Question 1

What alternative means are used in your legal system for resolving civil law disputes outside normal court procedures?

- Mediation (a process in which the parties engage a mediator or conciliator to encourage and assist them towards agreeing a solution)
- Arbitrations (a process in which the parties agree to submit their dispute to the binding decision by an arbiter)
- Non-binding arbitration (a process in which the parties obtain a decision on their dispute but which is non-binding and does not prevent litigation)
- Other methods (please describe).

- Mediation

During the last 10 years the acknowledgement of mediation has increased considerably in Germany.

Although the use of mediation in trial is still at an experimental stage and not finally established, there are various pilot projects in several regions all over Germany.

Roughly the option to employ mediation is legally implemented at two different stages of trial.

a) There is a legal option which empowers the Bundesländer to insert an act which makes the attempt of a pre-trial-settlement a procedural requirement. The scope of the application of pre-trial-settlement is limited to the following cases:
- disputes up to € 750,- (small claims)
- actions against neighbours
- an injury of a persons reputation

The Bundesländer which inserted the act have to install or certify settlement agencies which are often lawyers with a mediation training but also Chambers of Commerce or mediators without a legal training.

The regulation is limited to the end of 2005, afterwards it is intended to evaluate the results.

b) Furthermore a regulation is implemented in the code of civil procedure which allows the judge to suggest to the parties to try to solve their case by mediation at every stage of the trial as far as he considers it useful.

Another judge of the same court who has had some special training then holds a session of some hour’s maximum trying to find an agreed solution. If this doesn’t work the case goes back to the regular judge and procedure. The system is rather successful; quite a lot of cases are solved quickly and in
agreement. The others do not lose much time in trying, so that parties do not
back out of trying at least out of fear there cases will take much longer at court
than otherwise. Furthermore the judge doing the mediation will not tell any
confidential details discussed during his session to the regular judge. Parties
do not need to be afraid there might be prejudices.

There are already several regions in Germany where courts offer this
possibility (for details please see:
www.bmj.bund.de/Mediation/_aussergerichtliche_Streitbeilgeung)

- Arbitration
Arbitration is quite a lot in use among economically important parties who hope to
have their cases treated quicker and more efficient by arbitrators they chose
themselves in comparison to the time a trial takes at court. I don’t know any numbers
of how many cases go to private arbitration. There are no statistics on the cases of
private arbitration.

Besides there are some kinds of arbitration services offered by medical associations
or associations of builders or insurance companies. They offer to solve the non-legal
questions - i.e. is there a wrong medical treatment and has it caused any damage,
was a building erected in compliance to all technical rules or are there faults – hoping
to prevent a law suit. These methods work quite well and are helpful also in case of a
following law suit as the technical results can be used in it.

Question 2

(a) Are any of the alternative means used in your country subject to
special regulation by statutory provisions?
(b) Does a mediator or an arbiter require to have a particular qualification
or to have undergone professional training?
(c) If a mediator requires to undergo training, who provides such training?
(d) Is there a professional organisation of mediators which lays down
rules of professional conduct?

(a)
It was already outlined in the answers to question 1 that in several Bundesländern a
pre-trial-settlement is legally requested before the parties may put there case before
a court. Any other means of settlement out of court are voluntary. Arbitration is often
agreed on in the contract. In that case the agreement is binding for the parties.

(b)
Arbiters do not undergo any special training. The usual arbitration court has three
members. The usual rule concerning their choice says that each party chooses one
arbiter and the chairman of the arbitration court is found by both or all parties in
agreement. The person of the chairman is usually selected in advance before there
are any differences. Nearly always the chairman is a person from a legal profession,
an experienced lawyer or a presiding judge. The other two members may also be
technically or otherwise experienced.
There is not yet a legal demand for a special training for professional mediators. “The mediator” is not yet a legally protected profession. In the pre-trial- and court-settlements mostly lawyers offer the service of mediation, in some fields of law (for example family law) also psychologists and social workers. Most of them use proven methods of mediation and have some special training on the contents and application of these rules. This applies as well for the judges working as mediators in the special mediation projects (see question 1. b).

(c) Training for mediation is offered by several private schools and organizations; the mediation associations set up standards for the qualification of mediators. Generally the certified trainings cover 200 hours of training and practical work on cases in 1 to 2 years. They differ in the contents of the training as the main schools are based on the two main orientations of the American mediation schools. One school is more legally oriented, the other leans more on psychology and the principals of non-violent communication. The market seems to be highly competitive because lawyers as well as psychologists would like to get this market to themselves.

(d) There are two main mediation associations and several smaller ones in special areas.

Question 3

(a) Insofar as alternative dispute resolution procedures are available and are in use in your country, what are the principle areas of law (for example family law, building or construction law, medical negligence claims, consumer cases etc.) in which disputes are settled by the alternative procedures?

(b) Are there any types of civil law dispute which cannot be resolved by such alternative means but must be decided by a court?

(a) There is no special field of law which is especially the subject of alternative methods of dispute resolution. Arbitration is mostly used in building and constructing cases. The new forms of mediation in court (see question1 b) can be applied to any case that seems fitting. These are less chosen with view of the law field concerned but with respect to the kind of dispute and if it appears sensible to try an agreement. The pre-trial-settlement in small claim cases applies to any case where a sum up to 750, - € is demanded by the claimant.

(b) Decisions which change the legal status, like a divorce, cannot be reached by agreement but must go to court.

Question 4
(a) Is any publicly founded system of mediation available in your country? In particular, is there any mediation service attached or annexed to the courts?
(b) If so, for what types of civil law dispute is publicly founded mediation available?

(a) Publicly funded mediation is only available in the above mentioned pilot projects (question 1); mediation is offered by the court and included in the normal fees without any further cost. If a party is granted legal aid it also covers possible costs of mediation in court.

(b) There are no special law fields concerned.

Question 5

(a) To what extent, and by what means, are the courts in your system able to encourage or to require parties to attempt mediation or some other form of alternative dispute solution either as a preliminary to commencing to litigation or in the course of ordinary court proceedings?
(b) Is the court administration able to assist litigants, or potential litigants, in using alternative dispute resolution procedures by, for example, explaining the various possibilities of alternative dispute resolution or providing information about mediators or arbiters?

(a) (see question 1).

(b) No.

Question 6

(a) Has the use of alternative dispute resolution procedures in your country been increasing in recent years?
(b) If so:
   (i) Are there any particular reasons for the increase in use of alternative dispute resolution procedures?
   (ii) Has the increase in use sufficiently reduced the burden of work on the courts to allow the courts to improve the delivery of justice?
   (iii) Has any alteration been made to the rules of procedure or the practices of the courts in response to the increase in the use of alternative dispute resolution?
(a) There is no statistical material available but I estimate that the use of alternative methods of dispute resolution procedures has increased over the years. Yet in Germany it is still at a testing stage. Different ways of offering mediation are tried out. There are no established rules or models of mediation applied throughout the whole country.

(b) (i) The reasons to turning to alternative procedures of dispute resolution are threefold.

The duration of cases in court can be long, even is German courts offer very good short times of solving their cases on average (about four months in local courts, about six month in regional courts). If the parties can find a settlement out of these normal procedures it can usually be reached quicker as in most cases it is renounced to take evidence, which takes most of the time for solving the cases in court. Besides, an agreed settlement might give the parties a better new start.

It is hoped to save costs if more cases are solved by alternative procedures of dispute resolution. As is takes less time the mediator can treat more cases than a judge in the usual way of procedures.

A further reason is the acceptance of mediation by the parties. The more the rules of alternative conflict settlement are known and accepted by the public the more people agree in trying mediation or even ask for it on their own accord.

(ii) No.

(iii) No, with the exception of the small claims (see question 1 a). The judge has to send away the parties if they did not first try to solve their dispute first.

Question 7

In your system does the court provide any procedure in which the judge acts as a mediator?

As outlined above (question 1 b) there are several pilot projects where judges act as mediators.

The experiences made there are good. People easily accept a mediator who is a judge. The papers of the case have not to be sent away but are easily handed from the deciding judge to the mediator and, should mediation not lead to an agreement, back again.

Question 8
Are there any proposals to change the law relating to alternative dispute resolution?

Not yet, but they should be expected later on.

Brigitte Kamphausen  
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