing things. Making mistakes allows them to improvise and to show creativity, those attitudes that needed to be frequently applied in the American culture.[268] With respect to the introduction of mediation, the point can be made that Germans tend to need more time for studies, evaluations, and surveys in order to make sure that this instrument is worth continuing with. Americans, in turn, might just follow the trial-and-error principle to see if it will prove of value on the market.[269]

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[261] *See* K.-P. Schöppner, *Wie flexibel sind die Deutschen?*, *in* E. Eyer & C. Antoni (Eds.), Das flexible Unternehmen (2006).
[262] *See supra* figure 3.3.
[263] Storti, *supra* note 241, at 197.
[264] Nees, *supra* note 240, at 39.
[265] To illustrate that pattern, a frequently used and applied German saying could be seen as a reflection of German society: "Keine halben Sachen" (English: *Not to do things by halves*).
[266] *See* Storti, *supra* note 241, at 212-213.
[267] *See id*., at 242-243.
[268] *See* J. Hammond & J. Morrison, The Stuff Americans are Made Of: The Seven Cultural Forces That Define Americans – A New Framework for Quality, Productivity, and Profitability 181-196 (1996).
[269] *Id*.

V. Comparison

In America, mediation has shown to be a useful tool in a dispute. The comparison of the two mentalities indicates that Germany will need longer to apply mediation to the same degree as it is practiced in the United States. Introducing something new means the abandonment of the known and thus of security and certainty. Due to the German mentality, more time will probably be spent on the evaluation of the value of mediation before it will be used by a broader spectrum of people. However, once this step has passed and mediation has been broadly accepted, its further development might accelerate considerably.

H. Final Conclusion

The results of all the chapters will be briefly summarized to answer the question why mediation is still rarely used in Germany while it has already become a deep-seated part of the American dispute resolution environment:

First, the use of mediation in Germany began about 30 years later than in the United States. Hence, the time for growth was notably shorter. Second, the US was virtually forced to create something new to face the problem of the litigation explosion while Germany did not need to react to a comparable crisis. Third, the development of mediation in Germany has fast been accompanied by a drive to force mediation to fit into existent legal patterns. Mediation in the United States had for a long time been unregulated, offering it more space to develop. Fourth, due to the different mentality, a risky introduction of a new method is more readily accepted in the immigration country that is the USA, while Germans, as supporters of security and certainty, will be confronted with a longer period of approval until mediation has eventually established itself as an alternative dispute resolution method in the German legal system.

I. Appendix

I. General Information on the Respondents of the Survey

1. Gender (Number of Respondents)

a) United States

Female	12
Male	14

b) Germany

Mediators

Female	42
Male	40

Attorneys not practicing mediation

Female	15
Male	27

2. Size of Law Firm

a) Germany

Size of Law Firm	Percent of Respondents
1 – 5 attorneys	96%
5 – 10 attorneys	1%
10 – 30 attorneys	2%
30 – 100 attorneys	1%

b) United States

Size of Law Firm	Percent of Respondents
1 – 5 attorneys	57%
5 – 10 attorneys	9%
10 – 30 attorneys	5%
30 – 100 attorneys	29%