

## GERMANY



**Maiwald Patentanwalts  
GmbH  
Munich**

*Alexander Schmitz*

mediation clause forcing the parties to conduct a mediation procedure prior to going to court.

## Use of mediation for IP matters increases

In recent years, particularly in IP, opposing parties have increasingly chosen alternative dispute resolution (ADR) over court procedures.

Mediation is a confidential non-public procedure, so no details are available to competitors. It may be of most interest to those who want to keep conditions of, for example, IP licence agreements confidential. The mediator, as a neutral arbitrator, assists the involved parties in negotiations by way of his mediation skills in the fields of communication, negotiation mechanisms and psychology. The mediator, unlike a court judge, has no decision-making authority in the dispute: the involved parties remain in full control of the procedure. Mediation allows flexibility and freedom for the parties to arrive at a resolution in the form of an agreement. The parties are also free to take into account additional aspects to be included into an agreement, like other IP rights, so that a satisfying agreement is achievable for both parties. The success rate of mediation is almost 80%.

A court decision in litigation is usually satisfying for one party only. From a mediation agreement usually both parties gain. If mediation (unexpectedly) fails, parties remain free to go to court. Parties in IP mediation are often accompanied by patent attorneys or IP attorneys at law. In Germany, the Federal Government as legislative authority has considered this development and implemented the German Mediation Act. This Act includes regulations for mediation as well as the rights and duties of the parties and the mediator, thus acknowledging the increased demand for legal regulations for ADR, in particular mediation. A first major step is finding a suitable mediator acceptable to both parties. This regularly prevents having a party's attorney as mediator. Owing to the mediator's neutral status, the mediator is prevented from acting as a consultant for or representing any of the involved parties for a stipulated time. An increasing number of joint venture or IP licence contracts already include a