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The notarial function in avoiding disputes: Notarial advice and mediation as techniques

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Abbreviations

aaO	am angegebenen Ort = At the place quoted = loc cit.
AnwBl	Anwaltsblatt = Lawyers' Gazette
AG	Ausführungsgesetz = Implementing law
AGH	Anwaltsgerichtshof = Lawyers' court
BAFM	Bundes-Arbeitsgemeinschaft für Familienmediation = Federal Association for Family Mediation
BauR	Baurecht = Construction law/right
BB	Betriebs-Berater = Management consultant
BeurkG	Beurkundungsgesetz = Notarisation law
BGB	Bürgerliches Gesetzbuch = Civil Code
BGH	Bundesgerichtshof = Federal Supreme Court
BNotK	Bundesnotarkammer = Federal Association of Notaries
BNotK-SchiedsV	Empfehlung der Bundesnotarkammer für eine Schiedsvereinbarung mit Verfahrens- und Vergütungsvereinbarung = Recommendation of the Federal Association of Notaries for an Arbitration Agreement with Procedure and Remuneration Agreement
BNotO	Bundesnotarordnung = Federal Rules and Regulations for Notaries
BO	Berufsordnung für Rechtsanwälte = Professional Regulations for Lawyers
BRAO	Bundesrechtsanwaltsordnung = Federal Rules and Regulations for the German Bar
BRAGO	Bundesrechtsanwaltsgebührenordnung = Federal Lawyers' Fees Act
BVerfG	Bundesverfassungsgericht = Federal Constitutional Court
DB	Der Betrieb = The commercial concern
DNotV	Deutscher Notarverein = The German Association of Notaries
DNotZ	Deutsche Notar-Zeitschrift = The German Notaries' Journal
EGZPO	Einführungsgesetz zur Zivilprozessordnung = Introductory Law for the Code of Civil Procedure
EMRK	Europäische Menschenrechtskonvention = European Convention on Human Rights
FN	Fußnote = Footnote
FS	Festschrift = Commemorative publication
GBl.	Gesetzblatt = Law Gazette

GmbH	Gesellschaft mit beschränkter Haftung = Limited liability company
GmbHR	GmbH-Recht = Law on limited liability companies
GüteO	BNotK-Güteordnung = Federal Association of Notaries' Rules of Conciliation
GVBl.	Gesetz- und Verordnungs-Blatt = Law and Official Gazette
Hs	Halbsatz = Half-sentence
JGG	Jugendgerichtsgesetz = Juvenile Court Law
JurBüro	Juristisches Büro = Legal Office
KostO	Kostenordnung= The Regulations on Exparte Costs
MaBV	Makler und Bauträger-Verordnung = Brokers' and Developers' Rules and Regulations
MittBayNot	Mitteilungen des Bayerischen Notarvereins, der Notarkasse und der Landesnotarkammer Bayern = Communications from the Bavarian Association of Notaries, the Notaries' Fund and the Bavarian Land Association of Notaries
NJW	Neue Juristische Wochenschrift = New Legal Weekly Journal
Notar	Zeitschrift des Deutschen Notarvereins = Journal of the German Association of Notaries
Rdn.	Randnummer = Reference number
SGH	Schlichtungs- und Schiedsgerichtshof = Conciliation and Arbitration Court
Statut-SGH	Statut des Schlichtungs- und Schiedsgerichtshofes = Constitution of the Conciliation and Arbitration Court
StGB	Strafgesetzbuch = Penal Code
VOB/B	Verdingungsordnung für Bauleistungen, Teil B = The Standard Building Contract Terms, Part B
WM	Zeitschrift für Wirtschafts- und Bankrecht, Wertpapiermitteilungen IV = Journal for Commercial and Banking Law, Securities Bulletin IV
ZEV	Zeitschrift für Erbrecht und Vermögensnachfolge = Journal of Succession Law and Succession in Property Rights
ZGR	Zeitschrift für Gesellschaftsrecht = Journal of Company Law
ZIP	Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis = Journal of Commercial Law and Insolvency Practice
ZMK	Zeitschrift für Konfliktmanagement = Journal of Conflict Management

ZNotP	NotarPraxis Zeitschrift für die notariale Praxis = ‘Notarpraxis’, the Journal of Notarial Practice
ZPO	Zivilprozeßordnung = Code of Civil Procedure
ZPO-RG	Zivilprozess-Reformgesetz = Civil Procedure Reform Law

I. Introduction

1 The legal market has become very fluid.[1] Seen from a strategic standpoint – should German notaries do no more than meet their traditional commitments within the precautionary administration of the law (§§ 1 and 24, Paragraph. 1, Clause 1, Federal Rules[BnotO]), as regulated by statute (being commissioned[2] and notarisation), or should they make themselves available for new tasks that are not regulated by statute, which will not necessarily be simply tasks that make the administration of the law easier? Opinions are divided on the subject. Some see, in the broadening of tasks, an erosion of the profession of notary and fear it could lose its privileges.[3] Others, for their part, would prefer the notary's offer of service to remain attractive/have an attractive image. [4]

2 The number of legal disputes has diminished in Germany in the 'old' Federal Länder since 1992 and, in contrast, increased very considerably in the 'new' Federal Länder.[5] The conducting of legal proceedings has been made easier by legal expenses insurance[6] and companies that finance legal proceedings. As a consequence, court proceedings before state courts are taking longer, and so, solving of the problem causing the conflict is no longer central, in many instances, having been replaced by the problem of dealing

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1) Concerning the erosion of the monopoly on legal advice, *Kleine-Cosack* BB 2000, Issue 30 'Die erste Seite', ='The First Page'

2) See *Wagner* DNotZ 1998, 34*, 84* ff.: Certification of signatures (§ 20 Paragraph 1, Clause 1 BNotO), Carrying out drawing for redemption and drawing of lots for redemption of bonds (§ 20 Paragraph 1, Clause 2 BNotO), Acceptance of inventories of assets (§ 20 Paragraph 1, Clause 2 BNotO), Depositing and acceptance of seals (§ 20 Paragraph 1, Clause 2 BNotO), Acceptance of protests (§ 20 1, Clause 2 BNotO), Depositing of affidavits (§ 20 Paragraph 1, Clause 2 BNotO), Issuing of certificates concerning facts ascertained officially by the notary (§ 20 Paragraph 1, Clause 2 BNotO), Acceptance of conveyances (§ 20 Paragraph BNotO), Issuing of partial mortgages and partial charges (§ 20 Paragraph 2 BNotO), Execution of voluntary auctions (§ 20 Paragraph 3, Clause 1 BNotO), Negotiation of disputes concerning assets (§ 20 Paragraph 3, Clause 2 BNotO), Negotiation under the SachenRBerG (§ 20 Paragraph 4 BNotO), Negotiation of inheritance and estate disputes (§ 20 Paragraph 5 BNotO), Issuing of certificates in inheritance and estate disputes for purposes of the land register (§§ 20 Paragraph 5 BNotO, 36 GBO), Issuing of certificates for the registering of mortgage, land and annuity charges on land in cases of inheritance or estate disputes (§§ 20 Paragraph 5 BNotO, 37 GBO), Issuing of representation certificates (§ 21 BNotO), Acceptance of oaths and acceptance of affirmations under oath (§ 22 BNotO), Issuing of certificates concerning facts emanating from public registers, for other countries (§ 22 a BNotO), Acceptance of valuable objects for purposes of safeguarding or delivery (§ 23 BNotO), commissioning of participants, notably by the drawing up of draft deeds and consultation or representation before courts and administrative authorities (§ 24 Paragraph 1 BNotO), Keeping deeds in safe custody (§ 25 BNotO).

3) *Hoffmann-Riem* ZNotP 1999, 345

4) *Wagner* ZNotP 2000, 18

5) For statistics, see *Strempel* in: Gottwald/Strempel/Beckedorff/Linke**,** Außergerichtliche Streitregelung für Rechtsanwälte und Notare = The Extrajudicial Resolution of Conflicts for Lawyers and Notaries, 2.2.1 page 2; *Kirchof* BRAK-Mitt. 2000, 14, 15

6) *Riehl* in: Gottwald/Strempel/Beckedorff/Linke**,** Außergerichtliche Streitregelung für Rechtsanwälte and Notare, 2.1.5 = Extrajudicial Resolution of Conflict for Lawyers and Notaries, 2.1.5

with the resulting commitments (court costs, lawyers' fees, interest, the need to set up balance sheet reserves etc.). To this we might add legal disputes dealt with without becoming judicial disputes (e.g. retention rights, set-offs, the calling in of additional security if there is the threat of a challenge from business contacts etc.) and for which it is not always expedient to appeal to the courts. Thus there are many grounds for concerning oneself with what means can be used, as prevention, in an attempt to avoid legal – not merely judicial - disputes. This leads us to the following central questions:

3 - What opportunities for prevention exist that can be used to avoid legal/judicial disputes?

- Who is there that is up-to-date, independent and impartial, and whose fees are not prohibitive?
- How can these opportunities and institutions be made effective for the general public?

4 However, conflict has a cause, and that is the existence of clashes of interests that develop. If we want to avoid conflict it is worth going back one stage. This stage has already been reached if clashes of interests are present that need not have caused conflict yet.

Therefore, what follows will show how notaries can contribute to the balancing of the interests of participants through, on the one hand, the *avoidance of conflict* and, on the other, the *resolution of conflicts*.

II. First Principles

1. Essential aspects and practical objectives involved in the subject in the national context

1.1 Concepts

1.1.1 The giving of advice[/consultation]

5 We must distinguish between the partial and impartial giving of advice and, in doing so, we shall discover the difference between advice from lawyers and from notaries. The *lawyer* is, inter alia, his client's adviser, and thus a *partial* adviser (§ 1 Paragraph 3 Professional Regulations[BNotO]). He is not permitted to advise the other party in the same legal case as well (§ 3 BNotO). The *notary*, on the other hand, 'is not the representative of one of the parties, but .... an *impartial* person commissioned by the participants' (Plural - § 14, Paragraph 1 Clause 2 Federal Rules[BNotO]). The impartial 'advising of the

participants' falls within the scope of his official duties (§ 24 Paragraph 1, Clause 1 BNotO). Therefore, a lawyer must make clear to the participants in good time before he starts advising them, whether he is acting as a lawyer or a notary.[7)]

6 Therefore, it is permissible for persons or commercial concerns to arrange to receive advice together, with regard to their clashes of interests, for the purpose of avoiding conflict, by the notary who is obliged to remain impartial. However, if persons or commercial concerns arrange to receive advice together, with regard to their clashes of interests, for the purpose of avoiding conflict, by the lawyer of one of the participants, that lawyer would be violating his professional obligations on account of conflicting interests (§ 3 BNotO).

7 Whereas partial advice is thus provided for one side, impartial advice is also capable of being provided for participants with clashes of interests, as well. Notaries, as officially impartial persons, are thus authorised to advise persons or commercial concerns with clashes of interests impartially. Therefore, in §§ 14 Paragraph 1, Clause 2, 24 Paragraph, Clause 1 BNotO, it is also a matter of advising more than one participant, impartially.

8 Impartial advice is able to be provided in the initial stages of conflicts, for example, if participants with clashes of interests were to allow themselves to be advised by a notary as to how objective the legal situation is and/or what their prospects and the risks involved are.[8)] Such advice may be given verbally or in writing, for example, in the form of an expert's report, and it may even end with a plan or a draft contract/the conclusion of a contract.[9)] Impartial advice is thus suited to both the *avoidance* of conflict and the extrajudicial and even judicial *resolution* of conflicts.

9 Advice from notaries is thus extremely appropriate for conflict-*avoiding* and conflict-*resolving* outcomes.

1.1.2 Mediation

10 This can be a marketing concept, a generic concept or a notion.

11 *Marketing concept*

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7) Guideline recommendation in *BNotK* I. 3.

8) *Wagner* ZNotP 2000, 214, 217

9) *Wagner* ZNotP 2000, 214, 217

Outside specialist groups, e.g. in the media, the concept of mediation is used as a 'buzz word' for any type of extrajudicial conflict *resolution*. However, the idea of conflict *avoidance* is not present especially, with the result that the concept of mediation is not associated with it.

12 *Generic concept*

If mediation is used as a synonym for any type of extrajudicial conflict resolution, this is a generic concept. Moreover, in addition to mediation, the following could be said to fall within it as a notion: giving advice, [10] co-operative negotiation/instrumentality,[11] conciliation,[12] notarial deeds[13] and the contractual elimination of conflict and compromise.[14] The generic concept consequently includes various scenarios that relate, on the one hand, to the *avoidance* of conflict and, on the other hand, to the *resolution* of conflicts.

13 *Notion*

For mediation as a notion, there are a large number of definitions. Fundamentally it is characterised by the calling in of a neutral person who acts as an agent in conflicts involving two or more parities without his being authorised to make a decision. Thus, it is an extrajudicial, voluntary conflict management procedure in which parties to a conflict reach joint decisions in relation to the others, with the support of a neutral third party without decision-making authorisation as to the content (the mediator). Where possible, the latter decisions incorporate the interests of the participants, are directed towards the creation of value and are based on understanding of oneself and the other person, and their view of reality as relevant'.[15]

14 However, it is only c*onflict mediation* that is addressed here, that concerns itself with the balancing of the interests in a conflict that has already arisen. As a 'neutral third party' the notary, who is officially impartial, is also suited to this function.

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10) *Wagner* ZNotP 1998, Appendix 1, page 8

11) *Wagner* ZNotP 1998, Appendix 1, page 9

12) *Wagner* ZNotP 1998, Appendix 1, page 10

13) *Wagner* ZNotP 1998, Appendix 1, page 12

14) *Wagner* ZNotP 1998, Appendix 1, page 12

15) *Mädler/Mädler* in: Breidenbach/Henssler, Mediation für Juristen, = Mediation for Lawyers, page 13, 15

15 Instead, however, it is also conceivable that the participants are seeking a balancing of interests on the basis of clashes of interests, without a conflicting situation or dispute already having arisen:

16 - It has already been shown above that, possibly, mere impartial *advising* of the participants by the notary may enable them to balance their interests by agreement amongst themselves.

17 - Another option is to undertake a mediation process, as early as at the stage of clashes of interests that are present – without a conflict situation – with the assistance of a notary. The aim of this mediation would be to establish the balancing of interests agreed by the participants in a notarial deed. This is called *contractual mediation*.[16)]

18 If the notarial mediation (conflict or contractual mediation) ends in a final agreement that is notarised, the aim of the mediation is not the notarial deed, but the balancing of the participants' interests, regardless of whether this is recorded later in a notarised or hand-written final agreement, or not. Nor is it thus the notarial deed that is a starting point for pre-court elimination of conflict, but the notarial commissioning or advice under § 24 Paragraph 1, Clause 1 BNotO.[17)] The legal basis of notarial mediation is thus not the Notarisation law[BeUrkG], but § 24 Paragraph 1, Clause 1 BNotO. The BeUrkG is, as the legal basis of notarial mediation, only relevant insofar as the final agreement is notarised, with the result that notarial advice and instruction duties under § 17 Paragraphs 1 and 2 BeUrkG only relate to this *notarising* process.

1.2 Essential elements

19 Advice that avoids and resolves conflict and mediation that strives to reach a balancing of interests where there are clashes of interests (whether as a generic concept or notion), are determined by

- the *impartiality* of the adviser and also the mediator,
- the *result* of the *process* of advising and mediation being *open* and

16) This concept goes back to *Walz*, on the occasion of a lecture given to the Committee on the Extrajudicial Resolution of Conflict in the BNotK on 28.08.2000.

17) *Wagner* DNotZ 1998, 34*, 93*

- the *provision of assistance* with the *forming of their opinions*, to the participants, who are endeavouring to achieve the balancing of their interests by reason of clashes of interests.

1.3 Practical significance of the subject in the national context

20 According to our understanding of the law hitherto, advice given by notaries must be understood as advice that, in the first instance, is conducted in connection with the commissioning of a notary or notarisation by him (§ 24 Paragraph 1, Clause 1 BNotO or § 17 Paragraphs 1 and 2 BeUrkG). What is not regarded as such is the options of a reversed sequence, i.e. independent, impartial advice from a notary (verbally or in writing), which notarising can follow as an outcome, although it need not do so.[18)] A change like this is accompanied by an answer to the question as to whether the professional image of the work of a notary to be conveyed to the public who are under the law should be characterised exclusively as that of official duties or, additionally, by services.[19)] In the latter case it is natural that the public who are under the law should be informed about the range of services offered by notaries and made aware that the preventative avoidance of conflict and resolution of conflicts by *notaries* demonstrate a large number of advantages – which have yet to be described- as against offers of services from other professional sectors, on the one hand, and state offers of services on the other. The case law of the Federal Constitutional Court[20)] concerning the admissibility of information given by notaries in terms of effectiveness amongst the public (whether with or without the effect of publicity) and the legal position brought into line with it (§ 29 Paragraph 1 BNotO and VII. 1.1 of the guideline recommendation of the BNotK) have taken this into account.

21 The profession of notary in Germany has now addressed this subject through the Federal Association of Notaries (*BNotK*), and at least a new professional sphere of work for notaries was the conclusion.[21)] At the 1998 Symposium of German Notaries[22)], the subject of the opening lecture was ‘Relieving the Administration of Law by Notarial Work – An

18) In this matter, *Wagner* DNotZ 1998, 34*, 94* f.; *Wagner* ZNotP 2000, 214, 217

19) *Wagner* ZNotP 2000, 214

20) BVerfG 24.07.1997 - 1 BvR 1863/96, DNotZ 1998, 69; see also *Jaeger*AnwBl = Lawyers’ Gazette 2000, 475

21) *Wagner* in: Büchner, Außergerichtliche Streitbeilegung, = The Extrajudicial Resolution of Conflict, page LVI

22) 10.-13.06.1998 in Münster

Overview and Perspectives', i.e. 'Entlastung der Rechtspflege durch notariale Tätigkeit – Bestandsaufnahme und Perspektiven'.[23)] For the extrajudicial resolution of conflicts by notaries, the Federal Association of Notaries[*BNotK*] presented procedure regulations, which are termed the 'Rules of Conciliation'.[24)] And for arbitration procedures conducted by notaries as arbitrators they published a 'Recommendation for an Arbitration Agreement with Procedure and Remuneration Agreement' = 'Empfehlung für eine Schiedsvereinbarung mit Verfahrens- und Vergütungsvereinbarung',[25)] which is being introduced through an agreement phase.[26)] Even the German Association of Notaries – a special interest group for those working solely as notaries in Germany – has broached this subject and, by means of a limited liability company set up for that purpose under private law, initiated the establishment of a 'Conciliation and Arbitration Court of German Notaries (SGH)'.[27)]

22 In Germany, the notary may work in preventative conflict avoidance and the preventative resolution of conflicts in different functions.

23 - The notary may work in his official capacity as a notary.

24 - He may, indeed, work as a notary in the capacity described above but, at the same time, as a conciliation office recognised by the relevant Land Administration of Justice (§ 794 Paragraph 1, No. 1, Code of Civil Procedure [ZPO]), if he has received recognition as a conciliation office for the areas of law he has named, in response to his application, from a Land Administration of Justice office that is competent for him. In Bavaria, on the basis of the Bavarian Conciliation Law, all notaries are state recognised conciliation offices by law, for all areas of the law.[28)]

25 The law combines the following advantages with the function of the notary as a conciliation office recognised by the Land Administration of Justice or by statute:

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23) *Wagner* DNotZ 1998, 34*

24) *BNotK* DNotZ 2000, 1; in this matter *Wagner* ZNotP 2000, 18

25) *BNotK* DNotZ 2000, 401; in this matter *Wagner* DNotZ 2000, 421

26) Empfehlung der *BNotK* für eine Arbitrationvereinbarung mit procedures- and Vergütungsvereinbarung, DNotZ 2000, 401, in this publication, I. § 6 (op.cit., page 405) = Recommendation for an Arbitration Agreement with procedure and Compensation Agreement

27) In this matter: Constitution in: note 4 ´99, page 124; *Wolfsteiner* note 4 ´99, page 115; *Wegmann* note 4 ´99, page 122;

28) *Birnstiel* MittBayNot 2000, Sonderheft 'Schlichtung und Mediation', the Pamphlet 'Conciliation and Mediation', page 8, 14; *Heßler* MittBayNot 2000, Sonderheft 'Schlichtung und Mediation', the Pamphlet Conciliation and Mediation page 2, 4;

- In accordance with § 794 Paragraph 1, No. 1 of the Code of Civil Procedure [ZPO], compromises may be reached before the notary acting in this capacity between parties and third parties (not necessarily in notarised form) for the resolution of a legal dispute or a part of the subject-matter of the dispute, which are capable of enforcement.[29] This is thus a particular form of extrajudicial resolution of conflicts using an execution deed from the notary acting as a conciliation office during a legal dispute. This may be preceded by advice by the notary or mediation – quasi in parallel to the legal dispute.

26 - An application for conciliation may be submitted to a notary acting as a conciliation office recognised by the Land Administration of Justice or on the basis of the statutes as understood in § 794 Paragraph 1, No. 1 of the Code of Civil Procedure [ZPO], which interrupts limitation (§ 209 Paragraph 2, Item 1a. of the Civil Code [BGB]). This interruption of limitation lasts until the end of the conciliation procedure introduced in this way or its transfer to legal proceedings directly afterwards until its end (§ 212a Civil Code [BGB]). The Rules of Conciliation of the Federal Association of Notaries assume a conciliation procedure of this nature.[30] In terms of its content a conciliation procedure of this nature can have all the components in its subject-matter that were described previously in the mediation procedure as a generic concept.

27 - On 01.01.2000, § 15a of the EU Code of Civil Procedure [EGZPO] came into force.[31] Thus the Federal legislature empowered the Land legislatures, in disputes with a disputed value of up to DM 1,500.--, and disputes concerning neighbours, to determine that the filing of the action before the civil courts is not permissible until an attempt has first been made to resolve the dispute amicably before a conciliation office. The Land legislatures are now using this option in appropriate Land laws as implementing laws.[32] There, it is also provided for notaries to be conciliation offices. How the amicable resolution can be attempted before such an office is not prescribed, with the result that here, too, a conciliation of this nature can have substantially all the compo-

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29) Over and above § 794 Paragraph 1 No. 5 of the Code of Civil Procedure [ZPO], which requires recording in a notarial deed, a compromise of this nature may also have the purpose of the depositing of statements of intent and relate to the existence of residential tenancies

30) *BNotK* DNotZ 2000, 1

31) In this matter, *Karliczek* ZMK 2000, 111; *Stoecker* ZMK 2000, 105

32) *Baden-Württemberg*: 'Law concerning Compulsory Extrajudicial Conciliation in Cases of Conflict ...' of 28.06.2000, GBl. = Legal Gazette of 30.06.2000, page 470; *North Rhine-Westphalia*: AG § 15a EU Code of Civil procedure [ZPO] of 09.05.2000 Legal and Order Gazette of 06.06.2000, page 476;

nents in its subject-matter that were described previously in the mediation procedure as a generic concept.

28 Thus it is clear that the preventative *avoidance* of conflict by notaries, for example, by means of the advising of the participants, is permissible, but that these opportunities have not made much of an impression on the public consciousness – even amongst notaries, themselves. For the preventative *resolution* of conflicts for the purpose of avoiding judicial disputes, or in parallel for the purpose of resolving the same (the prevention then relates to the avoidance of a court *decision*), the statutory basis has been present for a long time now, but it has hitherto hardly been used – even by the notarial profession. Preventative avoidance of conflict and the preventative resolution of conflicts by notaries, as an inexpensive, quicker and more satisfactory option as against state jurisdiction is not yet a sufficiently well recognised alternative in Germany either amongst the public who come under the law and amongst the notarial profession, itself. The Federal Association of Notaries and the German Association of Notaries are currently in the process of counteracting this situation in the following manner:

29 - With the Rules of Conciliation drafted by the Federal Association of Notaries[33)] and the Recommendation for an Arbitration Agreement with a Procedure and Remuneration Agreement for ad hoc arbitration courts of notaries[34)] and the 'Conciliation and Arbitration Court of German Notaries' set up by the Association of German Notaries[35)] - each with a built-in agreement phase that must come first – the notarial profession has been given the *instruments*, taking into account their own professional law and the necessary procedure law, to be able to conduct preventative *avoidance* of conflict and *resolution* of conflicts. The profession has been informed about this in publications.

30 - the special features *in terms of content* of advice by notaries, on the one hand, and mediation by notaries, on the other, – in each case bearing in mind the professional law of notaries – have also been elaborated and presented to the profession.

31 - From this we glean a picture of notaries who are interested or – as in Bavaria – obliged to operate this, whereby the above content requirements of notarial advice and

33) *BNotK* DNotZ 2000, 1

34) *BNotK* DNotZ 2000, 421

35) note 4 ´99

mediation (as a generic concept and thus including mediation as a notion) are inextricably linked with the instruments made available for this purpose.

32 - This is concluded with appropriate public relations work (marketing related to the profession), whereby the intention is to make known to the general public what options are being offered within the notarial profession as an alternative to judicial disputes in the areas of

33 ⏩ preventative avoidance of conflict,

⏩ preventative resolution of conflicts and

⏩ arbitration jurisdiction on the part of notaries.

2. The contribution of the notary in arbitration and other extrajudicial work with a view to solving conflict

34 Under § 8 Paragraph 4 of the BNotO, notaries are allowed to act as arbitrators. This is not an official function, but an ancillary activity for which authorisation is not required.[36)]

35 In the light of increasingly long civil law proceedings before German state courts, in addition to the subjects of the *avoidance* of conflict and the *resolution* of conflicts, the Federal Association of Notaries has also addressed the subject of the *settlement* of disputes. It has issued a Recommendation for an Arbitration Agreement with a Procedure and Remuneration Agreement for notaries.[37)] The 'Conciliation and Arbitration Court of German Notaries (SGH)' is aiming at the same objective. Thus, the notarial profession in Germany is offering the following service, as an alternative to state jurisdiction, ranging from the avoidance of conflict, through the resolution of conflicts to decisions in disputes:

36 *Avoidance of conflict and advice by notaries/deed*

For purposes of the *avoidance of conflict,* parties may avail themselves of the advice of an officially impartial, skilled notary who has been called in in advance, whom they have chosen jointly, and/or minimise risk in advance in notarised contracts, articles of asso-

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36) *Baumann* in: Eylmann/Vaasen, BNotO and BeurkG, 2000, § 8 BNotO Ref. no. 23; *Reithmann* in: Schippel, BNotO, 7th edition 2000, § 24 Ref. no. 21; *Wagner* ZNotP 2000, 18, 21 (for the fact that this can also be regarded differently, see *Wagner* op.cit page 21 f.); *Wagner* DNotZ 2000, 412, 422

37) *BNotK* DNotZ 2000, 401; in this matter *Wagner* DNotZ 2000, 421

ciation and other agreements. The latter is achieved by notarial declaration of the facts of the matter and the intentions of the participants, as well as a recapitulation of the intentions of the participants unequivocally, by means of the drafting of agreements appropriate to the commission, of a specific and legally admissible nature, by means of the comprehensive, balanced drafting of contracts in conformity with the parties' interests, and through the evidence of the deed.

37 *Avoidance of conflict/resolution of conflicts and rules of conciliation for notaries*

For purposes of the *resolution of conflicts* parties may have established in advance, in notarised contracts, articles of association and other agreements, but also ad hoc, if they call in a skilled notary whom they have chosen jointly, with his assistance, which conflict solving mechanisms should be employed if conflicts arise, and who should manage them.. The parties may 'submit' to an extrajudicial/judicial resolution of a conflict that has been agreed in advance with the notary's help whereby, with the notarial Rules of Conciliation, rules of procedure order are also issued.[38)] Compromises or final agreements in extrajudicial conflict avoidance or arbitration proceedings may be notarised and given a notarial enforcement submission clause in order to guarantee what has been agreed.

38 *Decisions in conflicts and notarial arbitration*

For purposes of *decisions in conflicts*, parties may avoid a decision in a conflict in advance in notarised contracts, articles of association and other agreements, to the exclusion of the state jurisdiction, having called in a skilled notary whom they have chosen jointly, with whose assistance they set down how conflicts may be resolved by a notarial arbitration court, if the above measures have not been sufficient to avoid a decision in the conflict. With the Arbitration Agreement, Procedure Agreement and Cost Agreement proposed by the *BNotK*, on the one hand, and the cases of the arbitration court[SGH] on the other, the participants do not need to organise an arbitration procedure.

39 Parties involved in a pending arbitration procedure may ensure, in the manner described, that one or more notarial arbitrators, who are competent to deal with the area in which the subject of the dispute falls, decide their case without having to desist from calling upon the support of their own lawyers. There are no obstacles caused by questions of competence and, instead of having to make an effort to commission, for example, expensive

38) *BNotK* DNotZ 2000, 1

experts before initiating the legal proceedings before the state courts, in such arbitration procedures the person involved can be called in as an arbitrator instead of as an expert.

40 Apart from the arbitrator's or arbitration court's guaranteeing of competence, the advantage of confidentiality in arbitration hearings comes into play. The reason is this: In contrast to the public aspect of verbal hearings in legal proceedings in state jurisdiction, in the notarial arbitration procedure the public is excluded. Moreover, in contrast to state jurisdiction, long and time-consuming and expensive sequences of hearings are avoided.

41 This recommendation by the Federal Association of Notaries presupposes a notarial one-person arbitration court as an ad hoc arbitration court. In parallel to this, the German Association of Notaries has set up a Conciliation and Arbitration Court (SGH) via its service company, DNotV GmbH, as an institutional arbitration court with procedure and remuneration rules that are comparable to the recommendation of the Federal Association of Notaries.[39)]

42 In addition to advice by notaries and mediation (as a notion) on the one hand, and notarial arbitration jurisdiction, on the other, as other extrajudicial procedures that can (also) be carried out by notaries, [sic]are available for the resolution of conflicts, such as have already been mentioned above[40)] under the concept of mediation as a generic concept: Co-operative(s) negotiation/instrumentality,[41)] conciliation,[42)] notarial deed[43)] and the contractual elimination of conflicts and compromise.[44)]

3. National developments necessitating the resolution of conflicts

43 In the Civil Procedure Reform Law (ZPO-RG)[45)], in § 278 ZPO-E it is provided, for the oral hearing before civil courts, that a conciliation hearing must always be the basis for the amicable resolution of legal disputes, except in cases in which an agreement that might settle the dispute appears to be impossible. Something comparable is provided for in § 6 of the Recommendation of the German Association of Notaries (*BnotK)* for an

39) See above Ref. no. 21

40) See above Ref. no. 13 – 18

41) *Wagner* ZNotP 1998, Appendix 1, page 9

42) *Wagner* ZNotP 1998, Appendix 1 Seite 10

43) *Wagner* ZNotP 1998, Appendix 1, page 12

44) *Wagner* ZNotP 1998, Appendix 1, page 12

45) BT-Drucks. 14/3750 = NJW 2000, Appendix to Book 40

Arbitration Agreement with Procedure and Remuneration Agreement[46] and § 21 of the Constitution of the Conciliation and Arbitration Court of German Notaries (*SGH*)[47]. If, as a consequence, a conciliation hearing is part of the initial components of the legal proceedings, it is implied not only that the *decision* of a state court or a notarial arbitration court is to be avoided, but also its very *being called upon*. This can thus occur because attempts are already being made to resolve the conflict extrajudicially before calling upon a court. This is why the Federal Association of Notaries (*BNotK)* has given notaries a basis for procedures, the Rules of Conciliation.[48] How this extrajudicial resolution of conflicts can be initiated by notaries has been explained elsewhere[49] and is clarified still further in what follows.

44 Whereas the above shows why, for purposes of avoiding *calling upon* courts or why the *decision* can be sensible or necessary on the part of the courts *from the point of view of procedure law*, to conduct conciliation hearings, in the Federal Supreme Court case law the first cases have been decided whereby the obligation to have hearings is a duty of *substantive law*, rather, for example, than contractual announcements having to be pronounced:

Thus, for example, the VIIth Civil Senate of the Federal Supreme Court, that is competent for construction law, made the following guideline pronouncement in its decision of 23.05.1996[50]:

´The construction contract, as a long-term contract, requires the co-operation of both contracting parties. It brings with it obligations and duties of disclosure, co-operation and objection.'

This declaration related to construction contracts in general, and thus also to the developer's contract, and it was not restricted to a construction contract agreed with the Standard Building Contract Terms [VOB/B].[51] The Federal Supreme Court has recently con-

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46) *BNotK* DNotZ 2000, 401, 405

47) note 4 ´99, page 124, 128

48) *BNotK* 2000, 1

49) *Wagner* ZNotP 1998, Appendix 1; *Wagner* DNotZ 1998, 34*, 76* ff.; *Wagner* ZNotP 1999, 22; *Wagner* ZNotP 2000, 18

50) BGH 23.05.1996 – VII ZR 245/94, BGHZ 133, 44, 47

51) *Kniffka/Koeble*, Compendium of Construction Law, 6th Part, Ref. No. 329 talk about the duty of co-operation in the Civil Code working contract.

firmed this pronouncement, when it stated, in the matter of a construction contract in which the Standard Building Contract Terms were agreed:

Following the case law of the Federal Supreme Court, the contracting parties of a Standard Building Contract Terms contract are obliged to co-operate during the execution of the contract. From the relationship of co-operation there emanate obligations and duties to co-operate and give information mutually (Federal Supreme Court, judgement of 23rd May, 1996 - VII ZR 245/94, Federal Supreme Court Journal, 133, 44, 47).

The duties of co-operation should, inter alia, guarantee that, in cases in which one or other of the parties thinks the execution of the contract as provided for contractually, or its content should be adapted to the circumstances of fact that have changed, differences of opinion or conflicts that arise should be resolved amicably if possible (Nicklisch/Weick, VOB, 2nd Edition, § 2 Ref. 6). They have found expression in the Standard Building Contract Terms and, notably, in the provisions of § 2 No. 5 and No. 6. Accordingly agreement should be reached concerning remuneration should be decided upon for any altered or additional services before execution. These provisions should hold the parties to solving the critical remuneration questions early on and thus to avoiding conflicts subsequently.

If, during the execution of the contract, differences of opinion arise concerning the need or the type of an alteration, each party is bound, fundamentally, to attempt to reach clarification and an amicable solution by negotiation. The obligation does not then rest with one of the parties as an exception if, in an actual situation of conflict, the other party definitively refuses with insistence to be willing to contribute to an amicable resolution.[52)]

45 The Federal Supreme Court [BGH] operates, with the declaration concerning the co-operation relationship of the construction contract parties and the obligation to negotiate that emanates from it, a duty in *substantive law* on the part of the contracting parties, if they do not want to avoid disadvantages in law. This thus starts considerably earlier than the *commercial* resolution of conflicts in the pre-court sphere (e.g. on the basis of the Rules of Conciliation) or the introduction of *judicial* proceedings by means of a conciliation negotiation. To be able to meet this negotiation obligation under substantive law, the following systems are significant, in which notaries, e.g. in a developer's contract, can assist by notarising and being commissioned; this is because to this negotiation obliga-

52) Federal Supreme Court [BGH] 28.10.1999 - VII ZR 393/98, NJW 2000, 807, 808

tion in substantive law is related, in the notarising of a developer's contract, the notary's obligation to instruct (§ 17 of the Notarisation Law [BeUrkG]), which he should note in the deed:[53)]

46 - As early on as in the developer's contract the 'rules of the game' should be described, as to what the contracting parties with incipient clashes of interests (whether with or without conflict) should do in order to reach a balancing of interests.

- If these 'rules of the game' have not been provided for in the developer's contract because the contracting parties, despite being instructed appropriately by the notary (§ 17 BeUrkG)[54)] have not been able to reach agreement in the matter, the contracting parties should, in any case, at least provide for what is termed a 'mediation clause'.

- And if the contracting parties, despite being instructed appropriately by the notary, cannot reach an agreement in the matter even then[55)] they should, at any rate when clashes of interests arise that could lead to conflict, be aware of the case law of the Federal Supreme Court as quoted above.

- Finally, it is also sensible, regardless of whether the duties imposed by the Federal Supreme Court in one way or another should be a constituent part of the developer's contract – even if this only takes the form of an instruction note by the notary, for the contracting parties to agree upon an independent and impartial person who is available to them as moderator for such negotiations. The notary is also especially suited to this, as he is subject to the official obligation of independence and impartiality (§ 14 Paragraph 1, Clause 1 BNotO).

47 In what has been discussed hitherto, it was a matter of a 'construction contract as a long-term contract' which postulated conflict-resolving negotiation obligations for the contracting parties, on the basis of the duty of co-operation imposed by case law. It is implied that something comparable could also be decided by case law for other long-term

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53) See a early as in *Wagner* BB 1997, 1997, 53, 55 f.; *Wagner* In: FS for Vygen, 1999, page 441 = ZNotP 1999, 22; *Wagner* ZNotP 2000, 214, 218

54) The notary should note this information straight away in the deed to protect himself

55) The notary should note this information straight away in the deed to protect himself

contracts as well, (for example, memoranda of association[56]). Then, however, pre-court negotiation and attempting to achieve a resolution of the conflict are not only a sensible consideration in commercial terms on a voluntary level, but also a compulsory duty in substantive law, if contracting parties do not want to suffer disadvantages under the law. The notarial profession can/must then contribute in the following way:

- Wherever contracts have to be notarised because of statutory prescriptions, or on the basis of a voluntary decision by the participants, the notary must respond to this development in the law in the formulation, in terms of content, of what is being notarised by him. And it is recommended, as early on as in the notarial deed, to provide for the way in which the participants should deal with clashes of interests/conflicts that arise, and who should be available to them to assist impartially.
- The notary can also be available for the execution of negotiations held by the parties that avoid/resolve conflicts in the manner to be described in what follows, as an independent and impartial official.
- And the notary can then also be available to notarise a final agreement, such agreement setting down and guaranteeing the outcome of these negotiations that avoid/resolve conflicts.

III. Special research

1. Advice

1.1 National legislation and procedures in the area of advice

48 Advising participants impartially (§ 24 Paragraph 1, Clause 1 BNotO) is also part of the official function of the notary within the scope of the administration of justice that is precautionary (§ 1 BNotO). Here, the following distinctions must be made:

49 - that the notary is obliged to give advice in the notarising process under § 17 Paragraph 1 BeUrkG and in other types of work for which he is commissioned under § 24 Paragraph 1, Clause 1 BNotO.

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56) The co-operation obligation in company law is there as a violation of the duty of loyalty where, for example, in the passing of a resolution, a shareholder misuses his rights and refuses agreement: Federal Supreme Court [BGH] 26.10.1983 - II ZR 87/83, BGHZ 88, 320; BGH 23.09.1991 - II ZR 189/90, WM 1991, 1951; BGH 20.03.1995 - II ZR 205/94, BGHZ 129, 136

50 - Independently of this the notary can, commissioned by the participants,[57] give independent, strategic advice to them under § 24 Paragraph 1, Clause 1 BNotO, regardless of whether this is with 'open instruction to notarise'[58] or without notarisation ensuing from this.[59] A legal announcement[60] and the drawing up of a legal expert's report,[61] according to case law[62] can fall within this, but not an advice contract of the notary in private law, since notarial advice work is an official function.

51 Preventative giving of advice that avoids conflict, what is termed by *Reithmann*[63] 'balancing advice', is a matter of independent advising by the notary as an official function falling within § 24 Paragraph 1, Clause 1 BNotO.[64] This form of giving advice can, however, have as its subject-matter commercial issues in addition to legal issues.[65]

1.2 The individual forms of advice, and advice work and functions, paying special attention to the function of preventing conflict

52 From *Reithmann*[66] emanates the concept of the 'balancing advice' afforded by notaries. What he understands by this, apart from mediation as a generic concept, is all the other options listed for preventative avoidance of conflict and resolution of conflicts that fall within mediation as a generic concept, which he also allocates to advice as understood in § 24 Paragraph 1, Clause 1 BNotO. The differences can be seen in what follows:

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57) BGH 5. 11. 1992 - IX ZR 260/91, DNotZ 1993, 459; *Reithmann* in. Schippel, BNotO, § 24 Ref. No. 14; *Sandkühler* in: Arndt/Lerch/Sandkühler, Bundesnotarordnung = Federal Rules concerning Notaries , § 24 Ref. No. 20

58) Federal Supreme Court [BGH] 05.11.1992 - IX ZR 260/91, DNotZ 1993, 459; BGH 18.01.1996 - IX ZR 81/95, NJW 1996, 1675

59) *Hertel* in: Eylmann/Vaasen, BNotO and BeurkG, § 24 BNotO Ref. No. 13; *Reithmann* in. Schippel, BNotO, § 24 Ref. No. 16

60) *Sandkühler* in: Arndt/Lerch/Sandkühler, Federal Rules concerning Notaries = Bundesnotarordnung, § 24 Ref. No. 24

61) *Hertel* in: Eylmann/Vaasen, BNotO and BeurkG, § 24 BNotO Ref. No. 17; *Sandkühler* in: Arndt/Lerch/Sandkühler, Federal Rules and Regulations for Notaries, § 24 Ref. No. 20

62) Federal Supreme Court [BGH] 20.11.1979 - VI ZR 248/77, Federal Supreme Court Journal [BGHZ] 76, 9,11; *Hertel* in: Eylmann/Vaasen, BNotO and BeurkG, § 24 BNotO Ref. No. 15; *Sandkühler* in: Arndt/Lerch/Sandkühler, Federal Rules concerning Notaries, § 24 Ref. No. 21;

63) *Reithmann* in: Schippel, BNotO, § 24 Ref. No. 21

64) *Reithmann* in: Schippel, BNotO, § 24 Ref. No. 21; *Wagner* DNotZ 1998, 34*, 94*; *Wagner* ZNotP 1998, Appendix 1, page 8 f.; *Wagner* ZNotP 2000, 214, 217 f.

65) *Sandkühler* in: Arndt/Lerch/Sandkühler, Federal Rules concerning Notaries, § 24 Ref. No. 22

66) *Reithmann* in. Schippel, BNotO, § 24 Ref. No. 21

1.2.1 Negotiation/instrumentality

53 In co-operative negotiation, (potential) conflicting parties attempt to move towards each other in order to find a common basis for agreement *free of the bases of legal claims*. To the notary falls the function of a moderator in this situation, or even of negotiator, if he is commissioned to do so by conflicting parties.[67] As in mediation, the notary is merely a moderator, but the objectives of co-operative negotiation and mediation are nevertheless different: In co-operative negotiation the 'negotiator', i.e. the moderator, finds a solution that satisfies both sides[68] but, in mediation, the parties find a solution, themselves, that satisfies them, under the direction of the moderator. This highlights, at the same time, what distinguishes it from 'pure' notarial advice:

54 - In 'pure' preventative notarial *giving of advice* that avoids conflict, the latter is asked by one or more of the participants to advise impartially in a situation of fact and/or question of law. This giving of advice consequently does not serve to find a solution, but the forming of the opinions of the participants. They are intending, on the basis of *impartial* advice – possibly in an advice consultation afforded to them by a notary *jointly* – to assess their own position, and that of the 'opposing party'/counterpart, and nothing more.

55 - If the notary is called in as a moderator by one of the parties involved with the aim of *co-operative negotiation*, i.e. to negotiate, this can either take place for purposes of the *avoidance* of conflict or the *resolution* of conflicts. In this situation the participants will find the notary, because they anticipate, on account of his experience, competence and skills at being able to balance interests, that the latter – i.e. the notary – can, following the negotiation, find a solution for them that does not necessarily have to limit itself to legal claims, the bases of claims or an 'object of dispute'. The notary does not, however, decide upon what has to be the correct solution.

56 - If the notary, on the other hand, is called in by one of the participants as a moderator for a *mediation* procedure, the latter shall generally be conducted for the purpose of the *resolution* of a conflict that is already present. In this situation the notary should, on the basis of his experience, competence and skills at balancing interests, carry out

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67) *Wagner* ZNotP 1998, Appendix 1, page 10; *Wagner* DNotZ 1998, 34*, 98*

68) *Ponschab/Schweizer* 'Co-operation in Place of Confrontation', page 97

the moderation in such a way that the participants, themselves, find their own solution under his direction.

57 In a different manner from that of notarial advice that avoids conflict, in the case of co-operative negotiation or mediation, the solution found is set down in a written agreement which, unless otherwise prescribed by statute, can, but does not have to be a notarial deed (what is termed a final agreement).

1.2.2 Conciliation

58 The case of conciliation presupposes a conflict situation that already exists. Consequently it is a matter of the *resolution* of a conflict and not a conflict-avoidance situation. Conciliation begins when co-operative negotiation has not brought about a solution.[69)] If, as a result, participants have commissioned the notary to be a moderator for them in the co-operative negotiation process, it is appropriate for the notary to set down this commissioning relationship with the participants in concrete terms; and to do so not simply in terms of the content, but also with regard to the question of whether the notary should still be available subsequently, if co-operative negotiation fails, as a conciliator as well, or not. It is possible, however, for the notary to be called in as a conciliator even if he has not been involved in the co-operative negotiation process already.

59 Conciliation by a notary is the attempt to create another interim phase following the failure of co-operative negotiation and before the introduction of court proceedings – whether before a state court or before an arbitration court. It serves as the means of co-operative negotiation but with regard to the possible legal dispute *with a greater regard for mutual claims and legal bases of claims*.[70)] The notary as a conciliator submits, in conciliation, not only a proposal for a solution that takes into account the mutual interests of the parties, but also a written conciliation proposal. For the latter also considers the subject-matter of the legal dispute to which, if conciliation fails, the legal, and not merely the commercial, claims of the participants shall be directed if a legal action is filed. This also shows that, as against in co-operative negotiation, in the conciliation procedure,

- the written form of the mutual pleadings and

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69) *Wagner* ZNotP 1998, Appendix 1, page 10; *Wagner* DNotZ 1998, 34*, 98* f.

70) *Wagner* ZNotP 1998, Appendix 1, page 10; *Wagner* DNotZ 1998, 34*, 99*

- the legal grounds of the mutual positions

come into play and are the basis of the written conciliation proposal by the notary.

1.2.3 Contractual elimination of conflict

60 The scenarios already discussed, of the giving of advice by the notary, co-operative negotiation, conciliation and mediation have been based, as circumstances of fact, on the fact that, ad hoc and by prevention, conflicts are to be avoided or resolved and that conflict-solving mechanisms were not agreed previously by contract. The avoidance of conflict – and not the resolution of conflicts – can, however, also be made possible by the stipulation by the contracting parties as early as in their contracts, as to how they must deal with any conflicts that arise or occur and who should be appointed adviser, moderator, mediator or even arbitrator, as an impartial third party, or who should choose this impartial third party, what this may cost and who should bear such costs.[71)]

61 The notary can bear this in mind in contracts drafted or notarised by him. But he may also, independently of this, be called upon as an impartial third party by the contracting parties in the drafting of such contracts (by the parties involved, themselves – whether with or without their legal adviser) *giving advice for these purposes*, regardless of whether or not he is also to be appointed a adviser, moderator, mediator or conciliator in this contract, in case there is a conflict (-avoidance) situation.

62 Contractual conflict elimination may, however, also be necessary if a contract that has already been concluded enters a crisis.[72)] This may be the case, because

- a change in the legal situation has occurred on the basis of a change in laws or case law;
- the expectations of the parties in a contract that has been concluded have not been fulfilled;
- Prevention of performance/breaking of the contract by one of the contracting parties has occurred.[73)]

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71) *Wagner* ZNotP 1998, Appendix 1, page 12; *Wagner* DNotZ 1998, 34*, 103* f.

72) *Heussen*, A Handbook of Contract Negotiation and Contract Management, Ref. No. 381

73) *Heussen*, A Handbook of Contract Negotiation and Contract Management, Ref. No. 383

63 In such a situation the following solution will suggest itself: not only responding to the new situation but also, at the same time, while there is this opportunity, that of setting down in the amended/supplementary agreement, the 'game rules' as to how such situations should be dealt with in future. The notary can be of assistance in this kind of contractual elimination of conflict in the manner already described.

1.2.4 Compromise

64 Whereas the preventative conflict-elimination options previously mentioned serve the commercial balancing of interests of the participants in the first instance, extrajudicial compromise is simply a *balancing of legal claims*. Apart from the fact that a compromise of this nature can be notaries by a notary[74)] and, in this connection, the notary must instruct/advise the parties involved impartially (§ 17 Paragraphs 1 and 2 BeUrkG), the notary may be called in by the parties involved as an impartial third party for the conclusion of an extrajudicial handwritten compromise, in order to advise them impartially. This is a kind of a 'filter' to prevent one of the contracting parties from being given a disproportionately great advantage.

1.2.5 Interim result

65 It is thus clear that, apart from 'pure' advising by notaries, as a preventative resource for conflict avoidance, there are other, different forms of notarial advice with different objectives of preventative conflict elimination, which are triggered by notarising by notaries and in which, nevertheless, notarising by notaries is the consequence of such consultation, but is not its starting point.

66 This justifies placing as more important next to notarisation, notarial advice as a means of the preventative avoidance of conflict/resolution of conflicts, as an independent segment of the activity of the notary, than is the case at present. Nevertheless, in addition

67 - the difference and the benefits of these segments of notarial activity must be elaborated and clearly defined for the public who are subject to the law and

74) *Wagner* ZNotP 1998, Appendix 1, page 12; *Wagner* DNotZ 1998, 34*, 104* f.

68 - it must be internalised in the profession of notaries what benefits it can have for the activity and image of notaries, to see themselves as offering an alternative service to state jurisdiction in the sector of preventative avoidance/resolution of conflicts.

69 This requires a marketing campaign amongst their number (targeted at notaries) and directed outwards (to the public who are subject to the law).

1.3 Practical work in the giving of advice (including charges)

70 The provision of advice by notaries presupposes that the notary is commissioned to give it by one or more of the participants. Consequently, he must be given a request to that effect.[75)] The notary is not obliged to accede to this request.[76)] Consequently the notary is, indeed, obliged to carry out notarisation, at the request of the participants (§ 15 Paragraph 1, Clause 1 BNotO), but he is not obliged to give advice, and can also refuse to accept a request to advise. If he accepts, the notarial giving of advice is an official function.[77)] The content and scope of notarial advice for the purpose of preventative elimination of conflicts depend on what the interested party/parties and the notary agree.

71 Whereas the notary may exercise his notarisation duties only within his official competence (§ 10a Paragraph 2 BNotO), there is no such statutory provision for the giving of advice by the notary. He can therefore, advise in an official capacity anywhere in Germany, but not – since it is an official function – in other countries (Reverse Exclusion under § 11a BNotO).

72 What fees a notary can charge for advice in its various forms as an instrument of preventative conflict elimination, is not stipulated in German law. Thus, various solutions are being discussed. *Reithmann*[78)] is of the opinion that a charge will emerge under § 147 KostO, and by this he means at least a half of the full charge under § 147 Paragraph 2 KostO. Others are suggesting §§ 148 Paragraph 1, 116 KostO, if the dispute is not a for-

75) *Hertel* in: Eylmann/Vaasen, BNotO and BeurkG, § 24 BNotO Ref. No. 6; *Reithmann* in: Schippel, BNotO, § 24 Ref. No. 34; *Sandkühler* in: Arndt/Lerch/Sandkühler, Federal Rules concerning Notaries, § 24 Ref. No. 10;

76) *Hertel* in: Eylmann/Vaasen, BNotO and BeurkG, § 24 BNotO Ref. No. 7; *Sandkühler* in: Arndt/Lerch/Sandkühler, Bundesnotarordnung, § 24 Ref. No. 11

77) *Hertel* in: Eylmann/Vaasen, BNotO and BeurkG, § 24 BNotO Ref. No. 7;

78) *Reithmann* in: Schippel, BNotO, § 24 Ref. No. 21

mal one and the notary is to balance the interests of all parties with their agreement.[79)] This can range from 4 times the full charge (if the final agreement is also notarised)[80)] to twice the full charge[81)].

73 The practical work in the different options of notarial advice following preventative conflict elimination, after the preliminary issue of whether he wants to accept such a request has been clarified by the notary, requires clarification of the further question as to what type of advice should be used. To this end he must inform the participants about the different types so that it can be made clear what the notary's own function should be and what the different kinds can provide. It is thus recommended that the participants are given an indication of the associated costs. Then, the notary should make it clear that he will be taking on the function he has been asked to carry out in notarial prevention/resolution of conflicts on the basis of the Rules of Conciliation[82)] as rules of procedure. Commissioning in *that particular* form which the participants have agreed with the notary should then be established in writing. Notarial advice with the content agreed to and the function agreed must, if it is not 'pure' advice[83)] but another kind for the conflict elimination measures described,[84)] then be carried out on the basis of the Rules of Conciliation, as follows:

74 Since it cannot be ruled out that a preventative conflict elimination measure will not have to be settled in court, after all, the notary must adhere to the formalities described in the Rules of Conciliation. These include, inter alia:

75 - a procedure that must be initiated *in writing* (§ 2 of the Rules of Conciliation [GüteO]);

76 - the guaranteeing of impartiality by compliance with co-operation prohibitions and grounds of bias (§ 3 Rules of Conciliation [GüteO]);

77 - the establishment of the execution of the procedure (§ 4 of the Rules of Conciliation [GüteO]);

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79) Göttlich/Mümmler, continued by [or 'from'?] *Assenmacher/Mathias*, KostO, 'Dispute', Item 2.4

80) *Reimann* in: Korintenberg/Lappe/Bengel/Reimann, KostO, 13th Edition 1995, § 148 Ref. No. 14

81) *Hartmann*, KostO, § 148 Ref. No. 2

82) *BNotK* DNotZ 2000, 1

83) See above Ref. No. 5 – 9

84) See above Ref. No. 10 – 18, 52 – 69

78 - parties may (but do not have to) appear in person and may (but do not have to) call in (legal) assistance (§ 5 of the Rules of Conciliation [GüteO]);

79 - consequences of omission (§ 6 of the Rules of Conciliation [GüteO]),

80 - confidentiality of the conciliation procedure, including with regard to possible subsequent court proceedings (§ 7 of the Rules of Conciliation [GüteO]);

81 - final agreement (§ 8 of the Rules of Conciliation [GüteO]);

82 - costs (§ 9 of the Rules of Conciliation [GüteO]).

1.4 Other standpoints

83 The forms of notarial advice described above, as options for the preventative elimination of conflict, presupposed that the *individual* notary will be operating according to one of the forms represented, in an official capacity. In addition, there are two other options for notarial preventative conflict elimination that are worth mentioning:

1.4.1 Agreement phase in the arbitration procedure

84 If participants have agreed that, if conflicts arise, a lawsuit in the state courts must be precluded and, in its place, they shall arrange for their dispute to be decided before a notarial 1-person arbitration court as an ad hoc-arbitration court on the basis of the recommendation by the Federal Association of Notaries for an Arbitration Agreement with Procedure and Compensation Agreement[85], then the following special situation obtains:

85 The arbitration procedure commences – except in procedures concerning an interim measure – with an agreement phase before the arbitration court (§ 6 BNotK-Schieds V). This agreement phase, that is bound up with the arbitration procedure, can take place using any of the forms of notarial advice described above, i.e. before the notary, who is the arbitrator of the arbitration procedure.[86] But, because of this, since this agreement phase is already a constituent part of the arbitration process according to § 6 BNotK-Schieds V, the notary is not acting in an official capacity here, with the result that, for

85) *BNotK* 2000, 401

86) *Schiffer* JurBüro 2000, 188 and 235 concerning Mediative Elements in Modern Arbitration Procedures other than in the Notarial Arbitration Court

this agreement phase, as far as the person of the notary is concerned, the special features described thus obtain.[87)] With this agreement phase that is included in the arbitration procedure, mediative elements are initiated at the start of the arbitration procedure, before the beginning of the dispute at issue.[88)]

86 However, this linking in of the agreement phase with the arbitration process counteracts the objection of *Lachmann/Lachmann*,[89)] who are of the view that the compulsory bringing forward of a conciliation procedure to *before* an arbitration procedure allegedly violates the interpretation according to the guidelines in contradiction of Appendix No. 1 q RiLi 93/13/EU, whereby it is not permissible to make access to the legal solution harder.

1.4.2 Conciliation and agreement procedure in the arbitration court (SGH)

87 Participants may arrange for notarial preventative extrajudicial conflict elimination, instead of in the forms mentioned, before an individual notary before the 'Conciliation and Arbitration Court of German Notaries – SGH' that has already been mentioned. They may call upon the SGH and expressly request solely a conciliating and negotiating service from the SGH, and not its binding decision (§ 18 Paragraph 1 SGH Constitution), without the precondition of the prior conclusion of a conciliation or arbitration contract (§ 18 Paragraph 2 SGH Constitution). In this situation a conciliation process like this takes place on the basis of the Rules of Conciliation[GüteO] in conjunction with the SGH Constitution, before the Presiding Judge of the SGH (§ 19 Paragraph 1 SGH Constitution). Nevertheless, this conciliating/negotiating activity on the part of the Presiding Judge of the SGH under § 19 Paragraph 1 Clause 1 of the SGH Constitution does not constitute an official notarial function.

88 The conciliation phase within one of the arbitration procedures introduced before the SGH (§ 21 SGH Constitution) must be seen as separate from the conciliation procedure before the SGH (§ 18 SGH Constitution) as already mentioned. If the participants, with the exclusion of due legal proceedings through the state courts, have agreed, on account

87) See below Ref. No. 230 ff.

88) Concerning Mediative Elements in Modern Arbitration Procedures

Schiffer in: Gottwald/Strempel/Beckedorff/Linke, The Extrajudicial Settlement of Conflict for Lawyers and Notaries, 2.2.3.1

89) *Lachmann/Lachmann* BB 2000, 1633, 1639

of an arbitration court contract, to appeal to the SGH, in this too, – except in cases of interim measures – the arbitration court procedure begins with a conciliation phase before the Presiding Judge of the SGH (§ 21 SGH Constitution). What has been stated previously concerning § 6 BNotK-Schieds V[90] applies here by analogy.

1.4.3 Notarial advice – an overview

89 If we divide the preventative function of the notary according to the two large principal areas of the avoidance of conflict and the resolution of conflicts then, in the former case the dispute and, in the latter, after the dispute has arisen, legal proceedings (regardless of whether this is before state courts or arbitration courts), should be avoided. In both cases it is, however, an actual objective of the work of the notary not to avoid something, but to achieve something, i.e. the consensus of participants. Consensus is not an end in itself, in this respect, but it also needs to be guaranteed. Therefore, the notary is able not only to be of assistance in the drafting of a final agreement, or in its notarising, but also to make possible the achieving of what has been agreed lest participants fail to keep to what has been agreed, by the following means:

90 - notarial enforcement submission declaration under § 794 Paragraph 1 No. 5 of the Code of Civil Procedure [ZPO];[91]

91 - enforcement declaration under § 794 Paragraph 1 No. 1 ZPO, if the notary has been recognised by a Land Administration of Justice as a conciliation office, whereby such an enforcement declaration can, but does not have to be notarised.[92]

92 The options for advice from notaries, in the broadest sense of the term, that have been dealt with here can be classified under the spheres of conflict avoidance and conflict resolution:

1.4.3.1 Avoidance of conflict

93 - 'pure' giving of advice, verbally or in writing (expert's report);[93]

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90) See below Ref. No. 94

91) *Jost* ZNotP 1999, 276

92) See above Ref. No. 24 ff.

93) See above Ref. No. 5 ff.

94 - co-operative negotiation/instrumentality;[94)]

95 - contractual conflict elimination.[95)]

1.4.3.2 Resolution of conflicts

96 - co-operative negotiation/instrumentality;[96)]

97 - conciliation;[97)]

98 - contractual conflict elimination;[98)]

99 - compromise.[99)]

1.5 Notarial controlling[/monitoring] of contracts

100 The notary's advice with a view to avoiding conflict may, however, be afforded in an entirely different manner, which has been unknown hitherto and which, indeed, implies a new sphere of activity for notaries.

1.5.1 Present situation

101 Which of us is not familiar with this situation: contracts are often settled with considerable care and, in many cases, one of the contracting parties attempts, at the outset, to use its own standard contract or make its own draft contract the basis of contracts and enforce it during contractual negotiations. Generally, the stronger prevails. However, a large number of risks lurk behind this process, and these can lead to conflicts later on:

- Would such contracts always withstand scrutiny by a judge in terms of their content or reasonableness if differences of opinion between the contracting parties occurred?
- In what way do changes in laws affect the effectiveness of such contracts?

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94) See above Ref. No. 53 ff.
95) See above Ref. No. 60 ff.
96) See above Ref. No. 53 ff.
97) See above Ref. No. 58 ff.
98) See above Ref. No. 60 ff.
99) See above Ref. No. 64

- In what way does new case law or changes in case law affect the effectiveness of what has already been negotiated?

102 Generally, contracts that have already been concluded are not monitored by the contracting parties for their continued effectiveness. Often, it is just the conclusion of the contract that seems important, and not so much the checking of how long it is effective. Here, the fact that contracts have two functions is overlooked:

1. They are intended to represent what is virtually the contracting parties' 'game rules', with the result that they know what they must do for the duration of the contract.
2. But they are also intended show the settlement framework, e.g. for appraisal by courts, for a conflict scenario.

But who should monitor them in this way and what should they be like?

1.5.2 Proposal

103 A neutral person could monitor the effectiveness of contracts, who does not fall within the sphere of interest of any of the contracting parties. And the aim of such monitoring should not be restricted to notification of exceptions to effectiveness, e.g. on account of changes in laws, new case law or changes in case law etc.. Control is more than that: Proposals for amendments to contracts are associated with indications of this kind, with a view to enabling the contracting parties to introduce counter-measures.

The controlling of contracts in this way could be provided for as early as in the contracts, whereby contracting parties agree contractually how this should be implemented and which neutral person should be appointed to do it

1.5.3 Notarial controlling of contracts

104 Whereas lawyers are advisers to their clients and thus *partial* advisers, the notary may not be a partial adviser to one of the parties. He may, however, be appointed by one or more participants as an *impartial* adviser (§ 24 Paragraph 1, Clause 1 BNotO). Impartial advising of participants by a notary is an official function.

105 Contracting parties can consequently fully agree in a contract – this can be a handwritten contract or a notarised one – in agreement with a notary who has been jointly appointed

by them, that the latter should continuously inform the contracting parties about the contract that has been concluded, for a period to be decided upon, concerning the following:

106 - changes in laws, new case law or changes in case law that might have an effect on this contract.

- information as to how the contracting parties should deal with these effects following the adjustment of the contract or in the light of the situation.

1.5.4 Examples

107 - The Federal Supreme Court, in its decisions of 23.05.1996[100)] spoke in favour of a duty of co-operation for the construction contract on the part of the contracting parties. In differences of opinion contracts should not be terminated straight away but, rather, the contracting parties should first of all be committed to finding an amicable solution by means of negotiation.

An indication of this case law, which is consolidating itself, as part of the controlling of contracts by notaries, to both contracting parties, could be linked with the further indication as to how one can solve the situation contractually or as determined by the situation.

108 - The Federal Supreme Court, in its decisions of 29.05.2000[101)], effected a change in case law. Accordingly, cash dividends must be paid back to a limited liability company or public company as late on as years later, by the recipients, if it should transpire that the balance sheet figures on which the dividend resolution was based were erroneous and did not justify the payment of the dividend.

A reference to this change in case law as part of the process of the controlling of contracts by notaries, e.g. to the management of such a company, could sharpen up the perception as to the need to consider, when balance sheet problems occur later on, whether this could have consequences on claims for repayment of dividends paid in the past that would then need to be demanded back by the management.

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100) Federal Supreme Court [BGH] 23.05.1996 - VII ZR 245/94, Federal Supreme Court Journal [BGHZ] 133,44, 47 and BGH 28.10.1999 - VII ZR 393/98, NJW 2000, 807, 808

101) Federal Supreme Court [BGH] 29.05.2000 - II ZR 347/97 , ZIP 2000, 1256 ‘Balsam/Procedo’ II; 75/98, n.V. 'Balsam/Procedo III’; 118/98, ZIP 2000, 1251 ‘Balsam/Procedo’ I

2. Mediation

109 For purposes of this section, mediation as a notion[102)] is meant.[103)]

2.1 National legislation and procedures in the area of mediation

110 The German legislature has hitherto used neither the concept of mediation nor that of the mediator. In the Professional Regulations for Lawyers (see there § 18 Paragraph 1), a lawyer is referred to as mediator. However, a definition is not given. The statutory provisions concerning professional law concerning notaries have hitherto not admitted of the concept of 'mediator'. The notary as a mediator must, despite this, respect the following (statutory) provisions:

111 - Professional law concerning notaries, as emanates from the BNotO, [sic]the official regulations based on it that have been issued, the professional guidelines adopted and authorised as constitutions of associations of notaries (§ 67 Paragraph 2 BNotO) and – where relevant – the BeUrkG.[104)]

112 - If the notary is working as a mediator in his function of a conciliation office recognised by the Land Administration of Justice of on the basis of laws,[105)] he must also conform to the provisions of Land laws where the prescriptions of Land laws exist in this connection.

113 - As a recommendation that is not binding, he should also make use of the Rules of Conciliation [GüteO] of the Federal Association of Notaries.[106)]

114 If the notary works as a mediator he shall, because it is, therefore, a matter of an official function (§ 24 Paragraph 1, Clause 1 BNotO), act for the participants within the scope of a relationship of procedural law under public law.[107)] Independently of the criteria for mediation as outlined in what follows, the notary, as a mediator, must thus officially ful-

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102) For the definition see above Ref. No. 13 and 17

103) Zur Mediation als Marketingbegriff see above Ref. No. 11 and concerning mediation as a generic concept see above Ref. No. 12

104) *Rieger/Mihm*, The Notary as Mediator

105) See above Ref. No. 24 ff.

106) See **Appendix 1**

107) *Bohrer*, Professional Law concerning Notaries, Ref. No. 25; *Rieger/Mihm*, The Notary as Mediator

fil the following professional duties that are not subject to any arrangement under private law, because of the procedure relationship under public law:

115 - independence (§ 14 Paragraph 1, Clause 2 BNotO);
116 - impartiality (§ 14 Paragraph 1, Clause 2 BNotO);
117 - integrity/probity (§ 14 Paragraphs 2 and 3 BNotO); and
118 - confidentiality (§ 18 BNotO).

In the sphere of mediation the following procedures are to be reported on:

2.1.1 Family mediation[108)]

119 The Federal Professional Association for Family Mediation (BAFM), that was founded in early 1992, has elaborated guidelines for family mediation.[109)] Inter alia, these are intended for lawyers, but not notaries,[110)] without any explanation being given for this. At the beginning of mediation the mediator indicates to the participants the differences between mediation and other types of conflict settlement procedures, and then establishes the mediation procedure with the participants in a written mediation contract.[111)] This is characterised by the following principles:

120 - it is optional for the participants,
121 - neutrality of the mediator,
122 - the participants bear their own responsibility,
123 - the participants must be informed, and
124 - the procedure is confidential.[112)]

125 It is the aim of mediation to produce what is termed a 'win-win situation', which affords a benefit for each of the participants.

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108) *Dietrich/Theml/Ueberschär* in: Gottwald/Strempel/Beckedorff/Linke, Außergerichtliche Streitbewältigung für Rechtsanwälte und Notare, 5.2.5.2 = The Extrajudicial Settlement of Conflict for Lawyers and Notaries

109) Reprinted by *Mähler/Mähler* in: Breidenbach/Henssler, Mediation for Lawyers, page 123 ff.

110) I. of the guidelines: see *Mähler/Mähler* in: Breidenbach/Henssler, Mediation für Juristen, Seite 124

111) *Mähler/Mähler* in: Breidenbach/Henssler, Mediation for Lawyers, page 129

112) *Mähler/Mähler* in: Breidenbach/Henssler, Mediation for Lawyers, page 125; *Buchholz-Graf* ZMK 2000, 118

2.1.2 Mediation in administrative law,[113] notably environmental law[114]

126 Installations that are not wanted by the population (e.g. waste disposal plants, power stations, industrial plants, motorways, railway tracks, airports or extensions of the latter[115] etc.)[116] bring with them the need to increase efforts, before the initiation of a formal administrative procedure, to be concerned with mediation procedures.[117] Here, we are talking less about an individual mediation procedure with not many participants than collective mediation involving a large number of participants. Since the mediation procedure is played out openly and thus, apart from the administrative procedure, it is seen as worthwhile to include the person with decision-making powers.[118] However, it is also possible to conduct a mediation procedure of this nature in parallel or independently of an administrative procedure with a view to settling individual questions.[119] As minimum standards for the procedure, the following are given:

127 - fairness in the procedure,

128 - transparency in the procedure,

129 - requirement for parity,

130 - no demands of third parties who are not party to the mediation procedure,

131 - negotiation by representatives of groups,

132 - acceptance by interest groups,

133 - orientation of the outcome of mediation towards capability of being implemented in public law,

134 - no legal obligation but obligation in fact, of the subsequent administrative procedure, to the mediation result.[120]

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113) *Kostka* in: Gottwald/Strempel/Beckedorff/Linke, Außergerichtliche Streitbewältigung für Rechtsanwälte und Notare, 5.2.17 = The Extrajudicial Settlement of Conflict for Lawyers and Notaries

114) *Zilleßen* in: Gottwald/Strempel/Beckedorff/Linke, Außergerichtliche Streitbewältigung für Rechtsanwälte und Notare, 5.2.15 = = The Extrajudicial Settlement of Conflict for Lawyers and Notaries

115) *Niethammer* ZMK 2000, 136

116) *Zieher* ZMK 2000, 113

117) *Ramsauer* in: Breidenbach/Henssler, Mediation for Lawyers, page 161 ff.. Zur Verkehrsplanung und Mediation *Weber* ZMK 2000, 16 and *Sellnow* ZMK 2000, 18

118) *Ramsauer* in: Breidenbach/Henssler, Mediation for Lawyers, page 165

119) *Ramsauer* in: Breidenbach/Henssler, Mediation for Lawyers, page 166 f.

120) *Ramsauer* in: Breidenbach/Henssler, Mediation for Lawyers, page 165

135 In collective mediation procedures of the type just mentioned, a distinction is made between the following phases of the mediation procedure:

136 - *Preparation* for the mediation procedure: this serves, amongst other things, an analysis of the interests involved and the creation of an organisational structure for the mediation procedure.[121)] To this must be added the establishing of the subject-matter of the negotiations, the duration of the procedure, the place of the negotiations, appointments, minutes, secrecy interests, public relations work and a settlement concerning costs.[122)]

137 - *Execution phase*: negotiation of a co-operative solution to the problem.[123)]

138 - *Implementation phase*: implementation of the outcome of the negotiation or, at least, parts of it.[124)]

2.1.3 Mediation in commercial law

139 Whereas the way a commercial mediation procedure develops[125)] is similar to that of family mediation, emotional aspects – in contrast to the situation in family mediation – are not in the foreground in commercial mediation.[126)] In their place we have to deal with

140 - aspects of speed and satisfaction and

141 - aspects of understanding.[127)]

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121) *Ramsauer* in: Breidenbach/Henssler, Mediation for Lawyers, page 167

122) *Ramsauer* in: Breidenbach/Henssler, Mediation for Lawyers, page 168

123) *Ramsauer* in: Breidenbach/Henssler, Mediation for Lawyers, page 168

124) *Ramsauer* in: Breidenbach/Henssler, Mediation für Lawyers, page 169

125) *Siegmann* in: Gottwald/Strempel/Beckedorff/Linke, Außergerichtliche Streitbewältigung für Rechtsanwälte und Notare, 5.2.1 = The Extrajudicial Settlement of Conflict for Lawyers and Notaries (liability of doctors); *Boysen/Plett* (aaO = at place shown), 5.2.3.1 (Baukonziliation); *Nordmann* (aaO), 5.5.3.2 (construction conciliation); *van Raden* (aaO), 5.2.6 (industrial property); *Steinbrück* GmbHR 1999, R 165; *Steinbrück* Lawyers' Gazette 1999, 574; *Risse* BB 1999, Appendix 9, page 1; *Risse* WM 1999, 1864; *Risse* NJW 2000, 1614

126) *Schneider* in: Breidenbach/Henssler, Mediation for Lawyers, page 174 f.

127) *Schneider* in: Breidenbach/Henssler, Mediation for Lawyers, page 177 f.. Zur Wirtschaftsmediation im Wohnungseigentum = Concerning Commercial Mediation in Residential Ownership see *Allmayer-Beck/Auer* ZMK 2000, 9

142 These are also, in the last analysis, the reasons why *Casper/Risse* propose, in company law resolution deficiency disputes, that these should be resolved by mediation to this end instead of actions for rescission.[128)] The rationalisation of commercial concerns, disputes concerning the financing of projects and property funds that have met with a crisis are cited as appropriate spheres of application.[129)]

2.1.4 Mediation in neighbour, tenancy[130)] and consumer law

143 The development of the procedure is similar to that described under family mediation.[131)]

2.1.5 Mediation in the renegotiation of civil law contracts

144 Such mediation can be necessary in long-term and complex contracts (tenancy contracts, leases, memoranda of association and long-term supply contracts etc.), if renegotiation fails and court proceedings threaten for the purpose of adapting the contract.[132)] Here, the first issue is to work out in legal terms whether a contract has to be adjusted at all and, if so, to what extent. As a result the mediation procedure may be adapted to this two-phase situation.[133)] If mediation does not lead to a result in either of the phases, in its place an attempt could be made, by mediation, to bring the parties to the point of mutually agreeing how they want to settle amicably the question of the adaptation of the contract in the future.[134)]

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128) *Casper/Risse* ZIP 2000, 437

129) *Risse* WM 1999, 1864, 1869 f.

130 *Plett/Boysen* in: Gottwald/Strempel/Beckedorff/Linke, Außergerichtliche Konfliktbewältigung für Rechtsanwälte und Notare, 5.2.19.1; *Stehle* (aaO), 5.2.19.2

131) See above Ref. No. 119 ff.

132) *Nelle* in: Breidenbach/Henssler, Mediation for Lawyers, page 196 ff.

133) *Nelle* in: Breidenbach/Henssler, Mediation for Lawyers, page 199

134) *Nelle* in: Breidenbach/Henssler, Mediation for Lawyers, page 200

2.1.6 Criminal perpetrator/victim settlement[135)]

145 In statutory terms, this must be [sic][understood] as the 'endeavouring (paraphrased) to attain a settlement (on the part of the perpetrator) with the injured party' (§§ 10 Paragraph 1, No. 7 JGG, 46a, No. 1 StGB). The participants often make contact with each other by negotiation through lawyers or the court, and a mediation procedure may follow. Nevertheless, this is not so likely to produce results as other mediation procedures already described, because of the impending closeness of the administration of justice.

2.1.7 Taking stock

146 Mediation, involving the calling in of a notary as the mediator, will commend itself especially in family mediation, commercial law and the renegotiation of civil contracts. However, it can also go beyond these if we consider, for example, the resolution of disputes in succession law[136)] and consumer protection law[137)]. With regard to the latter we must bear in mind that the European Commission published a working paper in March, 2000, which apparently prescribed the framework for the setting up of a European network for the extrajudicial resolution of disputes in consumer law.[138)] The core elements of this 'Extra-Judicial Network, EEJ-NET' are to be the following:

147 - Clearing offices are to be set up, that act as central, national establishments, in every member state.

148 - The clearing offices are to be both national contact points for domestic consumers and European contact points for the clearing offices of other member states. Additionally, they are to be information and consultation points in matters of consumer protection law.

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135) *Delattre* in: Gottwald/Strempel/Beckedorff/Linke, Außergerichtliche Streitbewältigung für Rechtsanwälte und Notare, 5.2.13.1; = The Extrajudicial Settlement of Conflict for Lawyers *Hölzer* (aaO = op.cit.), 5.2.13.2. Zum Täter-Opfer-Ausgleich zu Gunsten juristischer Personen = Concerning Criminal Perpetrator/Victim Settlement see BGH 18.11.1999 – 4 StR 435/99, NStZ 2000, 205 and Anm. *Dierlamm* in NStZ 2000, 536

136) *Risse* ZEV 1999, 205

137) Thus, one of the subjects of the symposium held on 20.09.2000 in Brussels of the European Law Academy concerning future demands on the European notarial profession: 'The notarial profession and consumer protection'

138) Mediation report 4/2000, page 1; Documentation in WM 2000, 1170

149 - And, through the clearing offices, the complaints of private consumers shall be passed on to the extrajudicial conflict resolution office, which is competent for the commercial concern from which the purchase has been made.[139)]

150 The profession of notaries shall have to tackle, within its ranks, the question of whether and in what way it is interested in the field of consumer protection law and for which it would like to provide what has been described previously.

2.2 Definition and effects of mediation in notarial practice and in other professions

2.2.1 Notarial mediation

151 In mediation, we can be dealing with conflict mediation or contract mediation.[140)]

152 C*onflict mediation* is an

‘extrajudicial, voluntary conflict management procedure in which parties to a conflict reach joint decisions in relation to the others, with the support of a neutral third party without decision-making authorisation as to the content (the mediator). Where possible, the latter decisions incorporate the interests of the participants, are directed towards the creation of value and are based on understanding of oneself and the other person, and their view of reality as relevant’.[141)]

153 *Contract mediation* is an

extrajudicial, voluntary procedure which, without a conflict being present, with the existence of clashes of interests, strives for a balancing of interests which should be set down in a contract. The procedure follows principles comparable to those of conflict mediation.

154 *Conflict mediation* presupposes clashes of interests *with* conflict, and has as its objective the balancing of interests, but this need not necessarily be set down in writing or in a notarised final agreement (resolution of conflict). *Contract mediation*, on the other hand, presupposes the presence of clashes of interests *without* the situation of a conflict having arisen, and has as its objective the balancing of interests, settled in a handwritten or notarised final agreement.

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139) See documentation WM 2000, 1170

140) See above Ref. No. .13 and 17

141) *Mädler/Mädler* in: Breidenbach/Henssler, Mediation for Lawyers, page 13, 15

155 Here, we must distinguish between (1), the formulation of a solution that does justice to the interests on the part of the participants, themselves – with the moderation of the mediator, (2) the adjustment of this solution to the legal situation and (3), the contractual implementation of this solution in a final agreement. The subject-matter of the first is the negotiation management of the mediator and, in consequence, it is generally not a *legal* advice procedure which, in contrast, outlined under(2) and (3), relates to the factors of adjustment to legal circumstances, the contractual wording and the guaranteeing of what has been agreed, and also fits in very well with the giving of impartial legal advice.

156 Whereas, in general, people represent the view that a mediator does not bear any responsibility for the result,[142)] this must also be qualified on grounds of professional law, where a notary is acting as a mediator: The notary as mediator has no responsibility for the outcome where the participants find their own (commercial) solution, under his moderation, that does justice to their interests. There is a difference, however, in situations in which the notary as mediator is asked to convert this solution into a final agreement, whether in notarised deed or handwritten form. This is because, when notarising a final agreement, he must inform the participants about the scope of application of what has been agreed and draw their attention to the fact that there is no prejudice to one of the parties (§ 17 Paragraph 1, BeUrkG) in the same way as he must also point out to them that what has been agreed is legally valid (§ 17 Paragraph 2, BeUrkG). And, in drafting a handwritten final agreement, since his rôle as mediator is an official function, he has comparable duties (§ 24 Paragraph 1. Clause 1 BNotO).[143)]

157 This *legal* responsibility for the result on the part of the notary as mediator begins as early as in the prelude to what is to be agreed, and emanates from the duties to inform and warn that are incumbent upon the notary on account of his 'extended duties based on his commissioning' (§ 14 Paragraph 1, Clause 2 BNotO)[144)] from which the participants cannot release him.[145)] This translates itself into the following points:

158 - He must make sure that what is to be agreed does not only represent a fair balancing of the interests, but also that it is legally effective on the basis of the applicable laws

142) *von Schlieffen* ZMK 2000, 52: ' ... the autonomy of the parties should be guaranteed. A person is autonomous if they make their laws, … themselves. In the mediation procedure, therefore, all the parties … are, jointly, the legislators in their own case."

143) *Rieger/Mihm,* The Notary as Mediator; *Schippel* in: Schippel, BNotO, § 1 Ref. No. 5

144) *Rieger/Mihm,* The Notary as Mediator

145) *Rieger/Mihm,* The Notary as Mediator

and case law (*legal effectiveness*). This is because the notary is not allowed to contribute to the notarising of an ineffective agreement[146)] and, if there is doubt about the effectiveness, indicate this as well as his doubts, in the deed (§ 17 Paragraph 2, Clause 2 BeUrkG).

159 - He must also make sure that what is to be agreed can also be implemented (*practicability*).

160 - And, finally, he must also ensure that what is to be agreed also safeguards the participants. Included in this is release from a notarial execution deed (*executability*).[147)]

161 *This* legal responsibility for the result on the part of the notary as mediator with the appropriate warning and information obligations consequently comes into play as soon as the participants have found a (commercial) balancing of their interests under his moderation and before it is a matter of the conclusion of a handwritten agreement or the notarising of the final agreement in which what has been agreed is to be set down.[148)] The legal forming of intent on the part of the participants should thus not begin as early as when the final agreement is notarised since, entirely for reasons of the legal situation, an additional requirement for agreement of the parties may exist.[149)] To view this another way, the notary, in the light of § 17 Paragraphs 1 and 2, BeUrkG, must inform the participants on the occasion of the notarising of the deed, about questions of effectiveness, and point out to them that no one party is being prejudiced, which can then cause the agreement to fail. Moreover, the notary would have to be reproached by the participants as to why he had not given notification of this earlier, in order to extend their requirement for agreement to such questions as well. Consequently it is also the task of the notary as mediator to contribute to the consensus reached by the participants being able to be quantified in terms of the criteria mentioned, for its contractual implementation. Thus, only then can the participants evaluate what it is that also needs to be agreed by them, when these criteria are taken into account and before the final agreement is concluded. In

146) BGH 20.06.2000 – IX ZR 434/98, WM 2000, 1600

147) See above Ref. No. 205 and 209

148) a.A. *Rieger/Mihm,* The Notary as Mediator

149) The fact that legal information can lead to additional tensions and, therefore, have to be included in the agreement process, is also described by *Wiedermann* ZMK 2000, 22, 24

the prelude to the final agreement, the notary must also point out the protection options to the participants, for the agreement of the participants must relate to this, too.[150)]

For agreement is not an end in itself; it goes hand-in-hand with effectiveness, executability and the guaranteeing of what has been agreed.

162 It is not until these other stages of mediation have been completed with the assistance of the notary, that the notarising of the final agreement by the notary or the conclusion of a handwritten final agreement can follow, with the assistance of the notary, who may also be the notary in the mediation procedure,[151)], but he does not have to be. And if, in the notarising stage, the participants insist on stipulations, despite being advised appropriately by the notary, that give the notary grounds for doubt as to their effectiveness, the notary is bound to note his instruction and the explanations of the participants connected with it, in the deed (§ 17 Paragraph 2, Clause 2 BeUrkG).

163 What must be seen as separate from the issue, described already, of the *legal* responsibility for the result of the notary acting in mediation, is the question as to whether and when the notary as a mediator has the duty of assisting in the investigation of the facts. The Hamm Oberlandesgericht [Upper Land Court][152)] represents, for mediation by a lawyer, the following view:

‘The lawyer acting as mediator must, because of his obligation to be neutral, merely assess the information on the facts submitted by both parties and not, as a partial representative of interests, *research* facts that have not expressly been advised by the contracting parties, but that possibly favour one of the parties.[153)] Nor is the mediator obliged to ascertain certain facts for himself, that could give grounds for the risk of loss threatening one of the parties.’[154)]

164 For reasons of professional notarial law, this can only be followed with qualification, for the notary as mediator. Since the exercising of a mediation function by a notary is an official function (§ 24 Paragraph 1, Clause 1 BNotO), if he accepts the commission to

150) *Jost* ZNotP 2000, 276, 281

151) *Rieger/Mihm,* The Notary as Mediator

152) OLG Hamm 20.10.1998 - 28 U 79/97, OLGR 1999, 129

153) Cursive thesis by the author

154) JURIS-Orientierungssatz = Orientation thesis

mediate, he has the official obligation to give appropriate and expert advice.[155)] If he notarises the final agreement, under § 17 Paragraph 1, Clause 1 BeUrkG the notary has the statutory obligation,

165 - to find out the intentions of the participants and

166 - to clarify the facts of the matter (and not research them).

167 Since a mediation procedure, however, should lead to a result that should generally form the subject of a final agreement, and which must also be notarised – with the acceptance of an execution deed under § 794 Paragraph 1 No. 5 of the Code of Civil Procedure [ZPO], it is implied that the subsequent enforceable *clarification* of the facts must be given priority. Therefore, it is implied that, on the part of the notary, when mediation begins, the facts need not be researched immediately, but they must be clarified with the participants. This is supported not only by notarial professional law, but also the fact that, for the notary as mediator, it is not clear until then why clashes of interests have arisen between the participants.

168 Even when the activity of the notary as a mediator is an official activity, the conclusion of a mediation agreement between the participants and the notary as mediator commends itself.[156)] The legal relations of the participants of the mediation agreement between themselves are in private law. In contrast, the legal relations between a notary as mediator and the participants, since his activity falling under § 24 Paragraph 1, Clause 1 BNotO is an official function, is one of public law.[157)]

2.2.2 Effects of notarial mediation on the notarial profession

169 If notaries accept the sphere of activity of mediation, this could have positive effects on the professional group of notaries, if it

170 - does not restrict this subject to mediation as a notion[158)],

171 - positions mediation as a marketing concept for the notarial profession amongst the general public[159)] and

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155) *Ganter* WM 2000, 641, 645

156) For a comparison of a full version of a mediation agreement without the Rules of Conciliation [GüteO] of a lawyer-mediator, see *Schmidt* ZMK 2000, 71

157) Analogous, Federal Supreme Court [BGH] 19.03.1998 - IX ZR 242/97, BGHZ 138, 180, 181

158) See above Ref. No. 13 ff.

172 - extends the offer of services by notaries to mediation as a generic concept[160)].

173 This also requires them to become increasingly interested in state recognition as conciliation offices, as well, as understood in § 794 Paragraph 1 No. 1 of the Code of Civil Procedure [ZPO] (independently of the subject of § 15a of the EC Code of Civil Procedure [EGZPO][161)]), in order to counteract the following prevailing impression amongst the general public: Notaries are only competent for notarisation and then, only, when the law prescribes it. This preconceived idea that is prevalent amongst the general public is, factually, wrong – like all prejudices, but it exists. It is also pointless to try and describe to the general public the real legal situation, and everything that notaries are allowed to do, as this would not alter anything about their preconceived ideas.

174 Instead, with the plan of action already outlined, the prejudice mentioned could be combated in one area, in which frustration is spreading in the general public, in order to make known, at the same time, the benefits of the work of notaries other than in notarisation, and where the law does not prescribe the activity of a notary. By this we mean countering the frustration amongst the general public with state jurisdiction[162)] with an

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159) See above Ref. No. 11

160) See above Ref. No. 12

161) See above Ref. No. 24 ff.

162) How remote the legal system has now become and to what extent it is distant from reality and living in an ivory tower can be seen if we consider the following statements made by the lady judge, *Jaeger*, at the Federal Constitutional Court in the Lawyers' Gazette 2000, 475: 'Only 2 % of the constitutional problems [out of an average of more than 4,500 per year] are successful. ..... Despite the low success rate the Federal Constitutional Court is an institution that is recognised and valued in all sectors of the population by specialists and lay people.' One is inclined to permit oneself the comparison that people like playing the lottery even if the number of people winning the main prize is only very small. Reality is very different and, the Federal Constitutional Court, with its low success rate, also contributes to that frustration, especially since the Federal Constitutional Court[BverfG], in reality, – as every practitioner knows – is not directed at its published case law in non-acceptance decisions. Examples of 'hits' that relate to all the decisions collected in the database (in the JURIS database as at: 03.09.2000) show the real situation in terms of the law:

Objection of the denial of legal hearings (Basic right under Art. 103 Paragraph 1 GG, 6 Paragraph 1 EMRK): 11.812 factor

Objection of Bias (Basic right impartial/legal judges under Art. 101 Paragraph 1, Clause 2 GG, 6 Paragraph 1, Clause 1 EMRK): 3.595 factors

Objections of unfair or predetermined trial (Basic right to fair trial under Art. 3 Paragraph 1 of the Basic Law [GG], 6 Paragraph 1 EMRK): 1.904 factors

The general public is frustrated by *this* reality of life in the state courts: No guarantee of impartiality, cutting short of legal hearings and multiple violations of the basic right to a fair trial. There is no reason to be proud of the fact that the thresholds of legal evaluation for this sensitivity are pitched so high that a success rate for these three basic rights before the Federal Constitutional Court [BverfG] comes out at far less than 2 %.

alternative that incorporates the benefits afforded to the person seeking legal satisfaction and thus that person as the target. In this way it could be shown in what areas the profession of notary could be of benefit to persons and commercial concerns. Contrasting the services of state administration of justice against the background of the subjects of *conflict avoidance* and *resolution* would make the benefits more transparent:

175

Services	*Notaries*	*State courts*
Impartial giving of advice as an official function	+	--
Being commissioned impartially as an official function	+	--
Inexpensive impartial advice/commissioning	+	--
Clashes of interests/balancing of interests without conflict	+	--
Clashes of interests/balancing of interests with conflict	+	+/-
Conciliation proposal without decision-making competence	+	--
Co-operative negotiation/instrumentality	+	--
Contractual conflict elimination	+	--
Bringing forward of a conciliation procedure	+	+
Joint appointment of the judge/court	+	--
No compulsions concerning competence	+	--
Inexpensive court procedure	+	--
Sequence of appeals that can be agreed freely	+	--
Specialised judge(s)	+	+/-
No admission compulsion for lawyers	+	+/-
Confidentiality of court hearing	+	--
Short duration of proceedings	+	--

Compromise for legal claims	+	+
Court decision	+	+
Execution deed	+	+
Impartial drafting of contracts	+	--
Impartial administration of contracts	+	--

176 Mediation by notaries as a marketing concept, generic concept and notion thus makes possible an offer of services by the notarial profession in the broadest sense, which can be extended as the second 'pivot' of their services in addition to notarisation.

177 It would also place in the foreground the *benefits* for the public who are subject to the law and not, as is the case with state courts, privileged action[163)]. Everywhere where the commissioning of independent and impartial support would be important in connection with legal circumstances, the profession of notaries could position themselves and, stressing the independence and impartiality of notaries, offer everything from advice, through moderation, instrumentality, conciliation, mediation, and the elaboration of contracts and notarisation to arbitration jurisdiction, all from a 'one-stop' service. This would also have the effect

- of a greater understanding amongst the public who are subject to the law concerning the benefits of notarisation and
- an increase in the incidence of deeds.

178 (1) The profession of notary would have the opportunity of demonstrating, more than hitherto, the benefits to interested parties of the notarising work of notaries, whether notarisation is required by statute or not. This is because the fact that notarisation does not only have as its subject-matter an effective contract, but also an evenly-weighted contract, and the notary has duties to the participants of declaration, instruction, information and warning is, indeed, well-known in the notarial profession. The resulting benefits are, however, not widely known amongst the public who are subject to the law, which is why they only arrange for notarisation with a notary if

163) *Wagner* ZNotP 2000, 214

statutes require it, and not because it is known to be beneficial even when there are no laws that require it.

179 (2) If the benefits of notarisation by notaries, even without statutory regulations, are also known amongst the public who are subject to the law, willingness to make use of notarisation will increase even if no laws prescribe a compulsion to notarise.

2.2.3 Effects of notarial mediation on other professions

180 Mediation by notaries as a generic concept[164)] is an alternative to the (state) jurisdiction whereby its aim is to avoid court proceedings before state courts or arbitration courts. Thus, for example, it takes nothing away from lawyers but motivates the latter to rethink. The majority of lawyers see themselves as trial lawyers, which is backed up by the fact that the public who are subject to the law is motivated, through legal expenses insurance, concerns financing trials and increased reporting on trials by the media, to assert their own rights precisely through legal proceedings. As the latest trend in working options for lawyers, what is termed 'collective proceedings' are becoming more widespread in Germany, which costs nothing to the petitioner because he has the support of concerns financing the proceedings. Whereas hitherto injured parties have sought a lawyer in order to assert their own rights, in collective actions initiated by lawyers the latter look for 'injured parties' for themselves.

181 Legal disputes before state courts, however, in the light of the fact that their outcome cannot be calculated and because proceedings are lasting longer and longer, are no longer a commercial objective worth following for the participants and, now also, for their lawyers. As a result, even (serious) lawyers are going over more and more to desisting from pursuing the legal dispute, but to avoiding it and seeking a pre-court/ extrajudicial solution, quite apart from the fact that the lawyer receives greater remuneration for an extrajudicial compromise under § 23 Paragraph 1, Clause 1 BRAGO, than if it comes to court for a compromise (§ 23 Paragraph 1, Clause 3 BRAGO). Lawyers as *partial* representatives of their clients' interests are not always successful in this process in negotiating, with the other side in the case, for a compromise concerning legal claims, or bringing about a balancing of interests, with the result that, in such cases, an independent and *impartial* institution can be of assistance. Here, notaries are available to assist in the scope

164) See above Ref. No. 12

described previously, whereby said lawyers retain their function of partial representatives of their clients' interests. Notaries and lawyers thus do *not* compete in this area of mediation as a generic concept[165)].

182 A relationship of competition can only arise when lawyers are not partial representatives of their clients' interests and, instead, act impartially as agents, conciliators or mediators as permitted by § 18 BNotO. This relationship of competition must, however be qualified for the following reasons:

183 - In cases in which lawyers operate impartially, they are not allowed to act partially as the representatives of their clients' interests. Lawyers shall thus only make themselves available for impartial work in cases in which they believe they can build up a relevant, additional sphere of business outside their circle of clients. Who, however, would take cases to lawyers for them to work on impartially? Other lawyers would scarcely do so. This has been shown, for example, by failure to accept the arbitration court set up by the Frankfurt Bar Association, which court is occupied by lawyers, while lawyers are unwilling to place their own clients and commissions in contact with other lawyers. Thus, lawyers can initially hope for cases like this with respect to impartial activity, in which conflicting parties expect help without the assistance of a lawyer. And these will mainly be cases that come under § 15a EGZPO.[166)] However, this would be competition in commercial terms, which would have to be withstood by notaries.

184 - Another situation involving competition for lawyers who are starting to act impartially can arise where lawyers could be called upon as agents, conciliators or mediators, on account of particular competence in the areas (of the law) in which the conflict is being played out. This situation of competition will have to be taken on by the notarial profession.

185 However, wherever lawyers started to act *impartially* as agents, arbitrators or mediators, they would naturally not be able to act for and on behalf of the parties who are, for them, represented parties. They could thus not conclude a lawyer's compromise as lawyers acting impartially, as a final agreement, according to § 796a Paragraph 1 ZPO. If, therefore, a final agreement by the participants is to be executable, either solely the lawyers

165) See above Ref. No. 12

166) Value of dispute up to DM 1,500.- - and disputes involving neighbours

representing the participants partially could conclude with each other a lawyer's compromise that is to be declared to be executable or, on the other hand, notarise such a final agreement with an execution deed with a notary (§ 794 Paragraph 1 No. 5 ZPO).

186 This would be different where lawyers started to act *impartially* as agents, arbitrators or mediators *and* this took place in their capacity as a conciliation office approved by the Land Administration of Justice as understood in § 794 Paragraph 1 No. 1 ZPO, if and insofar as they had been recognised as such an office when they applied. In a case like this the lawyer acting impartially would be able to draw up a handwritten final agreement with an execution deed under § 794 Paragraph 1 No. 1 ZPO.

187 Whereas, in public opinion, impartiality is associated with the office of notary, partial representation of interests is linked with the work of lawyers. The legal profession must, therefore, make clear to the general public first of all that lawyers can also act impartially when necessary, and how the distinction is made between that and the partial representation of interests. It will take time to influence public opinion in this way, which gives the notarial profession a certain advantage in terms of competition.

188 If other professions take up mediation (e.g. (social) educationalists, psychologists, psychotherapists, management consultants, teachers etc.[167]), the latter can work in the first stage of mediation if it is a matter of the moderation of behaviour with a view to reaching a balancing of interests. On account of the Legal Advice Law the latter are not, however, permitted to give legal advice. They may thus neither participate in a legal advice procedure for the purpose of balancing the outcome established in legal terms, nor assist with the wording of contracts for final agreements. If, therefore, mediation requires the legal balancing of the outcome established by an *impartial* person and/or if the drawing up of a handwritten final agreement or the notarising of such an agreement necessitates [the effecting of this] by an *impartial* person, this scenario holds no competition for the notary, but these professions and the notary would be able to expand their services by offering mediation. The reverse also applies, if the mediation in the first part requires a special negotiating technique and knowledge from the areas that the professions mentioned possess, with the result that the notary can then recommend that such persons be appealed to for the first part of the mediation, whereas he will be 'competent' for the giving of impartial legal advice and for the wording of contracts/notarisation.

167) Evidence in *Ewig* 'A Mediation Guide', 2000

189 Such co-operation by a notary as a mediator with a person from another profession should be seen less from the standpoint of competition, and more from that of 'interprofessional co-operation'.[168] This co-operation is quite harmless in professional law as long as the notary, for his part, complies with the legal regulations of his profession and, in this connection, does not make any inadmissible fee agreements (§ 17 BNotO).

2.3 The special features of notarial mediation, procedures, practical measures, charges, relationship to other notarial work

2.3.1 Special features of notarial mediation – procedures

190 Since the notarial profession in Germany is only now beginning to take an interest in the subject of notarial mediation, there is still no experience of any certainty in the field. Therefore, at this point it is impossible to do anything other than describe proposals as to how we could imagine mediation by notaries against the background of the professional law that governs their work.

191 The Rules of Conciliation (GüteO)[169] must be the *voluntary* basis for a mediation procedure with a notary as mediator, if

- the procedure is initiated in writing (§ 2 Paragraph 1 GüteO) and
- all participants are in agreement with it (§ 1 Paragraph 3 No. 1 GüteO).

192 The Rules of Conciliation or comparable procedure rules must, *by compulsion,* be used as the basis of a mediation procedure with a notary, if

- the procedure is initiated in writing (§ 2 Paragraph 1 GüteO),
- the notary as mediator will act in his capacity as a recognised conciliation office as understood in § 794 Paragraph 1 No. 1 ZPO *and*
- the Land Justice Administration or the Land legislature has made the Rules of Conciliation or comparable procedure rules the precondition for recognition as a conciliation office.

193 The objectives of notarial mediation are in any case to bring about a balancing of the interests of the participants. But the starting point is not necessarily conflict, but the

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168) *Henssler/Kilian* ZMK 2000, 55; *Wagner* ZNotP 2000, 214, 222 f.

169) *BNotK* DNotZ 2000, 1

clashes of interests that have either not yet caused conflict or have already shown a propensity to conflict. In the former case the avoidance of conflict and, in the latter, the resolution of conflicts are called for. If clashes of interests are present without conflict, what is called *contract mediation* is often employed by the notary, whereas we talk about *conflict mediation* in a situation of clashes of interests with conflict.

194 *Contract mediation*

Clashes of interests – without a conflict situation – are taken forward, by contract, to the balancing of interests.[170)]

195 *Conflict mediation*

Definition:

'Extrajudicial, voluntary conflict management procedure in which parties to a conflict reach joint decisions in relation to the others, with the support of a neutral third party without decision-making authorisation as to the content (the mediator). Where possible, the latter decisions incorporate the interests of the participants, are directed towards the creation of value and are based on understanding of oneself and the other person, and their view of reality as relevant.'[171)]

2.3.1.1 Notarial mediation: substance and professional law

196 *(1) Objectives of mediation*

Setting down the objectives with the participants:

- creation of what is termed a 'win-win situation', which affords a benefit for each of the participants including legal advice and safeguarding or
- the achieving of a compromise solution or

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170) If the notary is called in by one of the participants as a moderator for a *mediation* procedure, the latter shall generally be conducted for the purpose of the balancing of clashes of interests that are already present –and not necessarily a conflict. In this situation the notary should, on the basis of his experience, competence and skills at balancing interests, carry out the moderation within the mediation process in such a way that the participants, themselves, find their own solution under his direction.

In the mediation contract, depending on the intentions of the participants, the otherwise contentious question may also be dropped, as to which party succeeds with 'its' contract or its model contract. The 'wording monopoly' and the 'contract administration monopoly' can by shifted to the notary as a neutral person.

171) *Mädler/Mädler* in: Breidenbach/Henssler, Mediation for Lawyers, 1997, pages 13, 15

- less (only/at any rate interim results).

197 *(2) Procedure basis*[172] *: Rules of Conciliation (GüteO)*

198 *(3) Principles of professional law in notarial mediation*

independence (§ 14 Paragraph 1, Clause 2 BNotO)

impartiality (§ 14 Paragraph 1, Clause 2 BNotO)

integrity/probity (§ 14 Paragraph 2 and 3 BNotO)

confidentiality (§ 18 BNotO)

199 *(4) General principles of mediation*

it is optional for the participants,

neutrality of the mediator,

the participants bear their own responsibility,

the participants must be informed,

the procedure is confidential

200 *(5) Special features of notarial mediation: 3 - stage model*

a) negotiation management:[173]

official function (= 'giving advice' as understood in § 24 BNotO[174]), but not legal advice.

clarification of the facts of the matter.[175]

b) legal advice in relation to the outcome established by the participants[176]

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172) For the basic structure of a mediation procedure other than notarial mediation see *Casper/Risse* ZIP 2000, 437, 438 ff.; *Risse* ZEV 1999, 205, 206 ff.

173) The participants intend to achieve their result by negotiation

174) *Reithmann* in Schippel, BNotO,7th Edition 2000, § 24 Ref. No. 21

175) See above Ref. No. 163 – 167

176) The notary must make sure that what is to be agreed does not only represent a fair balancing of the interests, but also that it is legally effective on the basis of the applicable laws and case law.

He must also make sure that what is to be agreed can also be implemented.

And, finally, he must also ensure that what is to be agreed also guarantees that what can be implemented, is. Included in this is release from a deed that is notarially executable (*executability*).

Participants and the notary settle to what extent, for the outcome established by the participants, an additional need for agreement is required on account of particular *legal* factors (notarial duties of warning and information = § 24 Paragraph 1, Clause 1 BNotO 'advice')

= responsibility for the result on the part of the notary for the *capability* of the notary's *agreement outcome* as established *of being implemented legally*

c) Notarial contract-drafting of the final agreement

= responsibility for the result on the part of the notary for the

c1) legal effectiveness of what has been agreed;

c2) practicability of what has been agreed;

c3) guaranteeing of what has been agreed (responsibility for execution) by means of

- handwritten agreement without execution deed;
- handwritten agreement with execution deed, if the notary is a conciliation office at the same time (§ 794 Paragraph 1 No. 1 ZPO);
- notarial deed with enforcement title;

  If the notary operates as a conciliation office within § 794 Paragraph 1 No. 1 ZPO.

  If the notary does not operate as a conciliation office, on the basis of § 794 Paragraph 1 No. 5 ZPO
- additional opportunities for protection by agreement in case future disputes arise with regard to what has been agreed:

  preclusion of the due legal process and agreement of a notarial ad hoc-arbitration court[177)] (if necessary, agreeing of the SGH as an appeal instance) *or*

  preclusion of the due legal process and agreeing of the SGH as an institutional arbitration court.

177) *BNotK* DNotZ 2000, 401

2.3.1.2 Sequence of notarial mediation

201 We can imagine that notarial mediation will take the following form:

202 *Preparation phase*

(1) clarification as to in what capacity the notary should be mediator:

- the notary as mediator or
- notary as mediator in the capacity of conciliation office with recognition (from the Administration of Justice).[178)]

ascertaining who all the relevant participants are and clarification of the objectives and 'feasibility' of mediation.

conclusion of a mediation agreement between the participants amongst themselves with the notary as a mediator.

203 (2) Introductory phase

a) introduction and determining and explanation of the course the mediation procedure will take by the notary[179)], to the participants.

b) statement of the prospects, risks and objectives of mediation.[180)]

204 (3) Information phase

c) factual representation of the statement by the participants.[181)]

d) clarification of the facts of the matter by the mediator.

205 (4) Interests phase

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178) In Bavaria all notaries are conciliation offices because of the law, and other than in Bavaria only where the Land Administration of Justice in question has authorised the notary upon application from a notary to act as a conciliation office for particular areas of the law, in response to his request.

179) For example, it must be clarified with the participants whether the notary as a mediator is allowed to talk to each individual interested party in separate meetings in order to gain an idea of the interests of the participants without being allowed to pass on what he learns in those meetings. Included in this is also clarification on the part of the notary as to when and to what extent he will intervene (initially only to steer the discussion by questions from the mediator then, if necessary, by giving information etc.)

180) Orientation for the future and balancing of interests, not orientation for the past and deciding about the grounds of legal claims. The participants do not have to convince the mediator but the other participants in each case.

181) The latter may, but do not have to be prepared in writing. They may address the participants through their accompanying lawyers. It is worth recommending that, initially, the participants represent their view of the matter, themselves, even independently of legal considerations.

e) clarification of the interests and preferences of the participants.[182)]

f) outlining of possible creative solutions by the notary as mediator.[183)]

206 (5) Negotiation phase

g) joint round of negotiations by the participants and the notary as mediator.[184)]

h) depending on the situation, separate negotiation by the notary as mediator with the participants ('shuttle diplomacy')[185)] with the following aims:

- clarification of the real situation of interests at issue of one of each of the participants;
- creation of the connection in reality between the facts of the case and the position of the parties' interests;
- creation of willingness to compromise on the part of the participants and sounding out of their 'thresholds of agreement';[186)]
- limitation of loss and clarification as to how a win-win situation could look for each of the participants.[187)]

i) joint round of negotiation by the participants and the notary as mediator.

207 (6) Legal advice

j) clarifying the result of negotiation in the light of legal factors and agreement in this matter, too.

208 (7) agreement phase

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182) This can also take place in such a way that the notary as a mediator undertakes such procedures, on his own, in separate meetings with each of the participants. The precondition is that the notary has agreed this way of proceeding in advance with the participants, jointly, and has made it clear to them that he is not disclosing the knowledge gained in the process without the agreement of the participants in question to the other.

183) The objective of the mediation is not so much the settling of a set of circumstances situated some time back in the past as, rather, the question as to how a situation characterised by clashes of interests (with or without conflict) can be improved for the future. Moreover, the participants need not clarify the facts of the matter, which can be helpful in order to save face. Instead, options for solutions and alternatives to them are outlined for the future.

184) This serves the re-establishment of communication between the participants.

185) Compliance with the principle of confidentiality in these individual meetings

186) Included in this is an improvement of mutual understanding, whereby the viewpoint of the other side in each case can be passed on.

187) This includes, first of all, on the part of the mediator, making clear that the result cannot be produced by an 'all-or-nothing' solution.

k) legal formulation of the agreement (final agreement) through

- notarial deed or
- handwritten agreement

209 (8) guaranteeing phase[188)]

l) guaranteeing of what has been agreed by notarial execution deed[189)]

- under § 794 Paragraph 1 No. 5 ZPO[190)] or
- under § 794 Paragraph 1 No. 1 ZPO.[191)]
- guaranteeing what has been agreed against new clashes of interests/conflicts by
- mediation clause,[192)]
- arbitration court clause.

m) If no agreement is possible, settlement as to whether judicial deliberation is desired before the state court or notarial arbitration court (ad hoc-arbitration court or institutional arbitration court[SGH])

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188) Responsibility for execution in the sense of what has been agreed being capable of being executed as a responsibility for practicability on the part of the notary

189) This is overlooked[or 'seen clearly'] by *Lörcher* DB 1999, 789, when he states that the guaranteeing of a final agreement with an execution deed requires that a state court or an arbitration court be called upon. To overlook the notarial execution deed and, instead, to refer clients to state courts, could be classed, rather, as a lawyer's 'creative error'.

190) For the notary's duty to inform under § 17 BeurkG in the procedure of the execution submission see *Jost* ZNotP 1999, 276, 282

191) This is only the case if the notary is recognised by the state as a conciliation office for the area of law related to the mediation procedure and has carried out the mediation in his capacity as conciliation office

192) On the basis of a proposal by *Casper/Risse* ZIP 2000, 437, 444, a contractual mediation clause could be worded as follows:

The participants ... undertake to conduct a mediation procedure for the conciliatory resolution of disputes in connection with .... The mediation procedure is governed by the Rules of Conciliation (German Notaries' Journal = Deutsche Notar-Zeitschrift 2000, 1). The participants will participate in the mediation sessions or send an authorised representative.

For the duration of the mediation procedure the filing of an action is not permissible unless it is requested for the purposes of the interruption of the limitation period. Nor is the filing of an action permissible until one of the participants in the mediation procedure is declared to have failed or if, from the time when the application for the carrying out of mediation ... weeks have elapsed, without a final agreement being concluded.

For the mediation clause see also *Risse* ZEV 1999, 205, 209

2.3.2 Charges

210 If notaries base the mediation they carry out in agreement with the participants on the Rules of Conciliation, the remuneration of the notary with respect to the participants is governed by § 9 Paragraph 1 GüteO. The obligations of the participants in the bearing of the costs of mediation between themselves is governed by § 9 Paragraphs 2 and 3 GüteO.

2.3.3 Notarial mediation in relation to other notarial work

211 If a notary notarises something, he must find out what the intentions of the participants are and clarify the facts of the case. (§ 17 Paragraph 1, Clause 1 BeUrkG). The ascertaining of the intentions of the participants and clarification of the facts are ancillary activities that assist in preparation.[193)] In this process the notary is generally allowed to work on the basis of the actual information given by the participants, without having to initiate his own research, unless he realises that the participants have misunderstood something, are not taking into account certain aspects on which the transaction depends, have an erroneous grasp of the facts or are classifying them wrongly in legal terms.[194)]

212 In notarisation, the notary must also give information about the legal scope (§ 17 Paragraph 1, Clause 1 BeurkG).[195)] Included in this is also instruction about the direct *legal* consequences of the transaction,[196)] but not concerning the *commercial* consequences of the transaction.[197)]

213 And, finally, in notarisation the notary must ensure that the declaration of the participants [sic]is reiterated unequivocally and clearly in the deed (§ 17 Paragraph 1, Clause 1 BeUrkG), that errors and doubts are avoided and that inexperienced participants and those who are not ‘au fait’ with what is happening are not disadvantaged (§ 17 Paragraph 1, Clause 2 BeUrkG). The notary must also ensure that an effective deed is drawn up. If the notary is in doubt about the effectiveness of a transaction, he must advise the participants of this and, if the latter insist on the notarising of the transaction, note his instruction in the deed (§ 17 Paragraph 2 BeUrkG).

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193) *Ganter* WM 2000, 641, 642

194) *Ganter* WM 2000, 641, 642; for a *clarification* of the facts see above Ref. No. 163 ff.

195) *Ganter* WM 2000, 641, 643

196) *Ganter* WM 2000, 641, 644

197) *Ganter* DNotZ 1998, 851, 856; *Ganter* WM 2000, 641, 645

214 The notary must adhere to these principles even when he is notarising a final agreement a part of a mediation process.

215 As has already been shown, the execution of a mediation process by a notary is an official function under § 24 Paragraph 1, Clause 1 BNotO, but it is not a constituent part of the notarising procedure, even when the mediation is concluded by a notarised final agreement. Therefore, the notary as mediator has, for the mediation process under § 24 Paragraph 1, Clause 1 BNotO, the independent commissioning and advice obligations already shown. In relation to the mediation preceding a final, notarised agreement, this is thus not ancillary preparation work for the notarising of the final agreement. Commissioning and advice obligations of the notary as a mediator during the mediation procedure, therefore, do not result from § 17 Paragraphs 1 and 2 BeUrkG.

3. Arbitration and the other types of preventative notarial work with regard to legal disputes

3.1 National legislation and jurisdiction (precedents) in the area of arbitration

216 The law of the arbitrator's procedure is governed by §§ 1025 ff. ZPO. It is essentially based on the UNCITRAL model law elaborated by the Commission of the United Nations for International Commercial Law (UNCITRAL) and recommended to the member states by the plenary meeting of 1985 as national law for national and international arbitration procedures.[198)] It came into force on 01.01.1998.

217 In § 1062 Paragraph 1 ZPO the competent Upper Land Court is competent to decide as to various applications in connection with an arbitration procedure. In the following cases legal objections against decisions of the Upper Land Court are allowed to be submitted to the Federal Supreme Court (BGH),[199)] if, in an instance of a final judgement by a state court, the filing of an appeal has been granted (§ 1065 Paragraph 1, Clause 1 ZPO):[200)]

218 - in which the Upper Land Court [decides upon] the establishment of the admissibility or inadmissibility of an arbitration procedure or the decision of an arbitration court in

198) *Baumbach/Lauterbach/Albers/Hartmann*, ZPO, Grundz § 1025 Ref. No. 2; *Lachmann*, A Handbook of Arbitration Court Practice, Ref. No. 64 – 65; *Schiffer* JurBüro 2000, 188

199) *Lachmann*, A Handbook of Arbitration Court Practice, Ref. No. 633 ff.

200) In this matter BGH 15.07.1999 - III ZB 21/98, BGHZ 142, 204

which the latter approves its competence in an interim decision (§ 1062 Paragraph 1 No. 2 ZPO);

219 - in which the Upper Land Court decides upon the reversal or writ of execution of the arbitration award or the reversal of the writ of execution (§ 1062 Paragraph 1 No. 4 ZPO).[201)]

220 It thus becomes clear that the arbitration procedure has a subordinate instance position in state jurisdiction, on certain preconditions.

221 If the place of the arbitration procedure is in another country, the German notary is also allowed to operate as an arbitrator/arbitration court, since his activity in this regard is not an official function but an ancillary activity not requiring authorisation. Even when the place of the arbitration procedure is in another country, German state courts nevertheless remain competent for particular functions:[202)] If a legal dispute begins before German state courts, they must take the arbitration plea into account (§§ 1035 Paragraph 2, 1032 ZPO). Appeal may be made to German state courts for interim court measures taken before them (§§ 1025 Paragraph 2, 1033 ZPO). And German state courts must support the arbitration court situated in a different country upon request in the taking of evidence or undertaking of other judicial acts, for which the arbitration court would not apparently be authorised (§§ 1025 Paragraph 2, 1050 ZPO). If the place of the arbitration procedure has not yet been determined, German state courts are obliged to afford further support if one of the parties has their[203)] official residence/registered office or usual place of residence in Germany (§ 1025 Paragraph 3 ZPO). And, finally, the recognition and execution of foreign arbitration awards is settled. (§§ 1025 Paragraph 4, 1061 – 1065 ZPO).

222 The linking of conciliation activity and arbitration jurisdiction has also aroused interest amongst the legal profession. Thus, the Frankfurt/Main Bar Association is currently, with the Frankfurt/Main Chamber of Industry and Commerce, setting up a joint conciliation office. In Stuttgart, something similar has already been achieved.[204)] Moreover, the

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201) *Lachmann*, A Handbook of Arbitration Court Practice, Ref. No. 550 ff., 589 ff.

202) *Lachmann*, A Handbook of Arbitration Court Practice, Ref. No. 69 - 71

203) § 1034: Composition of the Arbitration Court.
§ 1035: Appointment of the arbitrators.
§ 1037: Refusal procedure.
§ 1038: Failure to perform or impossibility of fulfilling performance.

204) *Kopp* ZMK 2000, 87, 88

Frankfurt/Main Bar Association has been setting up what is termed a 'Permanent Arbitration Court' since 1995[205)] which, as an institutional arbitration court, is comparable with the 'Conciliation and Arbitration Court (SGH)' of the German Association of Notaries, as already discussed..

3.2 Arbitration and the profession of notary[206)]

223 Now that the *BNotK* has proposed Rules of Conciliation for extrajudicial conflict resolution work by notaries,[207)] it is now able to take on arbitration work by notaries. Under § 8 Paragraph 4 BNotO, the notary is permitted to act as an arbitrator.[208)] This has encouraged the notarial profession to address this subject on two fronts:

224 - The Federal Association of Notaries (BNotK) adopted an arbitration agreement with procedure and cost agreement, in its meeting of representatives on 28.04.2000 [209)], which is intended to enable the notary to start operating as a one-man arbitration court or member of a 3-person arbitration court.[210)]

225 - For example, notaries may provide, in deeds by arbitration clauses recorded in them,[211)] or the arbitration agreement mentioned previously, for what is called an ad hoc-arbitration court, if the parties do not intend to go back, in the initiation of the arbitration procedure, in the formation of the arbitration court and the execution of the arbitration procedure, to the assistance of an arbitrator's organisation.[212)] The arbitration agreement proposed by the BnotK, in addition to a procedure and cost agreement,

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205) *Kopp* ZMK 2000, 87

206) As an exception, what follows reproduces the publication of the author in *Wagner* DNotZ 2000, 421

207) DNotZ 2000, 1; in this matter *Wagner* ZNotP 2000, 18, 22 f.

208) For the activity of notarial arbitrators as a service see *Wagner* ZNotP 2000, 214, 220

209) *Trittmann* ZGR 1999, 340, 345: The agreement of an arbitrator in a contract is named by the legislature in § 1029 ZPO 'Arbitration agreement'. 'This is the generic concept for the 'Arbitration agreement' with which the competence of an arbitration court is agreed in an independent agreement, and presupposes for the 'Arbitration clause', the one appropriate settlement in an independent agreement.'

210) BNotK DNotZ 2000, 401; see also Federal Association of Notaries German Notaries' Journal 2000, 81, 82

211) An example can be read in *Wagner* in: by Heymann/Wagner/Rösler, Brokers' and Developers' Rules and Regulations for Notaries and Credit Institutions, 2000, Appendix D. I. 1. § 13

212) *Raeschke-Kessler/Berger*, Law and Practice of the Arbitration Procedure, 3rd Edition 1999, Ref. No. 61; *Trittmann* ZGR 1999, 340, 359 ff.

should save the parties having to organise the development of the arbitration - procedure, themselves.

226 - At a time when the state jurisdiction is a proponent of the individual judge, the notarial single judge, being usual, is in keeping with the trend of the time.

227 - The German Association of Notaries, as an amalgamation of the associations of persons acting only as notaries has, via its service company, DNotV GmbH, set up a Conciliation and Arbitration Court (SGH), which is open to those acting simply as notaries, and lawyer-notaries.[213)]

228 - The SGH is an institutional conciliation and arbitration court organisation[214)] which takes over from participants the organising of a conciliation and arbitration court committee and the procedure(s) that must be carried out by them.

229 Whereas an ad hoc-arbitration court can be worthwhile when the parties who are willing to co-operate set great store by the proximity of the arbitrator who is designated for a specific dispute, an institutional arbitration court will, rather, commend itself if participants do not have this proximity (e.g. because they belong to different legal circles[215)]) or do not have this intention. To this must be added the fact that the different offers can take into account any differing circumstances which can arise when (lawyer-)notaries wish to make use of the opportunities for notarial arbitration jurisdiction independently of the offer of the Association of German Notaries. Both offers of notarial arbitration jurisdiction as outlined above do not compete with each other, but should, as alternatives, take different circumstances into account, and both – each offer per se – represent an alternative to state jurisdiction that is worth considering. To this must be added the fact that parties – where desired – e.g. can determine, themselves, whether they agree on a voluntary basis to the SGH as an appeal instance for the single judge notarial arbitration court according to the proposal of the BNotK, regardless of whether it is a matter of arbitration claims or arbitration procedures in the execution counterclaim procedure.

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213) ZnotP, Appendix 1/200: *Eylmann*, A courageous step !, page 1; *Wolfsteiner* 'The Conciliation and Arbitration Court of German Notaries (SGH), page 2; Constitution, page 6; Costs Order, page 10; *Wegmann*, The Concept of Conciliation in the Constitution of the SGH, page 11; DNotZ 2000, 81

214) *Raeschke-Kessler/Berger*, Law and Practice of the Arbitration Procedure, 3rd Edition 1999, Ref. No. 70

215) *Raeschke-Kessler/Berger*, Law and Practice of the Arbitration Procedure, 3rd Edition 1999, Ref. No. 74; *Trittmann* ZGR 1999, 340, 359 ff.

3.2.1 The notary as arbitrator

230 The notary as an arbitration court or arbitrator does not exercise any official function.[216] However, arbitration activity is well-known for not being exclusively the preserve of notaries. What speaks against an exclusive allocation of arbitration activity solely to notaries as those carrying out official functions and the allocation of notarial arbitration activity by notaries is not least the international comparison, whereby internationally – as currently also nationally – 'arbitration' is neither reserved exclusively for one professional group or allocated in a privileged fashion. In addition, such an arrangement would throw into question the activity of German notaries as arbitrators abroad under the consideration of freedom of establishment. Even though there is no official position from the BNotK on this, the committee for extrajudicial conflict resolution in the BNotK has nevertheless agreed that the arbitration activity of notaries cannot be classed as an official function in contrast to extrajudicial conflict resolution activity[217].[218] This means, for the arbitration activity of notaries:

231 - Notarial insurance cover also includes this work.[219]

232 - No official liability under § 19 BNotO, but contractual liability,[220] for which reason the notary exercising arbitration activity can limit his liability contractually.

233 - Arbitration activity remunerations are then not governed, if we assume no official function is involved, according to the KostO,[221] with the result that the notary can thus freely agree his remuneration.

234 - The notary is subject to supervision in relation to arbitration activity only insofar as he must make his conduct outside his office comply with the criteria of § 14 Paragraph 3 BNotO.

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216) *Baumann* in: Eylmann/Vaasen, BNotO and BeurkG, § 8 BNotO Ref. No. 23; *Reithmann* in: Schippel, BNotO, 7th Edition 2000, § 24 Ref. No. 21; *Wagner* ZNotP 2000, 18, 21 right-hand column; concerning notarial arbitration jurisdiction as a service, see *Wagner* ZNotP 2000, 214. Concerning the fact that this can also be viewed differently, Wagner ZNotP 2000, 18, 20 f.

217) This is an official function: *Reithmann* in: Schippel, BNotO, 7th Edition 2000, § 24 Ref. No. 21

218) In this sense, *Wagner* ZNotP 2000, 18, 21 right-hand column

219) New general insurance conditions DNotZ 1995, 721, 733; a.A. *Reithmann* in: Schippel, BNotO, 7th Edition 2000, § 24 Ref. No. 21

220) *Reithmann* in: Schippel, BNotO, 7th Edition 2000, § 24 Ref. No. 21

221) *Reithmann* in: Schippel, BNotO, 7th Edition 2000, § 24 Ref. No. 21

235 - An arbitration activity takes place by instruction or on the basis of a contract of several persons, with the result that the notary is not, in relation to an ensuing notarisation, subject to a co-operation prohibition in § 3 Paragraph 1 No. 7 BeurkG.[222)] The reason is that it could be doubtful whether § 3 BeUrkG is applicable at all to impartial activities (§ 3 Paragraph 1, Clause 1 No. 7 last HS BeUrkG).

3.2.2 Deployment of notarial arbitration work – examples

236 Arbitration courts are particularly suitable where specific knowledge of a subject is required.[223)] They require an arbitration agreement, whereby the due legal process is expressly precluded.[224)] What must come into play is an arbitrator's contract of the participants with the arbitrator(s),[225)] unless it is already incorporated in the arbitration agreement.

237 As examples of notarial arbitration jurisdiction, the following could be said to suggest themselves:

3.2.2.1 Commercial arbitration

238 *Schiffer*[226)] refers to the possibilities associated with this. Here is a broad sphere of activity of which the notarial profession can take on for itself with the offer of notarial arbitration court activity. One segment of this, for example, is private construction law. We have already referred to the notary as arbitrator in the settlement of construction disputes, elsewhere.[227)]

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222) *Wagner* ZNotP 2000, 18, 21

223) *Schütze*, Arbitration court and arbitration procedure, 3rd Edition 1999, Ref. No. 9; *Schütze/Tscherning/Wais*, a Handbook of the arbitration procedure, 2nd Edition 1990, Ref. No. 3

224) See § 1 BNotK-ArbitrationV

225) *Ahlers* Lawyers' Gazette. 1999, 308, 310

226) *Schiffer*, Commercial arbitration jurisdiction, 1999; also, *Lachmann* Lawyers' Gazette 1999, 241

227) *Wagner* FS f. Vygen, 1999, page 441 = ZNotP 1999, 22; *Wagner* BB 1997, 58 f.; Concerning the arbitration court in construction matters, see also *Mandelkow*, Opportunities and Problems of the Arbitration Court Procedure in Construction Matters, 1995. Concerning the extrajudicial resolution of conflicts in construction matters by the Munich Construction Arbitration Court, see *Frikell* ZMK 2000, 158

3.2.2.2 Company law

239 An arbitration capability is also needed in company law disputes. This applies to associations and partnerships and should also apply to joint stock companies:

240 Thus, the IInd senate of the Federal Supreme Court[BGH] indeed, still ruled, in its decision of 29.03.1996[228)] concerning old arbitration procedure law, that §§ 248 Paragraph 1, Clause 1, 249 Paragraph 1, Clause 1 of the Companies Act [AktG] are not applicable to decisions of private arbitration courts concerning joint stock companies[229)].[230)] At the time, what was involved was a challenge to a decision about a small limited liability company. The Federal Supreme Court [BGH][231)] refused the arbitration capacity essentially stating the following grounds: If, however, we bring into line with this Federal Supreme Court [BGH] case law the 'offers' of notarial arbitration jurisdiction according to the arbitration agreement proposed by the BnotK and the offer of the SGH, the following applies:

241 - A decision about resolution deficiency[?] disputes would also operate against all shareholders and company organs, even if they had not participated in the procedure. By concentration before *one* Land court (§ 246 Paragraph 3, Clause 3 AktG), contradictory decisions would be avoided.[232)]

242 However, this is also guaranteed when, in the memorandum of association, a particular notary is designated by name as the arbitrator[233)] or the institution of the SGH.

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228) BGH 29.03.1996 – II ZR 124/95, BGHZ 132, 278; in this matter *Lüke/Blenske* ZGR 1998, 253 m.w.N.

229) Concerning arbitration competence in decision deficiency disputes of the legal form of the association, Federal Supreme Court [BGH] 28.05.1979 - III ZR 18/77, NJW 1979, 2567; *Trittmann* ZGR 1999, 340, 350

230) Therefore, *Casper/Risse* ZIP 2000, 437 propose to accept mediation clauses in notarial articles of association, if they consider these clauses harmless

231) BGH 29.03.1996 – II ZR 124/95, BGHZ 132, 278

232) BGH 29.03.1996 – II ZR 124/95, BGHZ 132, 278, 285

233) On account of § 7 No. 1 BeurkG, the view is represented by *Eylmann* in: Eylmann/Vaasen, BNotO and BeurkG, 2000, § 7 BeurkG Ref. No. 8, that the *self*-appointment of the notary in 'his' deed as arbitrator would lead, for the notary, to a 'legal advantage' and would, therefore, be inadmissible. Staudinger/*Reimann*, Civil Code [BGB], 5th Book 1996, § 2198 Ref. No. Ref. No. 3 has, concerning the related concept of 'third party' in § 2198 Paragraph 1, Clause 1 of the Civil Code [BGB], that this could not be the notary drawing up the deed, himself; thus there should also exist there no *third party* appointment right of the notarising notary, himself (compare *Stockebrand* in: Bengel/Reimann, A Handbook of Will Execution, 2nd Edition 1998, Chapter. 11 Ref. No. 36). This justifiable special fea-

243 - The provision in §§ 248 Paragraph 1, Clause 1, 249 Paragraph 1, Clause 1 AktG is based on the trust of the legislature that the decision will be 'made by impartial state judges who are independent from the parties' in a strictly formal procedure exclusively from the viewpoints of the objective legality of the disputed decision[234)].

244 This is also guaranteed, however, in a notarial arbitration court whether in the notarial single-person arbitration court or in the notarial collegiate arbitration court, for example, the SGH. Indeed, the independence and impartiality as official duties of the notary (§ 14 Paragraph 1, Clause 2 BNotO) are not to be directly brought into play because, with the h. M., the arbitration activity is not an official function, but 'he has to show himself worthy of respect and trust through his conduct ..... (also) *outside* his office, which is brought to the office of notary..... He must ....., in particular, avoid the appearance of dependence or partiality' (§ 14 Paragraph 3 BNotO). The argument that an arbitrator appointed and remunerated by *one* party could, in contrast to an independent judge, regard himself as obliged to the appointing party,[235)] is consequently unacceptable in the notarial arbitration court for two reasons at least: On the one hand, on account of the obligation of the notary discussed previously to be impartial, including outside his official capacity and, on the other hand, because the notarial single arbitrator – in contrast to the case of the private 3-man arbitration court – cannot be appointed by one party, but has either already been appointed in the constitution, or is appointed by the parties in dispute jointly, or the president of an association of notaries (a corporation of public law).[236)] Even for the members of a notarial collegiate court of the SGH the participants can each forego their own right of appointment in advance for individual arbitrators in their arbitration clause. Parties of a notarial arbitration court must thus not be subjected to a decision by an arbitration court of which the composition is based on the preferences of only *one* group from among the persons affected by it.[237)] Thus, as a result, a different situation obtains from that in the private arbitration court with a right of participants to appoint an arbitrator, for which

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ture, for § 2198 Paragraph 1, Clause 1 of the Civil Code[BGB], which is connected with the concept of 'third party' that is present there is, however, not entirely capable of being generalised, and so the notary could, with regard to an arbitration agreement, exercise no *third party* appointment right for another notary as an arbitrator. There is no legal basis for such a generalisation.

234) BGH 29.03.1996 – II ZR 124/95, BGHZ 132, 278, 286

235) *Lüke/Blenske* ZGR 1998, 253, 268

236) *Trittmann* ZGR 1999, 340, 353 or 354 is also comparable

237) *Lüke/Blenske* ZGR 1998, 253, 268

Lüke/ Blenske think an arbitrator who is, in the real sense of the word, a neutral arbitrator who was appointed by the parties, is not conceivable.[238)] The plans for the notarial arbitration court proposed by the BNotK or German Association of Notaries were not, however, considered by *Lüke/ Blenske* when they made their statement.

245 If, however, elsewhere, *Lüke/Blenske*, with regard to the BGH decision that has been given, state the view that it is not to be considered questionable that arbitration procedures could also be agreed on the strength of agreement between shareholders and company including about the composition of the arbitration court,[239)] the notarial arbitration court then makes its assessment of this without the unilateral appointment right of o*ne* party. Even *Trittmann* deems an arbitration function in decision deficiency disputes permissible in joint stock companies, if a neutral membership of the arbitration court obtains.[240)]

246 - The arbitration award of a private arbitration court apparently has the effect of a judgement with the force of law only for the parties (§ 140 ZPO a.F. = § 1055 ZPO n. F.), and the Arbitration Procedure Reform Law has apparently not changed anything, here, either.[241)]

247 First of all the Federal Supreme Court, itself, indicates that the legislature responsible for the Arbitration Procedure Reform Law allegedly did not intend to have pass over into case law the extension of legal effectiveness of private arbitration awards to third parties not involved in the procedure.[242)] Nor has case law decided anything yet with respect to the Arbitration Procedure Reform Law. To this must be added the fact that the Federal Supreme Court [BGH] refused the arbitration capacity as understood in decision deficiency disputes only for a private, three-man arbitration court, in which each party had the right to appoint their own arbitrator. It mentioned problems in the choice of arbitrators for the remainder of the procedure and the resulting principle of equal treatment in the composition of the arbitration court.[243)] This problem is not posed in a notarial single-person arbitration court if the person of the notarial arbitra-

238) *Lüke/Blenske* ZGR 1998, 253, 279
239) *Lüke/Blenske* ZGR 1998, 253, 299
240) *Trittmann* ZGR 1999, 340, 349
241) BGH 29.03.1996 – II ZR 124/95, BGHZ 132, 278, 286
242) BGH 29.03.1996 – II ZR 124/95, BGHZ 132, 278, 286
243) BGH 29.03.1996 – II ZR 124/95, BGHZ 132, 278, 287

tor has already been appointed in the constitution. This problem is not posed, either, in an SGH arbitration court consisting of 3 notaries, if the arbitration activity is undertaken by a spokesman organ of the SGH,[244] without individual parties being granted an appointment right for individual arbitrators.[245]

248 The decision of the Federal Supreme Court [BGH][246] cannot be carried over to the notarial arbitration court of the BNotK being proposed here – the same applies to the arbitration activity of a spokesman body of the SGH with the precluded arbitrator appointment right of shareholders – which refuses an arbitration function in decision deficiency disputes.

3.2.2.3 Succession and family law

249 If, for disputes concerning matters during the participants' lifetime, an arbitration court has been agreed, their effect is transferred to the deceased's heirs if he dies.[247] But, also, independently of this, participants can voluntarily agree amongst themselves to have inheritance disputes decided by an arbitration court – whether with or without prior extrajudicial conflict resolution. Consequently this can also be a notarial arbitration court.

250 Also, maintenance in family law[248] or an agreement about claims concerning property rights or matrimonial property rights[249] can, for example, be made the subject of an arbitration agreement and thus an arbitration court also, therefore, of a notarial arbitration court. Consequently petitions to modify judgements can also be brought before such an arbitration court.[250]

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244) This is general in § 7 Paragraph 2, SGH Constitution

245) This possible opportunity according to § 7 Paragraph 2 of the SGH Constitution can be excluded in the articles of association of a public company if, for example, an SGH arbitration court has been agreed to in it.

246) BGH 29.03.1996 – II ZR 124/95, BGHZ 132, 278

247) BGH 28.05.1979 - III ZR 18/77, NJW 1979, 2567; *Wegmann* ZMK 2000, 154

248) BGH 03.12.1986 – IVb ZR 80/85, NJW 1987, 651; e.g. also advised in the facts concerning BFH 09.05.1996 – III R 224/96, NJW 1997, 542

249) BGH 03.12.1986 – IVb ZR 80/85, NJW 1987, 651; against arbitration competence in disputes concerning the supply settlement, Federal Supreme Court[BGH] 01.06.1988 - IV b ZB 132/85, NJW-RR 1988, 1090

250) BGH 03.12.1986 – IVb ZR 80/85, NJW 1987, 651

3.2.3 Advantages of notarial arbitration as against state jurisdiction

251 The discussion of the reforming of the legal system is anything but encouraging for the public who are subject to the law. The single judge is apparently going to become the general rule, without it being clear how this will affect the acceleration of proceedings and the competence of judges issuing decisions. The routine and specialist competence of specialised judges and courts does not appear in the legal system reform proposals. The differences as against state jurisdiction, become clear if the advantages already mentioned of notarial work[251)] are addressed, such as not only represent an attractive alternative to ordinary jurisdiction but can also be implemented immediately without the need to wait for further legislation - and certainly not for the reforming of the legal system.

252 Notarial arbitration jurisdiction is connected seamlessly with notarial extrajudicial conflict avoidance and resolution. All three components (conflict avoidance, the resolution of conflicts and deciding on conflicts) are an offer of service from notaries,[252)] into which the commissioning of a notary and notarisation are profitably linked. Notarial arbitration jurisdiction can be implemented immediately and is not dependent on discussions and the results of legal reform. However, it is not only an alternative to state jurisdiction but, at the same time, a contribution to the relieving of the task of administering justice.[253)]

3.3 Other effects in connection with the subject

253 In this is included the question of mediation in the general perception of the profession. The representatives' meeting of the Federal Association of Notaries[254)] assumes the following: If the notary has the designation, 'mediator', this is not permissible because it creates the inaccurate impression that he exercises two professions – that of notary and that of mediator, of which that of mediator is exercised outside official functions.[255)]

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251) See above Ref. No. 175

252) *Wagner* ZNotP 2000, 214

253) *Wagner* DNotZ 1998, 34*, 76*

254) Of 28.04.2000

255) For a comparable discussion as to whether lawyers are allowed to use the designation, 'mediator', see *Römermann* ZMK 2000, 83

Whether this opinion will have legal backing is not indisputable,[256] at least, in any case the development of the law concerning the limits and scope of the image the notary is allowed to have, is in flux..[257] Thus the right to represent oneself, according to precedents of the BVerfG[258] falls within the notary's basic right to exercise a profession under Art. 12 Paragraph 1 of the Basic Law [GG], in which one can only interfere by statute, in compliance with principle of reasonableness which must be evaluated in terms of constitutional law. 'Mediator' is, however, only a designation indicating the activity of mediation.[259] If the reference to this activity is permissible according to the view of the BNotK as well, use of the designation, 'mediator', would also have to be. Finally the notary may even, on the strength of the statutory basis, give information about the tasks, authorisations and spheres of activity with an effect on the public and, since mediation is an official activity, the question is posed, from where the statutory basis for the restriction of the basic right of exercising an occupation apparently emanates, of being allowed to indicate activity as a mediator with effects amongst the general public, but not being allowed to use the designation, 'mediator'. Even the argument of an assumed deception (2 occupations !?) is not compelling, but where the Land Administration of Justice, upon his application, authorises him as a conciliation office as in § 794 Paragraph 1 No. 1 ZPO, the notary will be allowed to refer to it, without it being possible to reproach him with deception in such a situation.

254 The discussion being held at the moment here, in Germany, is still overshadowed to too great an extent by the fact that, up until the decision of the Federal Constitutional Court [BVerfG] of 24.07.1997[260], the notarial profession was working on the basis of a prohibition of advertising, from which the BVerfG made a right to inform, even if this has the effect of advertising. This reversal of the circumstances and the connection to a basic right on which it is based is only being internalised slowly, in the same way as the op-

256) Thus, *Römermann* ZMK 2000, 83 appropriately refers to the fact that the Federal Chamber of Lawyers and the individual chambers of lawyers are not organs of the legislatures, but of the executives, to whom no competencies have been granted to prohibit the designation, 'mediator'. For the Federal Chamber of Notaries, and the individual regional chambers of notaries, the situation should be the same. Similarly in *Ewig* ZMK 2000, 85

257) In this matter, *Wagner* DNotZ 1998, 34*, 114* ff.; *Wagner* ZNotP 2000, 214, 224 f..

258) BVerfG 22.05.1996 – 1 BvR 744/88, 60/89, 1519/9, BVerfGE 94, 372, 389; *Wagner* DNotZ 1998, 34*, 119*

259) Thus, also, North Rhine Westphalia Arbitration Court 19.11.1999 – 1 ZU 50/99, ZMK 2000, 141; *Römermann* ZMK 2000, 83

260) BVerfG 24.07.1997 - 1 BvR 1863/96, DNotZ 1998, 69

portunities it brings for the notarial profession are as yet not sufficiently recognised. For what use are discussions about possible new spheres of activity for notaries, if the public who are subject to the law are hard to reach in the public relations work of the individual notary, if objections are given priority over a discussion of the opportunities.[261)]

255 The BNotK has not raised any objections to references to training as a mediator and the conducting of mediation by notaries in information or advertising media (prospectuses of firms, pamphlets and websites), but they certainly have against such references to the official/name plate, deed or deed cover.

256 Whereas the notary as a mediator is officially independent and impartial, other professions are still having to try and elaborate principles of independence and impartiality. Therefore, it is not uninteresting if, in the literature, the proposal is submitted that the notary's professional and notarising right should be used as a basis/criterion, and the relevant standards applied analogously.[262)]

IV. Further considerations

1. Potential developments in the profession of notary taking into consideration mediation and other means of solving conflict

257 The public perceives the notary and his work first and foremost like this:

258 - Notaries are mainly sought when the prescriptions of *laws* require it.

259 - In the first place the specialist competence of the individual notary is not grasped, but his independence and impartiality perceived. Since this must be attributed to all notaries, equally, and the remuneration also charged and accounted for for all of them on the same statutory basis, the service of notaries is fundamentally seen as interchangeable from one person to another. Hence, also the recurrent alternative of undertaking notarisation in Switzerland, because it is felt that notarisation is comparable is, however, less expensive.

260 - Notaries are trying to counteract this by providing their services more quickly. This reinforces the impression in the public who are subject to the law that, when a com-

261) In the same sense, with lawyers *Römermann* ZMK 2000, 83, 84

262) *Stumpp* ZMK 2000, 34

prehensive draft of a contract is dispatched quickly, no individual service is associated with it, which is why notaries' charges are seen, against this backcloth, as too high.

261 This perception, that is ever present amongst the public who are subject to the law is, in fact, wrong in terms of its content, but this perception is present and repeatedly causes reflection to be initiated as to how, for example, notarisation compulsions can be avoided, 'in order to save on notaries' costs'.

262 Because it is like that for them, for the notarial profession it is absolutely necessary to do something about the fact that, on the one hand, one's own individual competence is perceived and the public who are subject to the law recognises the benefits the work of notaries can have for it, i.e. independently of compulsory notarisations that are prescribed by statute. This could be introduced in the following way:

263 (1) Since the notary is brought into contact with the public who are subject to the law with the notarial deed, the aim of increasing the effectiveness amongst the public of notarial deeds suggests itself and, on the part of the profession, making known the benefits of notarisation in its marketing efforts:[263)]

- Clarification of the facts and the intentions of the participants as well as reiteration of the intentions of the participants unequivocally.
- Function of the deed for the provision of evidence.
- Appropriate wording of agreements in keeping with the instruction and legally reliable.
- Comprehensive, evenly-weighted wording of contracts in keeping with the interests.
- Effect of the deed in avoiding conflict with a guaranteeing function through execution deed, thus without having to call upon courts.

264 (2) Notaries may be aware which commissioning tasks they must undertake that they have been allocated by statute.[264)] The public who are subject to the law are scarcely aware of this at all. Here, too, the solution of the notarial profession making this effective amongst the public through marketing, and pointing out its benefits, suggests itself.

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263) *Wagner* DNotZ 2000, 13, 16

264) See above FN 2

265 (3) Neither notaries nor the public are aware of which advice and commissioning services they can offer, that are not prescribed by statute. Here, is included the whole range of notarial advice shown here and other conflict-avoiding and resolving work. It would be important in this connection to highlight the advantages of *notarial* work in this area so that, at the same time, it can be made clear precisely why *notaries* are predestined for this *and* what benefits the public who are subject to the law gains from it, if it actually accepts this offer of service from *notaries*.

266 (4) The conventional distribution of rôles, whereby the lawyer is responsible for the conflict and the notary for the deed, would then, itself, work to the advantage of the profession of notary in that it could clarify that the independent and impartial notary could make available a comprehensive legal instruction offer. On one hand, on the part of the public who are subject to the law, their own benefits of continued statutory notarising and commissioning services would be used. And, on the other hand, the benefit would be recognised if use were to be made voluntarily of notarising and commissioning options. The notarial profession could, in this connection, also make the subject of 'conflict' its own, if reference were to be made to the benefits and opportunities of notarial services ranging from notarial advice, through mediation as a generic concept[265)] (with impartial legal advice, with or without execution deed) to notarial arbitration jurisdiction and all its advantages. 'Mediation', as a marketing concept[266)] could give the way in.

267 (5) So that this can be started, nevertheless, in the light of an expanding sphere of activity for the notarial profession, more references should be allowed to be made than hitherto to specialisations offered by individual notaries ('advertise with competence').

268 The strategic campaign outlined previously would aim not only to expand the offer of the notarial profession but also to change/consolidate the need for demand for the services of notaries of the public who are subject to the law with the stronger and more detailed elucidation of the benefits for them. Thus the notarial profession could exert greater influence in an increasingly complex legal advice and legal instruction market than hitherto.

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265) See above Ref. No. 12

266) See above Rd. 13 ff.

Mediation as a marketing concept could give the impetus for such an campaign. A marketing strategy based on this would have to take the following into account:[267)]

- Definition of a segment of the market for the notarial services described.
- Formulation of a comprehensible message for all target groups of this segment of the market.
- Preparation and positioning of this message in a way that is suited to the target groups.
- Presentation of successful examples by the profession.

2. Evaluation and overall view of the preventative notarial work carried out by notaries with regard to legal disputes.

269 Legal reality has imprinted on it the fact that legal disputes are played out before state courts – in some cases also before arbitration courts. Legal expenses insurers and concerns financing proceedings make this easier. The state is trying to counteract the plethora of legal disputes by minimising legal expenses insurance/making it harder:

270 - Under § 15a EU Code of Civil Procedure [EGZPO], in association with the execution laws of the Länder, disputes with a value in dispute of up to DM 1,500.--, and disputes of neighbour law pass through a compulsory pre-court conflict resolution process; what is hoped for is a filtering effect on account of the slowness of such a procedure, as well.

271 - Under § 495 a of the Code of Civil Procedure [ZPO], civil judges can construct their procedure according to their own ideas in legal disputes of a disputed value of up to DM 1,200.,--. There is no legal expenses insurance for their decisions.

272 - According to the legal reform, legal disputes should generally go before sole judges who do not necessarily have to specialise in the area in which the conflict lies.

273 - The Federal Constitutional Court indicates that constitutional problems that are brought before it do not generally come out with a success rate of 2% or more and, in doing so, it does not yet measure constitutional problems in the majority of non-

267) *Eyer* Mediation Report 3/2000, pages 2, 3

acceptance decisions following the criteria that can be gleaned from its own published decisions.

274 In all this, however, there is one thing we have not dealt with: The causes of legal disputes. It has been shown that legal disputes can not only be decided but also avoided if one starts as early as a balancing of interests that is developing into clashes of interests. And, in this avoiding of legal disputes, notaries can operate in a preventative manner to a far more extensive degree than has been the case so far. If we intensify this, a significant positioning in the legal commissioning market can develop out of it for the notarial profession. Here, we must distinguish between

- new spheres of activity,
- the appropriation of new features of these spheres of activity and
- the marketing associated with this.

275 The discussion should not narrow itself down to the question of how one can avoid finally taking legal disputes before courts, but we should concern ourselves with the starting point of: the clashes of interests of participants, even if no conflict has arisen yet. The question should, therefore, be one of how we can go from clashes of interests to a balancing of interests, regardless of whether the clashes of interests have already turned into conflict or not, and what service the notary can offer, here.

276 Impartial notarial advice and contract mediation can already be of great assistance in a situation of clashes of interests *without* conflict with a view to bringing about a balancing of interests.

277 If a conflict has already resulted from a clash of interests, what must be done is to cause a balancing of interests orientated towards the future, that is more than the assessment, in terms of the past, of the bases of legal claims on the occasion of a compromise. Mediation (as a notion) by notaries can, here, be helpful to the participants – as has been shown – precisely because notarial professional law and, in a case of a final agreement that is to be notarised, notarisation law, as well, together with the capability of execution of the agreement, gives the participants more certainty than simply finding a joint solution, the duration of which is uncertain.

278 For notaries, dealing with clashes of interests of participants is not new, either, even if they still have something to learn in terms of new negotiation techniques.

279 In legal disputes before state courts, it is possible to make the following differentiation: If we are asking how we can avoid state courts that have been called upon giving a judgement, it is worth considering to what extent state courts, not following the co-operation model shown, ought to make use of notarial mediation, especially if the notary as a mediator is a recognised specialist precisely in the field which is so fraught with conflict. Moreover, it could be of benefit to participants, precisely in a specialist area, to play out their conflict, instead of before state courts, rather, before a notarial arbitration court, with a notary as arbitrator, who specialises in the area of conflict.

280 Legal disputes before state courts can also be avoided by participants' making prior use of one of the options that have been described above for mediation as a generic concept.

281 The profession of notary, itself, is on the point of initiating this development without the need for a new law or an amendment to laws. This can happen, on the one hand, through a professional public relations campaign, for example with the slogan:

'avoiding conflict in place of decisions about conflicts'.

282 On the other hand, the understanding of the public who are subject to the law can also be enhanced by mediation clauses and arbitration court agreements or arbitration clauses being provided for to a greater extent in notarial deeds, and it being explained to the participants what is involved.

3. Further comments in relation to the future of the profession of notary with reference to prevention, changing laws and practice

283 The European Court of Justice [268)] classes the activity of notaries who work with their own legal responsibility as commercial activity: They do so despite the fact that notaries undertake official duties on the basis of public [sic]appointment and, on the basis of authorisations that have been granted to them, exercise public authority. This service, which they call 'notarial service', also includes notarisation.[269)] Notarisation, giving of advice and commissioning, are thus subordinate concepts in this unified, notarial service. However, the idea of seeing themselves as service providers, as well, and acting accord-

268) European Court of Justice 26.03.1987 – C-Rs 235/87, [Slg.= 'conciliation court'?] 1987, 1485, 1489. Concerning the fact that the concept of notarial services does not need the derivation of the transfer of public responsibilities in Germany, either, which the state would otherwise have assumed, itself, see *Wagner* ZNotP 2000, 214

269) European Court of Justice 26.03.1987 – C-Rs 235/87, Slg. 1987, 1485, 1486

ing to such an understanding of themselves, then commends itself to the notarial profession. Public office and services are thus not in tension.[270)]

284 Such a change in their own view of themselves would also be helpful if the notarial profession were to ask not so much where their future place will be in an ever-changing legal advice market, as how they can gain market shares in it. For this to happen, repeated focusing on notarisation alone is not adequate. 'Our future does not lie with the notarial deed, alone.'[271)] Optional notarial advice and instruction that are not granted by laws, in which mediation as a generic concept is also included, must be added, and publicised and implemented actively. For this *no* changes in laws are needed, but an altered self-awareness on the part of notaries, for that which the public associates with services. Notaries must meet these demands and cannot expect the public to gravitate towards the image of themselves conveyed by the notary who is mainly engaged in notarisation.

285 Nevertheless this does not mean that the notarial profession should neglect notarisation, since this sector, too, can be expanded. Thus, *Hellge*[272)], in a contribution that is worth reading, has represented the – as he calls it – 'optimistic standpoint that European development can lead to a renewal and dynamism of the professional status of notaries.' He, too, stresses the usefulness of the profession of notary, which should incorporate greater emphasis on the idea of services, if it is going to have a presence in the legal services market. He also includes in this the intensifying of the opportunities for notarial legal advice, mediation and arbitrators' activity.[273)] Even if the notary were to run up against competition from, for example, lawyers, tax advisers and auditors in these areas, he could distinguish himself from them by additionally being able to include in his offer the enforceable public or private notarial deed that has been created by him and with his advice and supervision.[274)]

286 Whereas, in his contribution, *Hellge* regards it as a strategic goal for the notarial profession relating to the future, to position the public notarial deed and the notarial private deed more visibly, it has been shown here how notarial services could be positioned more strongly in the area of preventative remedying of clashes of interests – with or

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270) *Wagner* ZNotP 2000, 214

271) Thus, *Wagner* as already mentioned, Notary, one ´99, page 17

272) *Hellge* ZNotP 2000, 306, 308

273) *Hellge* ZNotP 2000, 306, 308

274) *Hellge* ZNotP 2000, 306, 309

without conflicts. This is not a vanguard sector of the notarial deed but, rather, the notarial deed or the notarial private deed complements these services.

287 The proposal of extending § 279 Paragraph 1, Clause 2 ZPO following a change in the law has been proposed by ourselves, with the effect that, in current court proceedings before a state court, this could refer the parties in dispute, for a conciliation attempt, to a (notary as) mediator.[275)] The fact that such a proposal was new to German legal circles, but is practised in the USA, especially in collective claims proceedings in order to achieve a compromise, is reported by *Duve*.[276)] And even without any changes in the law there are already cases in Germany in which the state judge calls in a mediator during the court proceedings.[277)] Therefore, it is entirely worth it for the notarial profession to consider striving for the quasi interprofessional co-operation of state jurisdiction and notarial mediation: the starting point of the legal dispute before state courts is then the presentation of legal claims, in each case, and the end could, on account of such co-operation, be not only a compromise about legal agreement, but also a detailed final agreement, with the inclusion of more comprehensive interests. This means, that notarial mediation as a generic concept and notarial arbitration jurisdiction could not only be an alternative to state jurisdiction, but also the subject of a model of co-operation with the state jurisdiction.

§ § 278 Paragraph 4 ZPO-RG offers a statutory basis for this, in that the legislature has taken up my proposal submitted at the German Symposium of Notaries in 1998. Thus, the state court can now 'in appropriate cases ..... propose to the parties *extrajudicial* dispute conciliation', in such a way that, at the same time, the opportunities for the co-operation model suggested previously are present.

V. Concluding summary in the form of 10 theses and recapitulation

288 1. Notarial activity (advice, commissioning, notarisation and the work of an arbitrator) is a service.

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275) *Wagner* DNotZ 1998, 34*, 68* f.

276) *Duve*, Mediation und Vergleich im Prozeß, = Meditation and Compromise in the Trial, page 1 ff.; concerning the resolution of conflicts associated with a court in the USA, *Duve* in: Gottwald/Stempel/Beckedorff/Linke, The Extrajudicial Settlement of Conflicts for Lawyers and Notaries, 3.3.3.3

277) *Kempf/Trossen* ZMK 2000, 166

289 2. The need for decisions concerning conflicts by state courts can be obviated if, at the request of the participants, a notary takes on the preliminary stages of this. For this purpose clashes of interests (with or without conflict) must be brought to a balancing of interests. This can happen at the request of the participants

- in a pre-court stage,
- in response to an additional proposal of the state court even while the court proceedings are still going on and
- in the agreement phase introduced in arbitration court proceedings.

A notarial arbitration court is also suited to the obviating of decisions concerning conflicts by state courts.

290 3. Notaries, as officially impartial persons, are authorised to advise persons or concerns with clashes of interests impartially. Therefore, in §§ 14 Paragraph 1, Clauses 2 and 24, Paragraph 1, Clause 1 BNotO, the impartial advising of more than one participant is also discussed. In the prelude to conflicts impartial advice is capable of being provided, for example, if participants with clashes of interests were to arrange for themselves to be informed by a notary what the legal situation is in objective terms, or what their situation is in terms of prospects and risks. It may take place verbally or in writing, for example, as an expert's report, and it can even end with a plan or a draft contract/the conclusion of a contract. The giving of impartial advice is thus appropriate for both the *avoiding* of conflict and the extrajudicial and even judicial *resolution* of conflicts.

291 4. Mediation can be a marketing concept (for any kind of extrajudicial solution to clashes of interests), a generic concept (for advice, co-operative negotiation/instrumentality, conciliation, the contractual remedying of clashes of interests, compromise and mediation) and a notion (for contractual and conflict mediation).

292 5. Notarial mediation as a generic concept and notarial arbitration jurisdiction can be not only an alternative to state jurisdiction, but also the subject of a model of co-operation with state jurisdiction.

293 6. Cases of notarial advice, co-operative negotiation, conciliation and mediation are based, as circumstances of fact, on the fact that ad hoc preventative conflict needs to be avoided or resolved, and conflict resolution mechanisms were not agreed contractually earlier on. However, the avoidance of conflict – but not the resolution of

conflicts – can also be made possible by the contracting parties providing, as early on as in their contracts, for the way in which they must deal with conflicts that are incurred or have arisen, and who should be present as the impartial third party, adviser, moderator, mediator or even arbitrator, who should appoint this impartial third party, what this may cost and who should bear such costs.

294 7. Notarial mediation as a generic concept is not a component of the notarisation procedure, but an independent official function of notarial advice/commissioning. This even applies when, as a constituent part of notarial mediation, as a generic concept, a final agreement has to be notarised. The special features of notarisation (e.g. § 17 Paragraphs 1 and 2 BeurkG), then only relate to the notarisation of the final agreement, itself.

295 8. Notarial mediation as a generic concept and notarial arbitration jurisdiction demand a marketing effort within the profession (to notaries) and towards the outside (to the public who are subject to the law).

296 9. Notarial mediation as a generic concept can be taken up by the notary, but he can also refuse to do it. He can conduct it anywhere in Germany, and he does not have to carry it out at his registered office. Because it is an official function – he may not carry it on in other countries. A final agreement that is to be recorded in a notarial deed must be notarised by the notary at the request of the participants (§ 15 BNotO), and he may not refuse to do so. Notarisation must be carried out by him at his registered office (§ 10a BNotO). Notarial arbitrators' activity can also be conducted by the notary in other countries – since it is not an official function.

297 10. In mediation as a generic concept – not until/only at the time of the final agreement he notarises – since it is an official function, the notary has *legal* responsibility for the outcome, from which responsibility interested parties cannot release him. Included in this are the legal effectiveness and the capability of being implemented and guaranteed, of what is to be agreed, and the prevention of participants' being inordinately disadvantaged.

298 The notarial profession should exploit the opportunity of also taking up a position in the current discussions that are taking place with an influence on the public, about mediation, on the one hand, and the unpopular German legal reforms of civil proceedings, on the other. On the one hand it could be pointed out that, because of his independence and impartiality, and professional law that is safeguarded, it is precisely the notary who, in the

balancing of clashes of interests – with or without conflict – is especially suited to assisting the public who avail themselves of the law.

299 And, on the other hand, the benefits of notarial arbitration jurisdiction as an alternative to state jurisdiction should be accorded greater attention. However, the precondition of this is that the notarial profession should start to concern itself to a greater extent with the features of notarial mediation (as a generic concept) and arbitration jurisdiction.