

The use of Dispute Boards in Europe

-Dispute Resolution in Germany-



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1. ADR in Germany

- Fairly long history of ADR in Germany to resolve commercial disputes; in principle:
 - In 18th/19th Century already arbitration
 - Later also Conciliation (recommendation by a Third)
 - Mediation (settlement by negotiated agreement)
 - Expert Opinion (adjudication of special techno/ commercial dispute)
 - Ombudsman (or similar; standing "body"; organised by trade chambers etc. such as for insurances, banks, car repair shop, doctors etc.; for limited size problems only; comparable to "Office of Legal Complaints" in UK)



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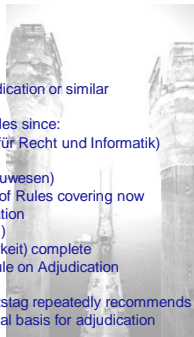
1. ADR in Germany (ff)

- In Germany strong demand on ADR as shown by scientific research in the industry, particularly by experienced experts
- German General Terms for Construction Works (VOB) mention ADR as general option but not specifically Adjudication
- At present known in the construction industry: mainly arbitration, mediation and Conciliation ("Stuttgart 21")
- Not really popular compared to about 70,000 new court cases a year related to building industry



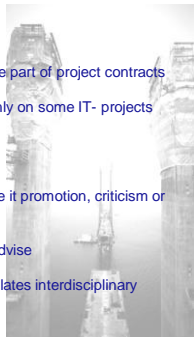
2. Adjudication in Germany 2.1 Use of DABs

- Since about 2004 various attempts to promote Adjudication or similar
- Various Organisations have developed their own Rules since:
 - First perhaps the DGRI (Deutsche Gesellschaft für Recht und Informatik) particularly for the IT- Industry
 - But also ASIB (Alternative Streitbeilegung im Bauwesen)
 - Deutsche Gesellschaft für Baurecht within a set of Rules covering now Mediation, Conciliation, Adjudication and Arbitration
 - Deutscher Anwaltsverein (Mediation/Conciliation)
 - DIS (Deutsche Institution für Schiedsgerichtsbarkeit) complete Conflict Management Concept including a module on Adjudication
- Above all these Institutions the Deutscher Baugerichtstag repeatedly recommends to German legislative bodies to establish specific legal basis for adjudication



2.1 Use of DABs (ff)

- Some Institutions claim that their Rules have become part of project contracts
- But have heard of procedure actually taking place only on some IT- projects and on two pilot project in the construction industry;
- I am chairman on one of them (I will revert to it later)
- All is very much influenced by the legal profession be it promotion, criticism or listing of potential members
- In the past due to law regarding inadmissible legal advise
- From above organisations only ASIB expressly stipulates interdisciplinary Panels



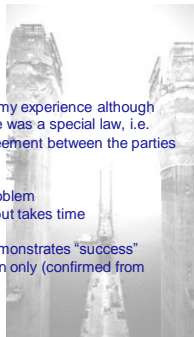
2.2 Frequently Raised Concerns

- An overview beyond details Mr. Halstenberg will discuss:
- Main alleged legal issues:
 - a) no particular law regarding Adjudication (based on party agreements)
 - b) no summary judgement i.e. decisions difficult to enforce
 - c) adjudication in conflict with Constitution and difficult to agree under consumer law on general business conditions (AGB) particularly if "binding"
- Other issues (management):
 - d) sufficient competent decider
 - e) education/ training and listing
 - f) formalities/ procedures



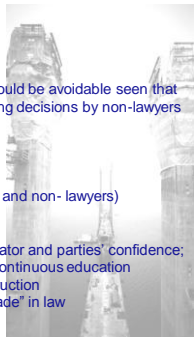
2.3 Some Answers

- Main alleged legal issues:
 - a) ...no particular law...
 - Internationally Adjudication did work to my experience although in none of the countries except UK there was a special law, i.e. adjudication always only by special agreement between the parties
 - b) i.e. ... difficult to enforce
 - enforceability should also not be true problem
 - first decisions can be enforced in court but takes time (Mahnverfahren, Urkundsprozess)
 - second own international experience demonstrates "success" in about 75% of cases if recommendation only (confirmed from US, where 80% success is reported)



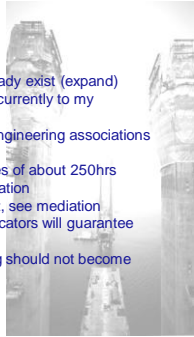
2.3 Some Answers (ff)

- c) ... adjudication in conflict with Constitution...
 - alleged conflict with Constitution and AGB should be avoidable seen that other concepts which may provide even binding decisions by non-lawyers (arbitration, expertise) are finally admissible
- Other issues:
 - d) ... sufficient competent decider
 - sufficient number to start, examples (lawyers and non-lawyers)
 - e) ... education/ training
 - first thing should be experience of the adjudicator and parties' confidence; on top it is good if he is able to demonstrate continuous education
 - lawyers often need some "upgrade" on construction engineers, commercials will often need "upgrade" in law



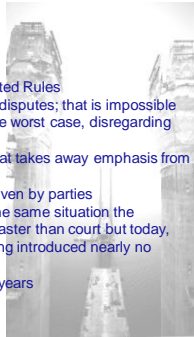
2.3 Some Answers (ff)

- e) ... education/ training (ff)
 - adequate courses for legal professionals already exist (expand)
 - adequate courses for non- legal in Germany currently to my knowledge only by:
 - VBI (FIDIC)
 - IFS and some other engineering associations (approximately)
 - some attempts to develop compulsory courses of about 250hrs to train adjudicators:
 - not needed, see arbitration
 - not promoting concept, see mediation
 - after a while also competition between adjudicators will guarantee quality
 - same with listing; good to have lists but listing should not become compulsory



2.3 Some Answers (ff)

- f) ... formalities/ procedures
 - one should also not overdo regarding sophisticated Rules
 - adjudication is to provide quickly a decisions on disputes; that is impossible with sophisticated procedural rules geared for the worst case, disregarding fall-back option in court
 - DRB requires some formalism; if too legalistic that takes away emphasis from underlying technical/ commercial issues
 - will loose advantage being fast and widely be driven by parties
 - by excessive rules adjudication will soon be in the same situation the arbitration concept is in today: started as being faster than court but today, after all the sophisticated procedural options being introduced nearly no difference in time and cost
 - last year have finished arbitration that took us 8 years



3. Some Final Thoughts

- Regarding non- lawyers essential to motivate sufficient number of people
- Back to the pilot projects in Germany and the one DAB, I am on: the DAB is one module only of a partnering concept
- Stimulating communication between parties from "day to day" via "value engineering" down to "dispute resolution"
- That seems to be a valuable concept, where DAB is a perfect tool
- ADR but particularly Adjudication are geared to resolve problems immediately forcing parties to compile records at times when knowledge is still available on site, not after completion of project
- With concerns in mind start with "party agreed" DB providing "recommendation"

