Extra-judicial and Judicial Mediation and Attempt of Settlement as a Prerequisite for Bringing a Dispute to Court

ENCJ North Western Region Seminar on Timeliness

Anne-Ruth Moltmann-Willisch*

2.11 - 4.11.2014

1 Attempts of settlement as a prerequisite for bringing a dispute to court

1.1 Section 15 a EGZPO

In 1 January 2000, a law as an annex to the Code of Civil Procedure (15 a EGZPO) was passed, which was designed to promote extra-judicial settlements before court proceedings are taken. This law allowed the federal states of Germany in an experimental clause to declare an action before the lower courts admissible to a settlement proceeding at a recognized conciliation institution (anerkannte Gütestelle). This was the first time in history that a compulsory requirement of extra-judicial settlement was implemented in the Civil Procedure Code. The idea was to reduce the case-load of courts in civil matters and also to stimulate a new culture in disputes. According to the law, this compulsory settlement proceeding was limited to actions for recovery of money below €750,000 , to actions between neighbours and actions taken because of injuries to personal honour. Explicitly exempted were actions in family matters and summary proceedings based on documentary evidence.

The implementations and the result of this law were rather disappointing.

*Judge at the Court of Appeals Coordinator of Mediation at the Civil Courts of Berlin

Only 8 of the 16 federal states passed such a law, Baden-Württemberg, Bavaria, Brandenburg, Hessen, Nordrhein-Westfalen, Saarland, Sachsen-Anhalt und Schleswig-Holstein. The other federal states declined to implement such a law. Those federal states, that passed the law, limited it in time, 31 December 2005, some of them prolonged it until 2008 and 2011.

An academic analysis done in 2006 showed that only 1 % of all cases that were legally admitted went through this settlement proceeding. The problem was that there was no unique transformation of the law. The 8 federal states passed different implementation regulations, so there was quite a diversity and difference in the application. In Baden-Württemberg e.g. lawyers could apply to be taken into the list of recognized conciliation institutions, in Bavaria there was no formal recognition of those institutions so that all lawyers and notary publics who were trained in settlement procedures were allowed to act as conciliators. This was legally dubious, because the settlement agreement taken by the conciliator was an enforceable legal document.

There was also no examination of quality of the conciliators, at least no unique one for all. Further, the recognition of the enforceable legal document in other federal states was not clear. The lack of unique application in all federal states was one of the main problems of this law. But also, there were many ways to avoid this compulsory proceeding which is an argument for those who plead for voluntary settlement proceedings.

1.2 Section 253 para.3 Code of Civil Procedure

Another law that was passed in 2012 is a rather unknown and a probably not very effective means to enhance extra-judicial mediation.

Section 253 in the Code of Civil Procedure stating the statement of claim now proclaims

Information as to whether, prior to the complaint being brought, attempts were made at mediation or any other proceedings serving an alternative resolution of the conflict were pursued, and shall also state whether any reasons exist to prevent such proceedings from being pursued.

This means that lawyers have to point out in the initial statement of claim whether there had been attempts of settlement agreements before the case was taken to court. It is a non-binding obligation with no legal sanctions. The complaint would not be inadmissible if the obligations are not fulfilled. But judges should insist lawyers to state on this matter and this might improve the awareness of other settlement proceedings.

2 Extra- Judicial Mediation

In 26 July 2012 the Mediation Act (MediationsG) entered into force in Germany fulfilling the Directive of the European Union 2008/52/EG on mediation.

This law making process was quite unusual and heavily controversial for over almost two years. The original draft of the government, which was submitted in July 2010, was designed to regulate mediation in general in or outside of court proceedings. At the end of 2011 this draft was turned upside down. The Mediation Act as it reads now only governs extra-judicial mediation, whereas judicial mediation is defined and regulated in the Code of Civil Procedure. The background of this controversy is that judges had been offering mediation within special projects of courts in the Bundesländer Niedersachsen, Schleswig-Holstein and also Berlin (2006) and they were quite successful. There was no law allowing them to do so, but some ministries of justice in some federal states supported and assisted them. Evaluations by Auditors Generals Departments in some states showed that about 70 % of the cases mediated by these judge-mediators were successfully solved. They established proof that mediation in courts was effective, saving financial and personal resources.

On the other hand extra-judicial mediators in the law making process asked for subsidies and financial aid systems in order to enable them to implement mediation on a broader scale. This conflict still is not solved, but by now there are laws that regulate mediation.

The Mediation Act applies to all mediation procedures. In section 1 it defines Mediation as a confidential and structured process in which the parties voluntarily and autonomously strive to achieve an amicable resolution of their conflict with the assistance of one or more mediators. In section 2 the process and the tasks of the mediator is described. Disclosure obligations are defined in section 3, the duty of confidentiality in section 4 and initial and further training of certified mediators in section 5. Section 9, the transitional provision, specifies that mediation in civil matters being offered at a court prior to 26 July 2012 and conducted during court proceedings by a judge with no decision-making power in the matter can continue to be conducted until 1 August 2013 with the designation (court mediator) used so far.

According to section 6 a certification system should be installed in order to assure the quality of the extra-judicial mediators which shall include the following requirements in order to keep transparency of the market: a minimum of 120 hours of training and either an academic degree or a job-qualification and two years of job experience. There is a

dispute whether there should be an officially authorized admission system or a private certification offered by the mediation associations in Germany (e.g. BM or BafM) In 2017 the Mediation Act will be evaluated and examined. If a private certification by a mediation association was not implemented until then, there could be an authorized admission system by the state.

Extra-judicial mediation is well known in family matters, school mediation is becoming more popular in Germany and mediation gains more ground in economic affairs between big businesses. However, the statistical evidence on these matters are scarce.

3 Judicial Mediation

Court mediation done by judges has been exercised in some German federal states since 2002 in Berlin, where I work at the Court of Appeal (Landgericht), since 2006. These projects, initiated by judges and promoted by the respective ministries of justice, were motivated by the idea that a conflict can best be solved by the conflict parties themselves even after the conflict had been brought before the court.

Judges organized and paid for their own training. They had to convince their colleagues to give cases into court mediation and the parties and their lawyers to agree to a mediation process. Expert evaluations stated that overall, judge mediation was highly successful with a success rate of about 70% and that it is effective in lowering the case burden of the courts.

After the controversy about the Mediation Act of 2012 judges may offer mediation and other alternative methods of conflict resolution in court, but judges doing so are called Güterichter (conciliation judges) implying that the Mediation Act does not apply to them.

Policy-makers enacted a law for court mediators a law in the Code of Civil Procedure Section 278, Paragraph 5: Amicable resolution of the dispute; conciliation hearing; settlement:

Court may refer the parties for the conciliation hearing, as well as for further attempts at resolving the dispute to a judge delegated for this purpose, who is not authorized to take a decision (Güterichter/conciliation judge). The conciliation judge may avail himself of all methods of conflict solution, including mediation.

So since 1 August 2013 court mediators have been called Güterichter (conciliation judges) even if they apply the mediation procedures as now governed by the Mediation Act. Conciliation judges according to this law may also apply other methods of conflict

solution like arbitration, moderation, etc. They are allowed to give legal evaluation on the case, even though they are not authorized to make a decision. I will return to this at a later point. As from 1 January 2013 in almost all civil courts (and also specialized courts) conciliation judges have been installed but the way it is done varies from state to state.

Generally speaking these are the common factors:

- Conciliation Judges are specially trained in the method of mediation.
- They will not take any decision in the case they mediate.
- They can draft an enforceable settlement agreement for the parties.
- Third parties that are not parties in the court proceedings can join the mediation process.
- In mediations in Court the parties are always accompanied by their lawyers (this differs in some federal states).
- The proceedings are confidential, voluntary and are non-public.
- Mediations can be governed by other languages, e.g. in English.
- The systems differ in the way the consent of the parties is obtained as for example by the deciding judge or by the conciliation judge.
- There are no extra fees in court for the mediation done by judges.

A very crucial problem is that according to the law conciliation judges can offer all kinds of conflict solution. Even non-binding judgements on the case are allowed and practised in some federal states.

In Berlin the Güterichter gathered at the end of 2012 and decided to offer only pure mediation proceedings in our courts, giving no legal advice to the case. This judicial self-restraint, however, is not binding for independent judges. As far as I know, Güterichter in Berlin work that way. In our opinion, it is important to define a clear offer of dispute settlement where the parties, their lawyers and also our colleagues would exactly know what we are doing.

There is no exclusive list of cases that are appropriate for mediation. In Berlin at the court of appeals, one third of our cases deal with construction and work compensation matters. Also, heritage cases are often brought to mediation with consent of the parties.

But also cases involving public authorities are prominent examples of court mediation. The parties can suggest themselves to go through a judicial mediation and they can even choose a conciliation judge from the court where the case is pending. Often, mediation in court takes place at a very early stage of the case, but there are also cases that come to mediation after many years of court proceedings.

In Berlin there are about 600-700 cases in all civil courts (11 lower courts, 1 court of appeal, 1 Kammergericht) that are dealt with in mediation proceedings, 500 of those at the court of appeals. The court of appeals success rate has been approximately constant at 70% since 2009. This is about 5% of all cases at the Landgericht Berlin.

Judicial mediation is a story of success, but will only be accepted on a rather small basis of all cases, brought to court. It should be supported as an offer of courts to give alternative ways of solving a conflict. Extra-judicial mediation will become more accepted as the Mediation Act and provisions of certification come into force. Attempts of settlement as a prerequisite for bringing a dispute to court should be made but on a voluntarily basis.