Chapter 9
'Mediation Judges' in Germany: Mutual Interference of EU Standards and National Developments

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9.1 Procedural Developments in Europe 2000–2012

In recent years, the development of procedural law in Europe has comprised mainly three trends: firstly, there has been growing competition between the national procedural systems, which are more and more perceived as 'judicial markets'; secondly, there has been the increasingly multi-layered character of procedural law, which is still based on national cultures, but more and more influenced by European and even global parameters and related actors (such as the European Court of Justice (ECJ), the European Court of Human Rights (ECHR), the International Monetary Fund (IMF) and the World Bank). The third development relates to the scope of dispute resolution: here, an expansion of different methods of dispute resolution has been taking place that is no longer limited to the traditional litigation between two parties in civil courts, but includes ADR between consumers and in businesses, collective litigation, arbitration, online dispute resolution, etc.

Prior to addressing the main topic of my contribution, I would like to explore a little more closely these general trends in Europe, which, of course, are closely interrelated. The first development, the competition between the national systems, has been reinforced by the economic crisis. Interestingly, the crisis triggered procedural reforms in many EU Member States: national procedures were reformed in order to improve the efficiency of the Judiciary[1] – especially the managerial role of the judges was enhanced. In addition, information technologies have increasingly

[1] In Italy, the reform of the (underperforming) court system was a priority of the government, http://www.economist.com/node/21560587?frsc=dg%7Ca (last consulted in May 2013).

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been used in order to improve procedures.[2] On the other hand, forum shopping has become a wide-spread phenomenon in the European Judicial Area, not only in commercial litigation, but also in the fields of insolvency and corporate restructuring, collective litigation, cartel damages and – especially – arbitration. In order to attract high value litigation, Member States have adapted their national systems to preserve their 'judicial markets'. In this respect, it remains to be seen whether market competition is the appropriate regulatory approach for procedural law, which is based on values such as the principles of fair trial, equality of the parties and the right to be heard by an impartial tribunal.[3]

The second development relates to the different regulatory levels of procedural law: in the European Judicial Area, national procedures of EU Member States are coordinated by EU instruments covering all areas of dispute resolution. However, the European legislator regards the coordination of the national procedures as a first step towards the integration of the procedural systems of the Member States. Since the start of the new millennium, national procedures have been harmonised in specific areas (e.g. intellectual property litigation and mediation).[4] The underlying strategy which has not gone unchallenged by the Member States aims at a continuous broadening of the scope of EU legislation. The EU Commission, however, equally uses this strategy for the implementation of modern concepts of dispute resolution like collective litigation, mediation, online dispute resolution and private enforcement.[5] These concepts challenge and change the customary face of civil litigation which was traditionally aimed at the solution of private disputes of individuals. In times of economic crisis, considerable influence is exercised by international organisations such as the IMF and the World Bank requiring structural reforms of struggling judicial systems where litigation is blocked for years.[6] Accordingly, complex judicial procedures, cumbersome execution of court decisions, lack of transparency, and disconnections between court performance and budgeting are considered to negatively affect economic growth. States in necessity are required to reform their court systems and their procedures, and to implement the best international practices. Additional influence is exercised by international courts, especially the ECJ and the ECHR, imposing far-reaching obligations on national courts based on the guarantees of fair trial (Article 6, European Convention on Human Rights and Article 47, Charter of Fundamental Rights of the European Union). The constitutionalisation of

[2] The availability of information technology in the courts directly influences forum shopping: in cartel damage litigation, parties must present thousands of pieces of evidence. If a court does not dispose of facilities for the sampling and screening of these documents, the proceedings are delayed and parties are deterred from selecting these courts for litigation.

[3] Jauernig and Hess 2011, § 1.

[4] Hess 2010, § 11.

[5] Hess 2012, p. 159, 164 *et seq*.

[6] Examples: Letter of Intent of 1 September 2011, agreed between the IMF and the Portuguese government, paras. 29–31: 'Judicial Reform', http://www.imf.org/external/np/loi/2011/prt/090111.pdf (last consulted in May 2013). Similar commitments are found in the letter of intent of the Greek government to the IMF and the European Union of 9 March 2012, para. 32, http://www.imf.org/external/np/loi/2012/grc/030912.pdf (last consulted in May 2013).

procedural law has become a matter of European and international constitutional law and human rights' protection.[7]

The third development relates to the growing privatisation and diversification of dispute resolution: since the 1990s, ADR has become a powerful concept to supplement court-oriented dispute resolution – the idea of a 'multi-door courthouse' providing for well-suited dispute resolution mechanisms for different disputes expanded from the US to Europe.[8] On the other hand, the concept of private enforcement is widely discussed in Europe, especially regarding cartel damages and consumer protection.[9] At present, the introduction of collective redress at the European level may prevent unlimited competition between the national legislators that may finally result in a race to the bottom in order to attract high value litigation or to deter unwelcome liability of local businesses.[10] Another innovative area is ADR, where consumer dispute resolution, online dispute resolution, mediation and sophisticated negotiation between businesses have come to form an innovative field (and a market).[11] In this context the question arises as to whether privatisation of dispute resolution could be a (cheaper and even better) alternative to litigation in civil courts. Although the concept of privatisation has lost much of its former appeal, in the area of dispute resolution the issue is still unresolved. However, in all these innovative fields of dispute resolution, there is still a compelling need to preserve the basic guarantees of procedural fairness, of an equitable and balanced and – if a settlement is not reached – fair resolution of disputes by an independent and impartial third party according to the rule of law.

These reflections serve to demonstrate the present situation in Europe, where the national systems are competing; additional actors (lawmakers and decision makers) are involved and new concepts of dispute resolution are being explored. However, the current situation should not be perceived as a situation of unwelcome change, but rather as a situation where improvement is imminent and possible. The subject of this paper – the phenomenon of the German mediation judge – shall demonstrate that the present situation can trigger positive developments which had not been predicted by the Lawmaker, but are mainly based on the individual initiative of local stakeholders confronted with new challenges of a global society. In Germany, judges on their own motion have used a new provision of the Code of Civil Procedure for the implementation of ADR techniques (especially mediation) in civil proceedings. However, the professional associations of lawyers have been very critical of these developments and have tried to preserve mediation as a new market for the Bar. In the legislative process on the implementation of the EU Directive on Mediation, judges have successfully warded off this attempt, referring to EU Directive 2008/52/EC, which backed the new developments in the courts by an open definition of mediation.

[7] Hess 2005, p. 540 *et seq*.

[8] Birner 2003, Steffek 2010, p. 841 *et seq*.

[9] Basedow et al. 2012.

[10] Wagner 2012, p. 93 *et seq*.

[11] Hodges et al. 2012.

9.2 The German Procedural Reforms in 2002

In 2002, Germany adopted a far-reaching reform of the Code of Civil Procedure[12] which mainly aimed at a reassessment of appellate proceedings. The old paradigm that appeal should provide for a full second instance was given up and replaced by a new system where the appellate court should review and correct the judgment of the court of first instance.[13] The legislative concept equally required a strengthening of the first instance and an improvement of the managerial powers of the judges. In addition, the legislator also intended to improve settlements by the judges. In this respect, the new Code introduced a provision (Section 278(2) ZPO) on a 'mandatory conciliation hearing', where the courts had to attempt a settlement between the parties before the beginning of the hearing.[14] This provision was borrowed from the Code of Procedure for Labour Disputes. Furthermore, Section 278(5) ZPO permitted the court to stay the proceedings and to suggest a settlement through mediation or another ADR procedure out of court.[15] In practice, this provision was seldom applied: judges were reluctant to promote dispute resolution out of court (also for constitutional reasons), and the parties expected and preferred an attempt by the judge himself to settle the case. Finally, the additional costs of mediation conducted out of court were regarded as an impediment.[16]

9.3 The Pilot Project for Mediation at the District Court Göttingen

Although legal literature criticised the new mandatory conciliation hearing under Section 278(2) ZPO as unsuited for civil litigation, being too formal and unnecessary, judges at the District Court Göttingen (Lower Saxony) developed a new approach to settlement.[17] Influenced by the ADR movement which had reached Germany in the

[12] Gesetz zur Reform des Zivilprozesses as of 27 July 2001, *Bundesgesetzblatt* 2001, Part I, p. 1887.

[13] Gottwald 2012, p. 29 *et seq*.; Hau 2011, p. 61 *et seq*.

[14] Section 278(2) ZPO reads as follows: 'For the purposes of arriving at an amicable resolution of the legal dispute, the hearing shall be preceded by a conciliation hearing unless efforts to come to an agreement have already been made before an out-of-court dispute-resolution entity, or unless the conciliation hearing obviously does not hold out any prospects of success. In the conciliation hearing, the court is to discuss with the parties the circumstances and facts as well as the status of the dispute thus far, assessing all circumstances without any restrictions and asking questions wherever required. The parties appearing are to be heard in person on these aspects.'

[15] Section 278(5) ZPO reads as follows: 'Where appropriate, the court may suggest to the parties that they pursue dispute resolution proceedings out of court. Should the parties to the dispute decide to do so, section 251 shall apply mutatis mutandis.'

[16] Tochtermann 2013.

[17] In some federal states, in Lower Saxony and especially in Bavaria, the state Ministry of Justice supported the pilot project (at least in the initial stage).

mid-1990s, the judges studied and applied the techniques and tools of mediation at the conciliation hearing in their courts.[18] For the implementation of mediation in the German civil trial, they adapted the new statutory provisions to their needs.[19] The most important step was the introduction of a 'mediation judge' who was not the competent judge for the decision of the case, but another judge of the district court.[20] This judge was trained in mediation and was the designated judge for the settlement of the case via mediation. According to the court's internal distribution list of cases, it was excluded that the mediation judge could decide the case on the merits if the mediation turned out unsuccessfully.

The judges in Göttingen developed the following practice for the implementation of mediation in the civil trial. At the beginning of the proceedings, the judge competent for the decision on the merits reviewed the case as to whether mediation would be feasible. If the judge deemed mediation appropriate, he asked the parties (and their lawyers) whether they agreed to an attempt at mediation. When they consented, the case was transferred to the mediation judge who immediately held a hearing where he used mediation techniques (mainly evaluating the case). When the parties reached a settlement, the mediation judge sent them to the judge competent for the decision on the merits of the case, as only the latter was authorised to register the settlement in the protocol. If mediation turned out unsuccessfully, the case was quickly decided on the merits by the competent judge.

The new procedure proved to be very successful: about 18 % of all cases were sent to the mediation judges, the rate of amicable settlements in these cases was about 88.5 %. Accordingly, the number of amicable settlements at the district court rose from 33 to 50 % of all cases.[21]

In Bavaria, the Ministry of Justice initiated a similar project in 2003 at the District Courts Augsburg and Nuremberg. However, in order to avoid any conflict with the Bar, the judges were not named 'mediation judges', but 'Güterichter' (judges for amicability/for amicable settlements).[22] This model was not as successful as the model in Göttingen, but the settlement rates were equally improved. However, the judges involved disapproved of the appellation 'Güterichter',[23] but still called themselves (on the websites of their courts) 'mediation judges'.[24]

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[18] Due to a lack of public resources and sufficient support of their ministries many judges paid for professional mediation training themselves; Tochtermann 2013, p. 533.

[19] Accordingly, the legality of the pilot project was disputed by the legal literature; see (for a critical assessment) Prütting 2011, pp. 163–172; contrary view Hess 2011, pp. 137–162.

[20] It should be noted that the local Bar fully supported the project; see Spindler 2007, pp. 79–83.

[21] Matthies 2007, p. 130, 131 *et seq*.; Görres-Ohde 2007, p. 142, 143, with a statistical overview on p. 144; von Olenhusen 2004, p. 104 *et seq*.

[22] This denomination was a reaction to severe criticism from the Bar which considered mediation as a genuine part of private dispute resolution, outside of the court system. According to this opinion, mediation was considered a task for lawyers and other experts operating in the private sector.

[23] The designation was a new – but inelegant – expression of the German language obviously created by the Bavarian Ministry of Justice for political reasons in order to avoid any similarity with mediation.

[24] Hess and Pelzer forthcoming, III.B.viii. with examples in footnote 115.

9.4 The Expansion of Judicial Mediation

The indisputable success of the Göttingen pilot project quickly entailed its expansion in the northern parts of Germany. Many courts adopted similar proceedings – the expansion often took place without the involvement of the competent ministries of justice, but mainly at the initiative of the judges. A genuine 'mediation movement' expanded in the Judiciary: judges trained other judges in mediation techniques – courts used the facilities of the Internet to promote local mediation proceedings. As a result, 'local rules on mediation' were developed at a local and regional level, sometimes promoted by the ministries of justice, sometimes regarded with much suspicion.[25] However, the new development also entailed concern about the role of the mediation judges in the resolution of disputes, as demonstrated by the following example: according to the website of the court of appeal for labour disputes in Hamburg, judicial mediation was not subject to procedural or substantive provisions, but simply aimed at the amicable settlement of disputes.[26] This self-understanding of mediation by judges was certainly faulty: as parties go to the court because they strive for dispute resolution according to the applicable law, they do not expect an amicable settlement without any respect for the rule of law. In Germany, judges are accorded great prestige and consideration by the public. However, they are expected to apply the law, even in a conciliation process. Thus, the 'information' provided by the website of the labour appellate court was misleading – but equally showed a need for a reform aimed at streamlining and fixing the autonomous developments and inserting them into the text of the Code of Civil Procedure.

From 2003 to 2010, the mediation movement within the German Judiciary gained considerable ground. The pilot projects were regarded as successful and several federal states (Hamburg, Schleswig-Holstein, Berlin, Mecklenburg-Vorpommern and Rheinland-Pfalz) adopted specific judicial mediation programmes. In 2008, almost 140 mediation judges at more than 30 district courts and courts of appeal in 8 of the 16 federal states (25 % of all district courts) were counted.[27]

However, there was still strong resistance in some federal states[28] and in the federal government.[29] This political resistance was fuelled by the Bar, where the mediation movement had equally gained ground. However, although many lawyers attended courses on mediation and became certified mediators, out-of-court mediation had not become popular. For 2010, only 2,500 private mediations were estimated (compared with 1.6 million civil lawsuits filed in German courts) along with

[25] After a change of the government, the pilot project in Lower Saxony faced considerable problems as the new government regarded mediation as a matter for lawyers and not for judges.

[26] Hess 2008, p. F 52.

[27] Hess 2011, p. 137, 142 *et seq*.

[28] Especially in Baden-Württemberg, where the Ministry of Justice and the Bar had unsuccessfully attempted to establish a court-annexed mediation scheme from 2000 to 2001; see Tochtermann 2013, p. 532, at footnote 60.

[29] The current minister of justice belongs to the Liberal Party, which traditionally represents the interests of the liberal professions (here, the Bar).

several thousand mediation proceedings in the courts. As a result, it must be stated that a genuine market for private mediation in Germany has not been established yet. However, many private mediators, most of them lawyers and the professional organisations of lawyers and mediators, argued that this failure was due to an unfair intrusion of judicial mediation in an area of private dispute resolution because judicial mediation – as part of the court proceedings – was free of additional costs.

9.5 The Constitutional Debate on Judicial Mediation

Against this background a constitutional debate was launched as to whether judicial mediation could be qualified as a judicial activity under the German Constitution. This controversy was important for the following reasons. First, qualifying mediation as part of the judicial activity entails its general admissibility in procedural law. In this respect, the Constitutional Court had held that the resolution of a dispute by amicable settlement forms part of the judicial activity. Thus, the proponents of judicial mediation heavily relied on this judgment although the opponents tried to demonstrate that this judgment did not address judicial mediation.[30] Secondly, if judicial mediation was not qualified as a task for the judge, it could be considered as an intrusion into the market for dispute resolution. In Germany, any dispute resolution out of court qualifies as a legal service requiring by law the involvement of a lawyer.[31] From that perspective, mediation by judges qualified as an unlawful activity.

Finally, the constitutional question remained unanswered – the Constitutional Court did not get an opportunity to decide the issue. However, the discussion was not confined to the German Constitution: the definition of mediation in Article 3(1) of the Mediation Directive 2008/52/EC expressly includes 'mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question.' As European Union law permits mediation by judges, it was hard to argue that German constitutional law bans it although the Constitution does not include any express interdiction.

9.6 The Implementation of the EU Mediation Directive by the Mediation Act (2012)

According to its Article 12, the Directive 2008/52/EC on Certain Aspects of Mediation had to be implemented by 31 May 2011. Although the Directive only addresses cross-border situations, there was a consensus that the German legislator

[30] The German Association of Procedural Law organised an open discussion in spring 2010 where H. Prütting and I openly discussed the different approaches; Prütting 2011, pp. 163–172; Hess 2011, pp. 137–162.

[31] See Section 2 of the Act on Legal Services of 2008.

should take the opportunity to broadly implement the Directive and to adopt a comprehensive set of rules to foster mediation in Germany. Beginning in 2007, a broad political debate was launched: the Federal Ministry of Justice commissioned a comparative study[32] and the Deutsche Juristentag – the most important political forum on law reform – put the subject on its agenda in autumn 2008.[33]

In 2011, the Federal Ministry of Justice – headed by a minister from the Liberal Party which is traditionally very close to the Bar – published a pre-draft of a new Act on Mediation.[34] At that moment, judicial mediation (and the question of the professional regulation of certified mediators) turned out to be the most controversial issue of the political debate on the new Act[35]: federal states with programmes on judicial mediation proposed including judicial mediation in the Code of Civil Procedure (ZPO) while lawyers associations, the Bar and some federal states (e.g. Baden-Württemberg) recommended that the new Act should strictly promote private mediation. The first draft proposal of the Federal Ministry of Justice tried to circumvent this conflict by a provision authorising the federal states to provide for judicial mediation in their respective jurisdictions. When the Bar vigorously contested this – timid – proposal, the Ministry took one step back and presented a formal legislative proposal abolishing judicial mediation in the form it was practised by the Bavarian 'Güterichter'. According to the legislative draft, mediation was exclusively reserved to out-of-court proceedings. Dispute resolution by 'amicable settlement judges' was considered a distinct procedure – although the *Güterichter* used mediation as a tool for the promotion of settlements. The legislative proposal of the government regarding judicial mediation was unanimously supported by the Committee for Legal Affairs of the Parliament – a committee almost completely dominated by lawyers. In December 2011, the Bundestag (the German first chamber of the Parliament) adopted the proposal in a second reading.[36]

In the meantime, judges associations and those federal states where judicial mediation was promoted openly contested the draft. In January 2012, the second chamber of the German Parliament (the *Bundesrat*) stopped the draft, and a conciliation procedure between the Bundestag and the *Bundesrat* concerning the Act on Mediation was initiated. When the bill was finally passed on 21 July 2012[37] things turned out much more positively: according to the compromise, judicial mediation will be expressly included in the German Code of Civil Procedure although the judges are not permitted to call themselves 'judge mediators', but 'amicable settlement judges'. Nevertheless, according to the new provision of Section 278(5) ZPO, the dispute may be referred to an amicable settlement judge who may promote a

[32] Hopt and Steffek 2008.

[33] Verhandlungen des 67. Deutschen Juristentages Erfurt (2008), Abteilung F.

[34] Bundestags-Drucksache 17/5335.

[35] Tochtermann 2013, pp. 532–533.

[36] Bundestags-Drucksache 17/8058.

[37] *Bundesgesetzblatt* 2012, Part I, p. 1577.

settlement by using mediation as a technique.[38] As mediation forms part of the ZPO, amicable settlement judges must respect mandatory procedural guarantees. On the other hand, all federal states are obliged to provide for settlement judges in their courts – a comprehensive and uniform regime was set up in the area of judicial mediation. And, finally, it remains to be seen whether the judges will use the legal expression 'Güterichter'. Even in Bavaria, where the Ministry of Justice initiated pilot projects, judges expressly called themselves (on the websites of the courts) 'mediation judges'.[39] Against this background, it seems predictable that amicable settlement judges will continue to call themselves 'mediator judges' because they practise mediation.

What lessons can be learned from the phenomenon of the mediation judge? The example demonstrates how a global development ('mediation') is transferred to a local level. The German judicial mediation movement was – in its beginnings – a kind of grassroots movement of judges who were convinced that mediation was the right technique to promote settlement within their courts. When legislation stepped in, the different interests of judges and lawyers – the latter keen to preserve a promising, although non-existing, market – resulted in an open conflict. However, the open structure of the EU Directive on Mediation permitted a positive outcome of the legal-political debate: as the Directive expressly permits judicial mediation, it was difficult to argue that it should be forbidden at the national level. Finally, the German legislator opted for an open model of dispute resolution which corresponds to the interests of the parties – this outcome does not seem to be a bad result.[40] All in all, the story of the German mediation judges shows that European and national law-making in procedural law can benefit from each other to finally get a balanced result.

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[38] The new provision reads as follows: 'The court may refer the parties for the settlement hearing to an amicable settlement judge not competent for the decision on the merits. This judge may use all pertinent methods of dispute resolution, including mediation.'

[39] See n. 24 above.

[40] Ahrens 2012, p. 2465 *et seq*.

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