

Dispute resolution by Courts and Dispute resolution in court. Partners or rivals?

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Abstract

This session of the workshop was dedicated to alternative dispute resolutions (ADR), which consists of dispute resolution processes and techniques through which disagreeing parties come to an agreement without having to litigate. Despite historic resistance, over the years ADR has gained widespread acceptance among both the general public and the legal profession. In the discussion there was a specific emphasis on mediation and arbitration.

Kathrin Nitschmann, a lawyer and mediator from Saarbruecken, Germany, talked about "Professionalisation in mediation". In addition to participation aspects she determined both the risks and the perspectives of professionalization in mediation. Luigi Cominelli, Assistant Professor of Sociology of Law at the University of Milan, Italy, reported on "Regulating Mediation in the EU". He described the history of regulating mediation in the EU as well as domestic regulations since the beginning of modern mediation movement in the western world since the 1970s. Claude Witz, a French civil law professor at the University of Saarland, Germany, referred to "His experience in arbitration." After highlighting some aspects of his experience, he pointed out the importance of arbitration in international commercial disputes. Alec Stone Sweet, Leitner Professor of Law, Politics, and International Studies, Yale Law School, United States, was reporting on "Arbitration and judicialization." Initially, he presented arbitration as a triadic dispute resolution and then focused on judicialization in arbitration. Sir David Edward, former Judge of the Court of Justice of the European Communities and Professor Emeritus of the School of Law of the University of Edinburgh, United Kingdom, spoke about "The view of an arbitrator." While elaborating on multiple reasons for ADR, he honed focus on mediation and arbitration. Finally Heike Jung, Professor Emeritus of Penal Law of the University of the Saarland, Germany, reexamined the role of lawyers, by illustrating "The authority of lawyers in the dispute settling-market."

Key words

Dispute resolutions; Alternative dispute resolutions (ADR); Courts; Dispute Resolution Processes; Conflict resolutions

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Whereas the first session of the workshop was dedicated to judges and their collaborators, the second session was focussing on alternative dispute resolution (ADR). These comprise dispute resolution processes and techniques through which disagreeing parties come to an agreement without having to litigate. Notwithstanding of historic resistance to ADR, it has meanwhile obtained widespread acceptance among both the general public and the legal profession. Among these techniques we were concentrating on mediation and arbitration.

Mediation includes a form of alternative dispute resolving in which the parties are working out a solution by themselves under the involvement of a third party member whose function it is to structure the meetings, and to help the parties come to a final decision based on the facts given through the discussions.

Kathrin Nitschmann a lawyer and mediator from Saarbruecken, Germany, was talking on "Professionalisation in mediation". To analyze the professionalization process in mediation she referred in a first step to the democratic idea of origin as a participatory ideal of mediation, alluding hence the dichotomy of professionalization and participation which *Heike Jung* addressed to later on more precisely and which could be brought up to the question if professionals are needed.

Beyond the aspect of participation she pointed out some characteristics, attitudes and standards of "Non-Professional"-mediators in history as criteria for her analysis: Education, Wisdom, Reputation, Restraint, Humility, Sensitivity, Respect, Understanding, Humanity, Equity, Peace, Trustworthy, Neutrality.

Taking the perspective of a legal practitioner and mediator she mentioned that mediation in the so called "red field" is perceived as an addition to "common" jurisdiction skills practiced by judges and lawyers. In consequence mediation appears in a negative approach as inferior to the existing system, coming into play after traditional justice mechanisms only – an aspect which was also mentioned by *Alec Stone Sweet* in the discussion later on. For the professional mediator this scenario results in the devaluation of his profession as well as to a situation of rivalry between mediators and professionals of Justice.

As reasons for this perception of mediation in the "red field" of conflicts near to justice *Nitschmann* assumed a lack of knowledge of professional actors in the field as well as the fact that referring to an external system might be perceived as a failure. This led her to the question, if mediators in this area could only be professionals of justice themselves. Finally she pointed out some perspectives of professionalization being connected certainly with the expectation we have on mediation itself. Among other she pointed out the acceptance of the coexistence of systems as complementary also mentioned by *Heike Jung*. Moreover she stressed a need of professionalization in a world of experts. Nevertheless there are also risks of professionalization. These are the same negative effects known from institutionalisation in other fields like in social work or journalism. There is always the risk that it comes to administration instead of participation and that finally mediation will suffer from the same problems like rivals i.e. that there is a reinforcement of a structure rather than of an idea like mediation. That's why there has to be a continued evaluation of professionalization process.

Luigi Cominelli an Assistant Professor of Sociology of Law at the University of Milan, Italy, was reporting on "Regulating Mediation in the EU". His starting point was the EU directive on mediation in civil and commercial matters which the member states have to implement in their legislation within May 2011. In this directive member states are required to regulate mediation in cross-border disputes only. Actually it is one of the main critics of the directive, that it is not ambitious enough because the member states are not required to make regulations for domestic disputes also. According to the directive, member states will have to provide for suspension of the limitation period during the mediation process, the confidentiality of the mediation process and the enforceability of the settlements.

Finally they will have to ensure the quality of mediators as well as of mediation procedures.

Apart from the fact that this directive is not the first supranational regulation on mediation – and the fact that there have also been domestic regulations on mediation – this regulation gives reason to the debate on regulation in mediation. Branded under the label of “Alternative dispute resolution” (ADR) the modern mediation movement in the western world has started in the 1970s. There are both problems and opportunities on mediation. Although social psychologists found out that in some cases mediation is a much better instrument to overcome barriers to conflict resolution, on the one hand the use of mediation is limited: Parties are reluctant to use mediation and there is no strong evidence that it can reduce the costs of the procedure or that there is a significant improvement in attorneys views of fairness in the management of cases. On the other hand it generally leads to a higher satisfaction of the parties at least with some exceptions.

According to the direction the member states have to promote mediation. *Cominelli* pointed out the challenge for the regulator: As mediation is based on the idea of the best practice, it is not regulation friendly, it rather eschews regulation. Regulators find themselves facing a dilemma: Institutionalization puts at a risk of judicialization and bears a risk to loose the creativity and flexibility of the original idea of mediation. It also prevents spontaneity of the procedure. Another consequence might also be that more lawyers will enter. When the regulator tries to preserve spontaneity by avoiding consistency there is also the risk that disputants are confused and might therefore refrain from mediation. There are three approaches to the promotion of mediation: a pragmatic, a cultural and a legalistic approach.

Moreover the problem of a regulation of mediation is, that as there are different countries there are also different cultures of dispute resolution and in each of these mediation has its own meaning. That’s why the EU-directive on mediation has been criticized in several ways. For being premature, since mediation systems in Europe are still in embryonic phase. Besides early institutionalization might endanger their efficacy. Finally it is criticized for covering insufficiently the issue of confidentiality, which is a crucial aspect.

When then turned from the ADR model of mediation to arbitration. In this dispute solving technique the parties refer the dispute to one or more persons – the “arbitrator(s)” or “arbitral tribunal”, – by whose decision – the “award” – they agree to be bound. The main difference to mediation is that a third party reviews the case and imposes a decision that is legally binding for both sides.

Claude Witz a professor for French civil law of the University of Saarland, Germany, told us about: “His experience in arbitration”.

He explained that arbitration is neither mediation nor conciliation. He then pointed out the differences between arbitration and state jurisdiction. Whereas judge’s power originates from a state, the power of the arbitrator originates from a contract i.e. from the parties. A second difference refers to the enforcement of the award.

There is manifold interest for arbitration in practice. In international commercial relations there is sometimes mistrust in foreign legal systems, more precisely in the courts of the country of the other party. Moreover the results are often not satisfying because of a long duration of procedures.

Witz highlighted two aspects of his experience in arbitration. Firstly, when comparing arbitration courts to state courts he found out that the deliberation of arbitral courts differs from that of a state court in many ways. Arbitral courts are more involved in the settlement of disputes than state courts, which might be due to the fact that they have been appointed by the parties. As a consequence of that

arbitral awards are often made more carefully, more over they are longer and better motivated.

Secondly he illuminated the concept of "amiable composition". In this approach moral principles come to play. The dispute is decided close to equity which means justice and fairness. As it incorporates rather conciliation than decision making it is closer to mediation than to jurisdiction. *Witz* only presented the French model but there are different approaches in law systems

He came to the conclusion that justice in international commercial disputes is better served by arbitration but nevertheless because of the high costs, this is not a solution for small and medium-sized companies. Hence, justice of state jurisdictions in international commercial disputes should be improved, which can be realized in cooperative entities like the EC.

The ADR-models can function as law-reinforcing and law-evaluating factor because they evaluate it's insufficiencies. This is also valid for mediation as *Kathrin Nitschmann* showed as for arbitration as *Claude Witz* demonstrated.

Alec Stone Sweet, Leitner Professor of Law, Politics, and International Studies, Yale Law School, United States, was reporting on "Arbitration and judicialization". He explained arbitration as a triadic dispute resolution. The triad is comprised of two disputants and the dispute resolver. From his point of view organizational forms of triadic dispute resolution include meditation and arbitration as well as adjudication. He presented two models of arbitration. In the first model the arbitrator is a creature of the contractual relationship, an agent of the parties. This model is based upon the idea of the autonomy of the parties. They can choose their own law, triadic dispute resolution procedures and the "judges". In the second model the arbitrator is not just an agent of the contracting parties, but also – in some meaningful sense – an agent of the transnational commercial and investment community. In this context norm interpretation and reason-giving occur, but the "law" that is "made" may have prospective and general effects. *Stone Sweet* exemplified that there is evidence that the latter model describes the current development of arbitration. Indicators are increasing rules of procedure in arbitration houses as well as the fact that arbitrators appear to be increasingly aware of their responsibilities to future disputants and to the system as a whole.

He defines "judicialization" as the process through which the disputant resolver develops authority not only over the disputants, but over the normative structure, i.e. over "society." "Judicialization" can also refer to the process through which a mode of triadic dispute resolution develops in "court-like" direction. There are several indicators of judicialization: arbitral tribunals are engaged in building a jurisprudence and in reason-giving by a precedent-based argumentation as well as the appearance of balancing and proportionality as techniques of TDR, to mention only some of them. As reasons for judicialization he mentioned amongst others the explosion in cross-border investment and trade and the fact that the more complex the disputes are, the more likely it is that lawyers will treat arbitration as they would adjudication.

Sir David Edward, former Judge of the Court of Justice of the European Communities and Professor Emeritus of the School of Law of the University of Edinburgh, United Kingdom, finally spoke about "The view of an arbitrator".

He was both focusing on mediation and on arbitration. He took up what we have already found out in discussing mediation: Law is a national matter as a consequence of that, cultural differences do matter. This can be illustrated by differences between the solution of disputes in common and in civil law countries. Above that religious and cultural differences can also be relevant.

Sir Edwards explained multiple reasons for ADR, such as the cost and the duration of the procedure, distrust to judges and to legal formalism and the absence of

publicity in ADR processes. In the end because of the fact, that courts procedure produce winners and losers: the willing to save one's face.

From *Sir Edwards* point of view, mediation is based upon an optimism towards human nature. Problems emerge when the settlement the parties found is against the law. Many questions in this context are unanswered: What if the mediator ignores the law? Where are the limits and what is permissible? To which extend is he allowed to ignore the law? What about penal consequences? What happens in the case of violation of the *Ordre Public*?

When focusing on arbitration he distinguished between national and international arbitration. He mentioned that arbitration in domestic disputes only is a true alternative dispute resolution. Compared to that in international disputes no judicial alternative exists. There are multifaceted problems in the context to arbitration. One major problem is the enforcement of the award. Another critical point is the compliance with the award. A prominent example could be Argentina. There were different awards in which Argentina was obliged to pay a certain amount, but in fact it hasn't fulfilled this obligation. Finally he threw up the same question he also discussed in the context of mediation: To what extent can the law be ignored in the arbitration process?

The discussion was mainly focusing on the question of the enforcement of the awards. In international arbitration the awards can be enforced under the New York Convention of 1958. It is sometimes easier to enforce an arbitration award in a foreign country than to enforce a judgment of a foreign court.

In the discussion it was also mentioned that there is a form of alternative dispute resolution at the ECHR. Art. 39 of the ECHR allows "friendly settlements". This means that at any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

So far we discussed the alternatives to judicial decision-making and their operational philosophy. Finally **Heike Jung**, Professor Emeritus of Penal Law of the University of the Saarland, Germany, was reassessing the role of lawyers. His topic was "The authority of lawyers in the dispute settling-market".

There is a dichotomy between democratic values and those of professionalization that can be observed already from the historical perspective: Lawyers have always been in the center of power, Lawyers have always been the interpreters of law, Lawyers are trained to understand and run the state and finally the jurist as a power person by professional standing.

Jung pointed out the powers of lawyers and what skills they have. They have at their disposal a valuable professional repertoire: such as fact finding procedures, analytical approach to cases, argumentative tradition and juridical rhetoric. Nevertheless there is dissatisfaction with the delivery by lawyers. That's why ADR was developed. However lawyers do also have the potential to reform and the ability to swallow other disciplines like mediation and other forms of ADR. In some meaningful sense, lawyers are handymen transgressing disciplines. Yet *Jung* also observed a loss of ground to specialists and generalists.

He concluded that after all there are still dichotomies which he names as participation vs. professionalization, monopoly vs. competition, tradition vs. change and overall competences vs. specialization. That's why we should keep an eye on the lawyers.

To put it all in a nutshell: During this session one could get the impression that in long terms we have to accept the existence of at least the two systems – ADR and

the traditional justice system – considering the fact that the ADR concepts seem to reinforce the existing systems and to contribute to their evolution. Here we also might find the answer that was also discussed in the session whether we should improve the existing system Rather than create a new one.

After all it seems we're on the right way – putting it in the words of Bankowsky- to overcome the barriers between those who administer the law and those who are being administered.