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Conference Report

Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads

Bayreuth, 14-16 September 2012*

The aim to develop transnational principles for the regulation of Alternative Dispute Resolution (ADR), which deal, *inter alia*, with whether and how the use of ADR should be promoted by the state and how ADR should be regulated, brought leading experts from different European countries, the USA and Japan to the University of Bayreuth from 14-16 September 2012. ADR refers to dispute resolution mechanisms outside the state court system. It includes procedures such as negotiation, mediation, conciliation, (binding) expert opinion, arbitration and ombudsman proceedings. In suitable cases, ADR offers solutions which are faster and cheaper than court procedures, especially for cross-border conflicts. The parties have greater control over the conflict resolution procedure. They can arrive at a sustainable compromise adapted to their interests. The procedures are conducted in private; the parties can agree to keep the result confidential.

A method to develop principles for the regulation of ADR was introduced at the conference by Felix Steffek in his presentation 'ADR Procedures – Characteristics, Policy and Principled Regulation'. To deal with the complexity and diversity of ADR procedures, a module approach is taken: the principles are to be formulated for certain characteristics of conflict resolution methods (e.g., (non-)existing initiation control or result effect control) with respect to different regulatory topics (e.g., infrastructure responsibility of the state, or legal aid). The principles can later be converted into models which can lead to rules. The basis for the principles should be normative individualism – according to which dispute resolution must be designed from the perspective of the individual, and the right of access to justice and to fair dispute resolution must be respected – and efficiency – which takes the interests of individuals and of the state into account and may require regulation, e.g., in case of information and decision deficits. Whereas normative individualism and efficiency often make the same demands, in some cases both principles have to be balanced.

The conference demonstrated that the use and regulation of ADR differ considerably between countries. Whereas in the USA, where ADR is regulated at state and federal level, only few court cases go to full trial, as Carrie Menkel-Meadow

* Organised by Hannes Unberath (Germany) and Felix Steffek (Germany), in cooperation with Hazel Genn (UK) and Reinhard Greger (Germany).

pointed out, Frédérique Ferrand reported that in France, most cases are decided by judgment and the French Code of Civil Procedure (CCP) includes a book on ADR. Kristin Nemeth and Peter Mayer related that, even before EU Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (Mediation Directive), Austria had a law on mediation. In Italy, transposing the Mediation Directive, a new law and new legislative decree on mediation were enacted in 2009 and 2010, as reported by Guiseppe de Palo and Aldo de Matteis. Ivan Verougstraete informed the conference that, in Belgium, mediation, settlements in court and arbitration are regulated by the judicial code. In the Netherlands, a law transposing the Mediation Directive is in the parliamentary process, as related by Machteld Pel. Isaak Meier reported that Switzerland regulated mediation in the new Swiss CCP, which includes rules on the ratification of the agreement by the justice of the peace of the court, a guarantee of confidentiality and a statute of limitations. Regarding consumers, Switzerland provides for several ombudsman procedures, e.g., for the banking or telecommunications industry; most of these are self-regulated and not regulated by the state. Shusuke Kakiuchi stated that, in Japan, the Act on the Promotion of the Use of Alternative Dispute Resolution entered into force in 2007. In Norway, ADR is regulated in the Dispute Act; about 50% of civil cases are settled by ADR, as pointed out by Anneken K. Sperr. Some countries have a long tradition of regulating ADR. In Denmark, a mandatory pre-trial mediation procedure existed from 1795 to 1952; in 1952, obligatory conciliation by the judge was introduced, as reported by Lin Adrian. Conciliation by judges has been provided for by the French CCP since 1806. Japan has had a court-annexed mediation procedure for all civil matters since 1951.

The main issues for discussion were how the right procedure for the resolution of a conflict was to be chosen and what interests had to be taken into account in making this decision; mandatory ADR, incentives for ADR or sanctions for non-use of ADR; mediation by judges; and financial support for ADR.

The participants agreed that there was no priority of dispute resolution mechanisms. Whereas Hannes Unberath stressed that party autonomy was of primary importance, Menkel-Meadow underlined that in certain cultures it was not considered as most important. Hazel Genn emphasised that some issues should be dealt with in court. While some experts argued that the parties' interests should be of foremost importance for regulation, others pointed out that public interests should also be taken into account.

Lars Kirchhoff underlined the problem that individuals were given advice by lawyers and institutions that were biased towards a certain mechanism. While there were different lobbies, there was no dispute resolution lobby other than academia. He raised the idea that a 'neutral neutral' – who should have as little self-interest as possible and could not be the intermediary in the ADR procedure – should determine what procedure to apply. The participants discussed the gatekeeper role of lawyers and other professionals. The importance of information about dispute

resolution mechanisms was stressed, as was that of education, especially for lawyers.

In view of the advantages of ADR, some countries oblige parties to use ADR or offer incentives to use it. For instance, a claim may be inadmissible until a mandatory pre-trial ADR procedure has been conducted, or the non-use of ADR may lead to cost sanctions. Such obligations and incentives have to be proportionate in relation to the right to effective access to justice (see German Federal Constitutional Court, 1 BvR 1351/01, 14.2.2007, and European Court of Justice, *Alassini*, Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, 18.3.2010). Genn reported that, in the UK, parties were in some cases forced to choose mediation, e.g., the party that had unreasonably refused to mediate, had to bear the expenses even if it won the case. Italian law on mediation provides for, *inter alia*, mandatory pre-trial mediation in many civil and commercial matters; a party refusing mediation without good reason has to pay twice the amount of court fees. In Japan, in regard to all civil matters, the trial court can order participation in a court-annexed mediation procedure in the early stages of the court proceedings. The Belgian judicial code gives the judge the right to refer parties to mediation by an officially accredited mediator; it is not ruled out that a cost sanction will be imposed on a party refusing to mediate since this refusal might be regarded as abuse of rights. In Austria, mandatory pre-trial ADR exists only for very few matters.

The participants agreed that dispute resolution clauses between parties should be generally enforceable, but must be subject to content control in order not to hinder access to justice too much. During the discussions, it remained an open question whether cost sanctions should be imposed on parties who hinder or prolong the alternative dispute resolution process without good reason.

Most participants believed that while the state has to organise and finance an adequate court and enforcement system, it does not have the same duty in relation to a complete dispute resolution infrastructure.

The role of judges as mediators was disputed. In Germany, mediation by judges plays a prominent role, with an estimated 15,000 court mediations but only 2,500 private mediations per year, as Burkhard Hess pointed out. The court mediation procedure was developed by some courts after the 2002 CCP reform that enhanced settlement by judges, and is still permitted under the new mediation law which was enacted in July 2012; the judges are referred to as '*Güterichter*'. Verougstraete raised concerns in this context. The best judges should not devote themselves to mediation, but take decisions. Judges should promote mediation, but not act as mediators themselves. Other experts shared this critical view. Mediation by the court/judges raises problems concerning confidentiality and concerning the role of the judge/mediator. It was questioned how the judge/mediator could change his role and distance himself from his role as judge.

Another issue raised was financial support for ADR by the state. Whereas, in the UK, ADR is private dispute resolution with hardly any financial support by the

state, in France, legal aid for mediation is granted; in addition, some ADR associations are subsidised by the French state. In Belgium, legal aid is available, but the amounts are lower than for adjudication. Austria grants legal aid and offers other financial incentives for only very few matters. During the discussion on principles, the participants agreed that legal aid for court proceedings should be provided to individuals in financial need but should not set a monetary incentive for parties not to use ADR; thus, legal aid for ADR could be introduced, depending on the level of legal aid for adjudication.

The experts' country reports as well as the principles developed by the conference will be published by Hart Publishing, Oxford, edited by Steffek and Unberath, in cooperation with Genn and Greger, under the title 'Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads' (2013).

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