Experiences in the Judicial Dispute resolution Process for the Judiciary of Germany

Dear colleagues
from Australia, Canada, China, Malaysia, Philippines, the UK
and of course from Singapore,

Let me first express my deep gratitude to the colleagues from Singapore, who have accomplished to organize this inaugural meeting on JDR proceedings.

My name is Anne-Ruth Moltmann-Willisch, I have been a judge in civil matters at the higher regional court of Berlin for about 35 years. (This court is the middle level of jurisdiction, it is appeal court for civil cases with amounts of dispute up to 5.000,- € and also Court of first instance for all other cases. We deal with about 20.000 cases per year). I have worked as a deciding judge and as a mediating judge (Güterichter = "conciliation judge") at court and since 2009 I organized and implemented mediation proceedings done by judges at all civil and other courts (social court, labor courts) in Berlin.
I had an active part in the pilot programmes we had for judge made mediation in Berlin from 2006 until 2012 and in the law making process afterwards for the federal state of Germany.

To start with I would like to give a very short overview of how civil court proceedings take place on a regular basis and specially of the role of a judge in the German court system **(I).**

Then I would follow up with a short description of the pilot projects on in court mediation (judicial mediation) and the law that now governs in court ADR proceedings in Germany (JDR Proceedings **II)**

Finally I would like to share with you some of our experiences on the effects of having introduced JDR into the German legal system **(III).**

I. Civil court proceedings regular and the role of the judge

Germany has a civil law system. That means the written law, decided by the parliament, prevails as a legal source. Judges have to apply the written law and the will in the law making process. Legislative is generally speaking the only source of law.

This makes quite a difference to countries with a common law system, which relies on judge made law and predecices. Statutes of law do exist but only to a rather small amount.

Once a lawsuit or an appeal has come to court and the plaintiff has paid the court fees, the judge decides whether he or she goes for the written procedure or directly for an early oral hearing. In any case the defendant is asked to indicate that he wants to defend himself and respond to the law suit or appeal. At the higher regional court and the regional court it is mandatory for the parties to be represented by a lawyer.
In case of defense the judge schedules a date for the court hearing depending on the work load of the judge within a time of 4 month to a year, at the Kammergericht even longer.
According to our code of civil procedure the judge is obliged to start the hearing with a conciliation hearing, that means he sorts out whether the parties are willing to find a compromise, unless efforts have already been made by the parties before an alternative dispute resolution entity. If parties agree to a conciliation hearing it normally proceeds in a way that the judge summarizes the facts of the case and gives his early judicial evaluation on the outcome of the court proceedings, depending on the legal implications, if evidence will have to be taken, if there are still other documents to be presented.
The judge might even be asked to offer a solution he or she finds fair according to the law. Conciliation hearings of this kind normally don't last longer than 15-30 minutes.

If an agreement is not found the court hearings proceed, the lawyers make their applications, discussions on the applicable law might follow. At the end of the hearing the judge decides how to proceed, can a judgement be taken already at this point, is a hearing of evidence with witnesses or experts affordable.
In our civil code (§ 139) it is stated that the court is to work towards ensuring that the parties make declarations in due time and completely…and that the parties amend further information on those facts they have asserted only incompletely…

The role of a judge in our court system is rather strong and pro active.
He or she regularly presents a summary of legal implications on the case, he or she might be asked to propose a fair solution according to the Law and the legal proceedings. Her job is not only to apply the law but to try to bring the parties to an early amicable solution.
The highest federal court of Germany has once put in similar words as follows:

“ In a state under the rule of law it is in general preferable to find an amicable solution in a dispute rather than for a judge to find a judgement”.

II. Judicial mediation in Germany – pilote programmes and the law nowadays.

When I use the term mediation in this context I am talking of the procedure during an ongoing legal proceeding (first instance or appeal) where the person who conducts the mediation is a judge (judicial mediation).

Mediation as a procedure for alternative dispute resolution wasn’t known in the German legal culture until the late 90s of the last century. Triggered by the success on the “Harvard-concept” in the United States also lawyers and ministries of justice showed interest in ADR and mediation. But it was only used as an extra judicial procedure for the resolution of disputes in family and commercial matters.
That changed when at the beginning of 2002 the civil jurisdiction started pilot projects to test mediation as a procedure of dispute resolution in the practice of the civil courts in some German states. 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 parties themselves even after the conflict has been brought before the court. Conflicting parties often just need assistance of experts in conflict matters and that can also be done by judges. There was no explicit law during these pilot projects allowing judges to provide mediation in court proceedings. So it was kind of a revolutionary act of judges to offer mediation within court proceedings.
Judges at this early stage organized and paid for their own training. This shows they were highly motivated to invest time and money in order to promote an idea they were convinced of: modernizing justice in court proceedings by offering mediation. They had been quite successful within a short period of time of 2-3 years. Expert evaluations by Auditor general Departments in some German states stated that overall judge mediation was highly successful with a success rate of about 70 %. That means in 70 % of all the cases brought to mediation proceedings an amicable agreement has been found. And it was stated that mediation in court is lowering the case burden of the courts, saving financial and personal resources.

In 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 almost two years. The reason for that is that there is a hard competition between mediators working outside of court, especially attorneys specializing on mediation, and judges wanting to offer mediation within court proceedings who turned out to be very effective and successful in the pilot projects.
To turn a long story short: the controversy ended in a law that allowed Judges to offer dispute resolution proceedings specially mediation. But they are not allowed to call themselves "mediator" but "Güterichter", that means conciliation judge.
For Güterichter an new law applies 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). The conciliation judge may avail himself of all methods of conflict solution, including mediation.

This law applies not only to civil court proceedings but to all court proceedings, be it social, labour, administrative… So in fact all courts have to provide Judges with a special training in mediation (and other methods of conflict resolution like f.e. moderation, arbitration…), actually not all of them do.
There are no common legislative rules on how the training of judges should be done, how judges should handle mediation cases…Every court and jurisdiction has its own way of installing mediation judges.

But there are common factors:

- The mediation judge who tries to settle the dispute by ADR is a judge who <u>does not decide</u> the case himself. This is important and implemented by procedural law because of two important reasons: if the parties know that the conciliation judge will not decide on the merits the personal responsibility of the parties is challenged to find a solution by themselves. Furthermore, the parties don't have to fear that something they say in the conciliation hearing is used in a judgement against them if the conciliation hearing is not successful.
- The proceedings in front of the mediation judge is non public, confidential and voluntary.

- Third parties who are not involved in the court proceedings can participate in the conciliation hearing
- The mediation judge can draft an enforceable settlement agreement
- There is no recording of the hearing except for the final settlement agreement.
- There are no extra fees for the parties taking advantage of the mediation proceedings in court.
- Mediation proceedings can be governed by other languages, f.e. in English, if the parties wish to do so.
- According to the law the deciding judge is allowed to refer the parties to the conciliation judge without asking them for consent if he thinks the mediation hearing being appropriate and most effective dispute resolution system. This is rarely done because if parties don't aim at a consensual solution of their conflict they will not positively and actively cooperate.
- The mediation judge may use any kind of ADR proceedings, he may even give legal evaluation and propose solutions or advise parties how to solve their conflict. In Berlin we refrain from giving legal evaluation and propose legal solutions because we believe and have good experience in letting the parties work on a solution active and self-responsible. We moderate the legal views on the case by the lawyers. Since the mediation judge is not the deciding judge he is not taking any responsibility on the legal evaluation and he should not prepare for the hearing the legal argument because having the legal outcome in mind he might not be as impartial to the parties as we want him to be as a impartial mediator. And there is the idea that mediation will take into account that there are other interests and needs of the parties emphasizing personal concerns and not enforceable rights.

III. Experiences on JDR proceedings in Germany

Let me summarize our experiences with JDR proceedings in the German court system in 3 statements:

1. According to our understanding of the role of a judge in court proceedings his duty is not only to find judgement on legal basis but also to help and support the parties to find an amicable solution on the conflict at all times during court proceedings. He can do this by an early neutral evaluation of legal implementations of the case, supporting the

parties in their negotiations and offering them mediation proceedings in or outside of court proceedings.

2. If the judge offers judicial mediation and the parties consent to it the mediation is done by other judges, not the judge who will finally have to decide on the merits on the case. The reason for this separation I have pointed out. Mediation means that other interests and needs of the parties play an important role for the solution and we want parties within these mediation proceedings to be frank and open to express all their needs. This will only be effective when these mediation proceedings are non public, confidential and with the trust of the parties that the mediating judge will not take a judgement on a legal basis at the end, when mediation is not successful.

3. JDR proceedings are effective and save time and money for the court and the parties. They also make courts appear in a new and modernized light.

Anne-Ruth Moltmann-Willisch, LL.M.(Michigan)
Former judge at the regional Court of Berlin; Mediator

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